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POMEROY'S
EQUITY JURISPRUDENCE
AND
EQUITABLE REMEDIES,
SIX VOLUMES.

POMEROY'S
EQUITY JURISPRUDENCE,
IN FOUR VOLUMES.

By JOHN NORTON POMEROY, LL.D.

THIRD EDITION, ANNOTATED AND MUCH ENLARGED,

AND SUPPLEMENTED BY

A TREATISE ON EQUITABLE REMEDIES,
IN TWO VOLUMES.

By JOHN NORTON POMEROY, JR.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
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1905.

A TREATISE

ON

EQUITY JURISPRUDENCE,

AS ADMINISTERED IN

THE UNITED STATES OF AMERICA;

ADAPTED FOR ALL THE STATES,

AND

TO THE UNION OF LEGAL AND EQUITABLE REMEDIES

UNDER THE REFORMED PROCEDURE.

BY JOHN NORTON POMEROY, LL.D.

THIRD EDITION,

BY

JOHN NORTON POMEROY, JR., A.M., LL.B.

IN FOUR VOLUMES.

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TABLE OF CONTENTS.—VOL. IV.

PART FOURTH.

THE REMEDIES AND REMEDIAL RIGHTS WHICH ARE CONFERRED BY THE EQUITY JURISPRUDENCE.

PRELIMINARY SECTION.

§ 1315. General object.
§ 1316. Classification.
§ 1317. Remedies acting *in rem* or *in personam*.
§ 1318. Remedies *in personam* beyond the territorial jurisdiction.

FIRST GROUP.

REMEDIES PURELY ANCILLARY AND PROVISIONAL.

CHAPTER FIRST.

INTERPLEADER.

§ 1319. Description of this group.
§ 1320. General nature and objects of interpleader.
§ 1321. The claims, legal or equitable.
§ 1322. Essential elements.
§ 1323. *First.* The same thing, debt, or duty.
§ 1324. *Second.* Privity between the opposing claimants.
§ 1325. *Third.* Plaintiff a mere stakeholder.
§ 1326. *Fourth.* No independent liability to one claimant.
§ 1327. By bailees, agents, tenants, and parties to contracts.
§ 1328. Pleadings and other procedure.
§ 1329. Interpleader in legal actions by statute.

CHAPTER SECOND.

RECEIVERS.

§ 1330. Definition, general nature, and objects.
§ 1331. The appointment discretionary.
§§ 1332–1335. Cases in which a receiver may be appointed.
§ 1332. First class.
§ 1333. Second class.
§ 1334. Third class.
§ 1335. Fourth class.
§ 1336. Their powers, rights, duties, and liabilities.

SECOND GROUP.

REMEDIES PURELY PREVENTIVE.

CHAPTER FIRST.

INJUNCTIONS.

SECTION I.

TO PROTECT OR RESTRAIN THE VIOLATION OF OBLIGATIONS AND RIGHTS OF PROPERTY OR OF CONTRACT, EITHER LEGAL OR EQUITABLE.

§ 1337. General nature and objects: Interdicts.
§ 1338. Fundamental principle.
§ 1339. To protect purely equitable estates or interests, and in aid of purely equitable remedies.
§ 1340. The same: Particular instances.
§§ 1341–1344. To prevent the violation of contracts.
§ 1341. General doctrine.
§ 1342. (1) Restrictive covenants creating equitable easements.
§ 1343. (2) Contracts for personal services or acts.
§ 1344. (3) Other agreements, generally negative in their nature.
§ 1345. Miscellaneous cases: Corporations and their officers; between mortgagor and mortgagee; public officers; cloud on title; married women's property; partners, etc.

SECTION II.

TO PREVENT OR RESTRAIN THE COMMISSION OF TORTS.

§ 1346. The estates and interests generally legal.
§ 1347. Kinds and classes of torts restrained.
§ 1348. Waste.
§ 1349. Nuisance: Public.
§ 1350. Nuisance: Private; when restrained.
§ 1351. Same: Instances; violations of easements.
§ 1352. Patent rights and copyrights.
§ 1353. Literary property as distinct from copyright.
§ 1354. Trade-marks.
§ 1355. Good-will.
§ 1356. Trespasses.
§ 1357. General doctrine; cases in which trespass may be enjoined.
§ 1358. Slander of title; libels; wrongful use of name.

SECTION III.

MANDATORY INJUNCTIONS.

§ 1359. Nature and object; when granted.

SECTION IV.

TO RESTRAIN ACTIONS OR JUDGMENTS AT LAW.

§ 1360. Origin of the jurisdiction.
§ 1361. When the jurisdiction is not exercised: General doctrine.
§ 1362. When the jurisdiction may be exercised: First class; exclusive equitable interests or rights involved.
§ 1363. The same: Second class; legal remedies inadequate.
§ 1364. The same: Third class; fraud, mistake, or accident in the trial at law.
§ 1365. Jurisdiction to grant new trials at law in the United States.

CHAPTER SECOND.

EQUITABLE DEFENSES INTERPOSED IN LEGAL ACTIONS, AS A SUBSTITUTE FOR INJUNCTIONS.

§ 1366. General object.
§ 1367. Equitable pleas under the common law procedure.
§ 1368. Equitable defenses under the reformed procedure.
§ 1369. Meaning and nature of an equitable defense.
§ 1370. General effect: Injunction against actions at law unnecessary.
§ 1371. Cases in which an injunction may still be necessary: First class; to avoid multiplicity of suits.
§ 1372. The same: Second class; new parties needed.
§ 1373. The same: Third class; no affirmative relief.
§ 1374. Some illustrations of equitable defenses.

THIRD GROUP.

REMEDIES WHICH INDIRECTLY ESTABLISH OR PROTECT INTERESTS AND PRIMARY RIGHTS, EITHER LEGAL OR EQUITABLE.

CHAPTER FIRST.

REFORMATION AND CANCELLATION.

§ 1375. General nature and object.
§ 1376. Reformation and re-execution of instruments.
§ 1377. Cancellation, surrender up, or discharge of instruments.

FOURTH GROUP.

REMEDIES BY WHICH ESTATES, INTERESTS, AND PRIMARY RIGHTS, EITHER LEGAL OR EQUITABLE, ARE DIRECTLY DECLARED, ESTABLISHED, OR RECOVERED, OR THE ENJOYMENT THEREOF FULLY RESTORED.

CHAPTER FIRST.

SUITS BY WHICH PURELY LEGAL ESTATES ARE ESTABLISHED, AND THE ENJOYMENT THEREOF RECOVERED: NAMELY, ASSIGNMENT OF DOWER; ESTABLISHMENT OF DISPUTED BOUNDARIES; PARTITION OF LAND, AND OF PERSONAL PROPERTY.

§ 1378. General nature and object of this group.
§ 1379. Nature and object of the first class.
§§ 1380–1383. Assignment of dower.
§ 1380. Legal remedies.
§ 1381. Origin and grounds of the equitable jurisdiction.
§ 1382. The jurisdiction now concurrent.
§ 1383. Exclusive jurisdiction over dower in equitable estates.
§ 1384. Establishment of disputed boundaries.
§ 1385. The same; equitable incidents and grounds.
§§ 1386–1390. Partition of lands.
§ 1386. Common law remedy.
§ 1387. Equitable jurisdiction and remedies.
§ 1388. The title of the plaintiff.
§ 1389. Mode of partition.
§ 1390. Partition by means of a sale.
§ 1391. Partition of personal property.
§ 1392. The same: issue of title.

CHAPTER SECOND.

SUITS BY WHICH SOME GENERAL RIGHT, EITHER LEGAL OR EQUITABLE, IS ESTABLISHED: BILLS OF PEACE, AND BILLS QUIA TIMET, QUIETING TITLE.

§ 1393. Nature and object.
§ 1394. Bills of peace; bills *quia timet*, quieting title.

CHAPTER THIRD.

SUITS BY WHICH SOME PARTICULAR ESTATE, INTEREST, OR RIGHT, EITHER LEGAL OR EQUITABLE, IS ESTABLISHED: STATUTORY SUIT TO QUIET TITLE; SUIT TO REMOVE A CLOUD FROM TITLE.

§ 1395. Nature and object.
§ 1396. Statutory suit to quiet title; legislation.

§ 1397. The same; essential features and requisites; possession; title.
§ 1398. Suit to remove a cloud from title; to prevent a cloud.
§ 1399. The same; when the jurisdiction is exercised; general doctrine.

FIFTH GROUP.

REMEDIES BY WHICH EQUITABLE OBLIGATIONS ARE SPECIFICALLY AND DIRECTLY ENFORCED.

CHAPTER FIRST.

SPECIFIC PERFORMANCE OF CONTRACTS.

§ 1400. Nature and object.
§ 1401. Specific performance of contracts; grounds of the jurisdiction.
§ 1402. Extent of the jurisdiction; inadequacy of damages; various kinds of contracts.
§ 1403. The same: Impracticability of the legal remedy.
§ 1404. The jurisdiction discretionary.
§ 1405. Essential elements and incidents.
§ 1406. Rights under the contract; effect of events without the agency of the parties.
§ 1407. Performance by plaintiff a condition precedent.
§ 1408. Time as affecting the right to a performance.
§ 1409. Enforcement of verbal contracts part performed.
§ 1410. Damages in place of a specific performance.

CHAPTER SECOND.

SPECIFIC ENFORCEMENT OF OBLIGATIONS ARISING FROM TRUSTS AND FIDUCIARY RELATIONS.

§ 1411. General nature, kinds, and classes.
§ 1412. Suits against corporations to compel the transfer or issue of stock.

SIXTH GROUP.

REMEDIES IN WHICH THE FINAL RELIEF IS PECUNIARY, BUT IS OBTAINED BY THE ENFORCEMENT OF A LIEN OR CHARGE UPON SOME SPECIFIC PROPERTY OR FUND.

CHAPTER FIRST.

FORECLOSURE SUITS; MARSHALING SECURITIES; CREDITORS' SUITS.

§ 1413. Nature, kinds, and classes.
§ 1414. Suits for marshaling of securities.
§ 1415. Creditors' suits.

SEVENTH GROUP.

REMEDIES IN WHICH THE FINAL RELIEF IS WHOLLY PECUNIARY, AND IS OBTAINED IN THE FORM OF A GENERAL PECUNIARY RECOVERY.

CHAPTER FIRST.

SUITS FOR CONTRIBUTION, EXONERATION, AND SUBROGATION.

§ 1416. General nature, kinds, and classes.
§ 1417. Exoneration; rights of surety against the principal.
§ 1418. Contribution.
§ 1419. Subrogation.

CHAPTER SECOND.

SUITS FOR AN ACCOUNTING.

§ 1420. Origin of the equitable jurisdiction.
§ 1421. Extent of the equitable jurisdiction; when exercised.

A TREATISE

ON

EQUITY JURISPRUDENCE.

PART FOURTH.

PART FOURTH.

THE REMEDIES AND REMEDIAL RIGHTS WHICH ARE CONFERRED BY THE EQUITY JURISPRUDENCE.

PRELIMINARY SECTION.

ANALYSIS.

§ 1315. General object.
§ 1316. Classification.
§ 1317. Remedies acting *in rem* or *in personam*.
§ 1318. Remedies *in personam* beyond the territorial jurisdiction.

§ 1315. General Object.— The general nature, kinds, and classes of equitable remedies, both those belonging to the exclusive and to the concurrent jurisdictions, have been fully described in a former volume.[1] The main purpose of the discussions in this Part Fourth is to determine under what circumstances, for the protection of what primary rights and interests, legal or equitable, on the occasion of what wrongs or violations of duty, and between what parties, equity *will exercise its jurisdiction* by granting either those remedies which are peculiar to courts of equity, or those which are essentially legal in their nature and are administered concurrently by courts of law and of equity. In other words, my object is to show *what* remedies may be conferred by equity, and *when* its jurisdiction will be exercised by granting them. The entire discussion is based upon the general principles and doctrines which define the equitable jurisdiction and determine its exercise, as explained in a previous volume.[2]

[1] See *ante*, vol. 1, §§ 112–116; Ibid., §§ 134, 135; and Ibid., §§ 170–172.
[2] See vol. 1, pt. 1, c. 1, 2.

§ 1316. **Classification.**— The classification presented in the former volume, and referred to in the preceding paragraph, was intended merely for purposes of general description, and in order to present the active remedial system in one body. For the discussions of this Part Fourth I shall adopt the following classification, by which all equitable remedies are collected and arranged in eight separate groups: 1. The First Group contains those remedies which are purely ancillary and provisional, which do not affect any primary right nor confer any ultimate relief.[1] 2. The Second Group consists of remedies purely preventive.[2] 3. The Third Group consists of remedies which *indirectly* establish or protect interests and primary rights, whether those interests and rights are legal or equitable.[3] 4. The Fourth Group consists of remedies by which estates, interests, and primary rights, either legal or equitable, are *directly* declared, established, or recovered, or the enjoyment thereof is fully restored.[4] 5. The Fifth Group consists of remedies by which *equitable obligations* are specifically and directly enforced.[5] 6. The Sixth Group con-

[1] These are interpleader and receivers.

[2] It includes injunctions for all possible purposes; and in this connection I treat of equitable defenses in legal actions as a substitute for injunctions to restrain actions at law.

[3] They are reformation and re-execution, and cancellation, surrender up or discharge of instruments.

[4] This entire group contains three main classes: 1. Suits by which purely *legal* estates are established, and the enjoyment thereof is recovered; including assignment of dower; establishment of disputed boundaries; partition of land, and partition of personal property. 2. Suits by which some *general* right, either legal or equitable, is established; including bills of peace; bills *quia timet;* quieting title; suits to establish a will; suits to construe a will. 3. Suits by which some *particular* estate, interest, or right, legal or equitable, is established; including statutory suit to quiet title; removing a cloud from title; strict foreclosure of a mortgage or pledge; redemption of mortgages or pledges.

[5] This group contains three main classes: 1. Specific performance of contracts; 2. Specific enforcement of obligations arising from trusts; 3. Specific enforcement of obligations arising from relations analogous to trusts; including suits against fiduciary persons; suits against corporations and their officers; administration suits against executors and administrators.

sists of remedies in which the final relief is *pecuniary*, but is obtained by the enforcement of a *lien* or *charge* upon some specific property or fund.[6] 7. The Seventh Group consists of remedies in which the final relief is wholly *pecuniary*, and is obtained in the form of a general pecuniary recovery.[7] 8. The Eighth Group contains certain additional remedies which have been created and conferred by statute in several of the states, and which therefore do not belong to the original jurisprudence of equity nor to the general equitable jurisdiction.[8]

§ 1317. **Remedies Acting in Personam or in Rem.**— Before taking up these various divisions in their order, I shall present with more of practical detail some incidents common to many large classes of equitable remedies which have been alluded to in a previous volume. The fundamental doctrine of equity as originally administered has already been explained: that its remedies and decrees operated *in personam* upon defendants, and not *in rem* upon the subject-matter; that a decree was not of itself a legal title, nor did it transfer title to the plaintiff.[1] This original doctrine has been abrogated for all classes of remedies to which it could apply by statutory legislation in a large number of the states.[2] This legislation may be reduced to two

[6] Embracing foreclosure of mortgages of real and personal property and of pledges, by judicial sale; enforcement of equitable liens; marshaling of securities; enforcement of the equitable contracts of married women; and creditors' suits.

[7] This group contains the following particular suits: By assignees of things in action, equitable assignees of a fund, etc.; by persons entitled to participate in a common fund; for contribution in general; suits growing out of suretyship, for exoneration, contribution, or subrogation; suits growing out of partnership; suits for an accounting in general; recovery of damages.

[8] In this statutory group should be placed suits for divorce; proceedings in the nature of an inquisition, for the appointment of committees over lunatics, persons of unsound mind, and habitual drunkards; statutory suits to dissolve and wind up corporations; or to remove corporate officers for cause, or for the appointment of officers.

[1] See *ante*, vol. 1, §§ 134, 135, 170, 428–431, where this doctrine is fully explained; Penn v. Lord Baltimore, 1 Ves. Sr. 444; 2 Lead. Cas. Eq., 4th Am. ed., 1806; Proctor v. Ferebee, 1 Ired. Eq. 143; 36 Am. Dec. 34.

[2] This legislation is, of course, confined to remedies which in some way

general types: 1. That by which the decree itself, without any act of the defendant or of an officer on his behalf, becomes a title, and vests a legal estate in the subject-matter in the plaintiff; 2. That by which a commissioner, master, or other officer of the court executes the decree, and through his conveyance or other official act transfers the legal estate from the defendant to the plaintiff, or otherwise vests the plaintiff with title. Both these types are often found in the statutes of the same state, and they are subject to minor modifications, as shown by the footnote, which contains a list of the states and of the statutes. In all cases where an instrument is directed to be executed by an officer, the statutes provide that it shall have exactly the same effect as if executed by the party himself. These statutes do not generally interfere with the original power of courts of equity to enforce obedience to their decrees

relate to or deal with title or estates, legal or equitable, in specific property. The most important modifications referred to in the text are the following: In some statutes of the first type the language is positive and peremptory that the decree shall operate to transfer the title, etc.; in others it is permissive, — the court may provide in the decree that it shall operate to transfer the title in case the defendant neglects or refuses to obey its mandates. Similar variations are found in the statutes of the second type. The following are the most important of these statutes:—

Alabama: Code 1876, p. 848, secs. 3899 (3469).

Arkansas: Gantt's Dig. of Stats. 1874, p. 675, secs. 3640, 3641; p. 836, secs. 4783, 4785, 4787.

Connecticut: Pub. Acts 1875, p. 63, c. 97, sec. 26.

Delaware: Rev. Stats. 1874, p. 571, c. 95, sec. 12.

Georgia: Code 1882, p. 1106, sec. 4209 (4150).

Illinois: Hurd's Rev. Stats. 1880, p. 191, c. 22, secs. 46, 47.

Indiana: Davis's Rev. Stats. 1876, p. 237, secs. 542, 544, 549.

Iowa: 2 Miller's Rev. Code 1880, p. 722, secs. 2886, 2888.

Kansas: Dassler's Comp. Laws 1881, p. 654, art. 17, c. 80, sec. 400.

Kentucky: Bullitt's Codes 1876, p. 79, secs. 394, 396.

Louisiana: Code of Practice 1875, sec. 636.

Maine: Rev. Stats. 1871, p. 582, c. 77, sec. 7; c. 111, secs. 6, 7, 8.

Maryland: Rev. Code 1878, p. 643, art. 65, sec. 73.

* *Massachusetts:* Pub. Stats. 1882, p. 797, c. 142, sec. 1.

Michigan: 2 Comp. Laws 1871, p. 1541, c. 176, sec. (5099) 63; pp. 1419–1421, c. 162, secs. (4530) 1, (4536) 7, (4538) 9, (4541) 12.

Minnesota: Young's Gen. Stats. 1878–80, p. 818, c. 75, sec. 32; p. 611, c. 58, secs. 1, 7.

by the parties themselves, and to punish such parties for their disobedience by attachment, fine, imprisonment, or sequestration. The operation of these statutes is confined to the territorial limits and jurisdiction of the states in which they are respectively enacted. It does not extend to decrees of the United States courts. The effect of equitable remedies granted and decrees rendered by the United States courts, in the absence of legislation by Congress, is governed by the original doctrine of equity; their decrees do not transfer title; they must be executed by the parties, and obedience is compelled by proceedings in the nature of punishment for contempt, attachment, or seques-

Mississippi: Rev. Code 1880, p. 535, c. 59, sec. 1954.

Missouri: 1 Rev. Stats. 1879, p. 464, secs. 2760, 2761.

Nebraska: Brown's Comp. Stats. 1881, p. 585, sec. 429 b; p. 587, sec. 451; pp. 249–251, secs. 323, 329, 331, 334.

New Hampshire: Gen. Laws 1878, p. 489, c. 209, sec. 9.

New Jersey: Rev. of Stats. 1877, p. 115, sec. 63.

New York: Code Civ. Proc. (new code), sec. 718.

North Carolina: Tourgee's Code Civ. Proc. 1878, sec. 215.

Ohio: Seney's Code Civ. Proc. 1874, secs. 375, 395; Rev. Stats. 1879, secs. 5318, 5399.

Oregon: Gen. Laws 1874; Code Civ. Proc., sec. 402.

Tennessee: 2 Stats. 1871 (Thompson and Steger's ed., 1872), secs. 4478, 4484, 4485, 4486, 4487, 4488.

Texas: Rev. Stats. 1879, p. 210, art. 1338.

Vermont: Rev. Laws 1880, p. 204, c. 43, secs. 766–770.

Virginia: Code 1873, p. 1164, c. 182, sec. 1.

West Virginia: Kelly's Rev. Stats. 1878, p. 929, c. 163, sec. 1; c. 22, sec. 1.

The following cases illustrate the provision that the decree itself is *a title*, or operates to transfer the title: King v. Bill, 28 Conn. 593; Price v. Sisson, 13 N. J. Eq. 168; Griffith v. Phillips, 3 Grant Cas. 381; Young v. Frost, 1 Md. 377, 403; Taylor v. Boyd, 3 Ohio, 337; 17 Am. Dec. 603; Randall v. Pryor, 4 Ohio, 424; Penn v. Hayward, 14 Ohio St. 302; Battle v. Bering, 7 Yerg. 529; 27 Am. Dec. 526; Gitt v. Watson, 18 Mo. 274; Hoffman v. Stigers, 28 Iowa, 302.

Whenever the decree itself thus operates to transfer title, a reversal of the decree on appeal necessarily destroys this effect *as between the parties themselves*, divests the title from the party to whom it had been transferred, and revests it in the party from whom it had passed. But if the decree had been executed by means of a conveyance, and the title had thus passed to a *bona fide* purchaser, before the appeal, a reversal may not divest him of the title or compel him to reconvey: See *ante*, Stats. of Delaware; Taylor v. Boyd, 3 Ohio, 337; 17 Am. Dec. 603. As to the time when the title passes by operation of the decree, whether from the date of the decree or by relation from the

tration.[3] There are, of course, classes of remedies to which this legislation cannot apply,— as, for example, decrees prohibiting any act, general pecuniary recoveries, analogous to money judgments at law, and many purely ancillary or provisional reliefs.

§ 1318. **Remedies in Personam beyond the Territorial Jurisdiction.**— The power to act *in personam,* through their remedies, is still held by all courts of equity, even in presence of the foregoing legislation. Of this nature must always be the remedies when the subject-matter, either real or personal property, is situated beyond the territorial jurisdiction of the court, in another state or country. The jurisdiction to grant such remedies is well settled. Where the subject-matter is situated within another state or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which *directly* affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted. As examples of this rule, suits for specific performance of contracts, for the enforcement of express or implied trusts, for relief on the ground of fraud, actual or constructive, for the final accounting and settlement of a partnership, and the like, may be brought in any state where jurisdiction of defendant's person is obtained, although the land or other subject-matter is situated in another state, or even in a foreign country.[1] On the other

date of the commencement of the suit, see Shotwell v. Lawson, 30 Miss. 27; 64 Am. Dec. 145; King v. Bill, 28 Conn. 593.

[3] This is so, although the property which is the subject-matter of the decree is situated within a state which has legislated in the manner above described: Watkins v. Holman, 16 Pet. 25, 26; Briggs v. French, 1 Sum. 504; Lyman v. Lyman, 2 Paine, 11, 13; Tardy v. Morgan, 3 McLean, 358; Massie v. Watts, 6 Cranch, 148; Shepherd v. Comm'rs of Ross Co., 7 Ohio, 271.

[1] This rule applies to the United States courts as well as to the state courts, and is also well settled in England: Penn v. Lord Baltimore, 1 Ves. Sr. 444;

hand, where the suit is strictly local, the subject-matter is specific property, and the relief when granted is such that it *must* act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated.[2]

2 Lead. Cas. Eq., 4th Am. ed., 1806; Caldwell v. Carrington's Heirs, 9 Pet. 86; Watkins v. Holman, 16 Pet. 25; Massie v. Watts, 6 Cranch, 148; Briggs v. French, 1 Sum. 504; Carrington's Heirs v. Brents, 1 McLean, 167; Watts v. Waddle, 1 McLean, 200; Tardy v. Morgan, 3 McLean, 358; Moore v. Jaeger, 2 McAr. 465; Wood v. Warner, 15 N. J. Eq. 81; Brown v. Desmond, 100 Mass. 267; Davis v. Parker, 14 Allen, 94; Pingree v. Coffin, 12 Gray, 288, 304; Gardner v. Ogden, 22 N. Y. 327, 332–339; 78 Am. Dec. 192; Newton v. Bronson, 13 N. Y. 587; 67 Am. Dec. 89; Bailey v. Ryder, 10 N. Y. 363; De Klyn v. Watkins, 3 Sand. Ch. 185; Cleveland v. Burrill, 25 Barb. 532; Sutphen v. Fowler, 9 Paige, 280; Hawley v. James, 7 Paige, 213; 32 Am. Dec. 623; Mead v. Merritt, 2 Paige, 402; Dickinson v. Hoomes's Adm'r, 8 Gratt. 353; Moore v. Hood, 9 Rich. Eq. 311; 70 Am. Dec. 210; Ross v. Southwestern R. R. Co., 53 Ga. 514; Guild v. Guild, 16 Ala. 121; Topp v. White, 12 Heisk. 165; Penn v. Hayward, 14 Ohio St. 302; Henry v. Doctor, 9 Ohio, 49; Wills v. Cowper, 2 Ohio, 124; Olney v. Eaton, 66 Mo. 563.

[2] For example, a suit to abate a nuisance, and, it seems, a suit to determine the title to specific land: Miss. & Mo. R. R. v. Ward, 2 Black, 485; North Ind. R. R. v. Mich. Cent. R. R., 15 How. 233; 5 McLean, 444; Massie v. Watts, 6 Cranch, 148. As to injunctions restraining threatened acts in another state, see Western Union Tel. Co. v. West. etc. R. R., 8 Baxt. 54; Atlantic etc. Tel. Co. v. Baltimore etc. R. R., 14 Jones & S. 377.

FIRST GROUP.

REMEDIES PURELY ANCILLARY AND PROVISIONAL.

CHAPTER FIRST.

INTERPLEADER.

ANALYSIS.

§ 1319. Description of this group.
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§ 1321. The claims, legal or equitable.
§ 1322. Essential elements.
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§ 1328. Pleadings and other procedure.
§ 1329. Interpleader in legal actions by statute.

§ 1319. **Description of This Group.**— The distinguishing characteristic of the remedies belonging to this group is, that they determine no primary rights, and grant no final reliefs, either directly or indirectly. They are, in fact, instruments and means by which the court is enabled more conveniently and perfectly to adjudicate upon the *ultimate* rights and interests of the parties, and to award the *final* reliefs, in the further judicial proceedings to which they are auxiliary, and of which they are really the preliminary stage. These remedies are therefore, in every sense of the terms, ancillary and provisional.

§ 1320. **Interpleader — General Nature and Object.**— I purpose in this chapter to describe the general equitable jurisdiction to grant the remedy of interpleader independent of statute; and afterwards to notice briefly the modern stat-

utes, some of which may perhaps have enlarged that jurisdiction, but most of which have simply conferred a similar jurisdiction upon courts of law, to be exercised in certain kinds of legal actions.[1] Where two or more persons, whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, debt, or duty, by different or separate interests, from a third person, and he, not knowing to which of the claimants he ought of right to render the debt or duty, or to deliver the thing, fears he may be hurt by some of them, he may maintain a suit and obtain against them the remedy of interpleader. In his bill of complaint he must state his own rights and their several claims, and pray that they may interplead, so that the court may adjudge to whom the thing, debt, or duty belongs, and he may be indemnified. If any suits at law have been brought against him, he may also pray that such proceedings be restrained until the right be determined.[2] The object of

[1] Under the ancient common law, the relief of interpleader was allowed in two special cases in a legal action by a court of law: when two or more persons had made a joint bailment and then brought separate actions of detinue against the depositary for the thing bailed; and when the thing came into the holder's possession by finding, and two or more persons claiming to be owners sued him in separate actions of detinue. Modern statutes, English and American, have enabled courts of law to grant a similar relief, in a summary manner, in certain legal actions, but this legislation has no connection with the ancient common-law jurisdiction above mentioned. For a more full account of this common-law relief, see Mitford's Eq. Pl., Jeremy's ed., 141, 142; Crawshay v. Thornton, 2 Mylne & C. 1.

[2] This description is taken, with some additions and alterations to conform to later decisions, from Mitford's Equity Pleading, 58, 59. As to the general nature of the remedy, see Crawshay v. Thornton, 2 Mylne & C. 1; Sieveking v. Behrens, 2 Mylne & C. 581; Glyn v. Duesbury, 11 Sim. 139, 147; Langston v. Boylston, 2 Ves. 101, 103, 109; Jones v. Thomas, 2 Smale & G. 186; Prudential Ass. Co. v. Thomas, L. R. 3 Ch. 74; Farley v. Blood, 30 N. H. 354; Lincoln v. Rutland etc. R. R., 24 Vt. 639; Dorn v. Fox, 61 N. Y. 264; Shaw v. Coster, 8 Paige, 339; 35 Am. Dec. 690; Mohawk etc. R. R. v. Clute, 4 Paige, 384; Bedell v. Hoffman, 2 Paige, 199; Badeau v. Rogers, 2 Paige, 209; Bell v. Hunt, 3 Barb. Ch. 391; Richards v. Salter, 6 Johns. Ch. 445; Atkinson v. Manks, 1 Cow. 691; Cady v. Potter, 55 Barb. 463; Mount Holly etc. Tp. Co. v. Ferree, 17 N. J. Eq. 117; Strange v. Bell, 11 Ga. 103; Burton v. Black, 32 Ga. 53; Hayes v. Johnson, 4 Ala. 267; Michigan etc. Co. v. White, 44

the suit is, that the conflicting claimants shall litigate the matter among themselves, without involving the stakeholder in their controversy, with which he has no interest. It is plain, therefore, that the plaintiff can obtain no *specific* relief. So far as he is concerned, upon his filing the bill, and surrendering up the thing or money into the custody of the court, *his* remedy is exhausted by the decree that the defendants do interplead with each other, and that he be freed from or indemnified against their demands, and that he recover his costs; with the result of their dispute he has no concern. The ground of the jurisdiction is

Mich. 25; Cogswell v. Armstrong, 77 Ill. 139; Hathaway v. Foy, 40 Mo. 540; Orr Water Ditch Co. v. Larcombe, 14 Nev. 53; Pfister v. Wade, 56 Cal. 43.

Rationale of the Remedy. — It is sometimes supposed that the remedy of interpleader is allowed to avoid the risk of two recoveries. This is entirely a mistaken view. If a party has in any way made himself liable, even for the same demand, to two claimants, he is not entitled to an interpleader. It is the essential fact that he should actually be liable to only one of the claimants. The true *rationale* of interpleader is, that the party thereby avoids the risk of being vexed by two or more suits. Even though there is no danger of his being compelled to pay the same demand twice, the danger of two suits against him, with the consequent trouble and expense, is the sufficient ground for the remedy: Crawford v. Fisher, 1 Hare, 436, 441; East and West India Dock Co. v. Littledale, 7 Hare, 57, 60; Langston v. Boylston, 2 Ves. 101; Sablicich v. Russell, L. R. 2 Eq. 441; Greene v. Mumford, 4 R. I. 313; School District v. Weston, 31 Mich. 85; Pfister v. Wade, 56 Cal. 43. In Crawford v. Fisher, Wigram, V. C., said: "The office of an interpleading suit is, not to protect a party against a *double liability*, but against double vexation in respect of *one* liability. If the circumstances of a case show that the plaintiff is liable to both claimants, that is no case for interpleader. It is of the essence of an interpleading suit that the plaintiff shall be liable to one only of the claimants; and the relief which the court affords him is against the vexation of two proceedings on a matter which may be settled in a single suit." The supreme object of an interpleader is to protect the plaintiff, — the stakeholder, — and not the claimants against him; to protect him from the danger and vexation of two opposing suits for the same demand by those claimants, while he is ready and willing to pay the demand to the one who is judicially ascertained to be entitled to it: Trigg v. Hitz, 17 Abb. Pr. 436; Farley v. Blood, 30 N. H. 354; Mich. etc. Co. v. White, 44 Mich. 25; Newhall v. Kastens, 70 Ill. 156; Nelson v. Barter, 2 Hem. & M. 334; 33 L. J. Ch. 705; 10 Jur., N. S., 832. Such danger must be real; a mere suspicion of risk will not be sufficient to support a bill: Blair v. Porter, 13 N. J. Eq. 267; and this danger must not only exist when the bill is filed, but must continue until the decree: Kerr v. Union Bank, 18 Md. 396.

plain. The party seeking the remedy is exposed to the hazard, vexation, and expense of several actions at law for the same demand, while he is ready and willing to satisfy that demand in favor of the claimant who establishes his right thereto. For this liability the law furnishes no adequate remedy, and in most instances no remedy whatever.

§ 1321. **The Claims, Legal or Equitable.**— The equitable jurisdiction exists, although both or all the conflicting claims against the stake-holder are legal,[1] since it depends upon the fact that distinct claims are made, rather than upon their intrinsic nature as being legal or equitable. It is not necessary, however, that all the claims should be legal; the remedy is granted when one of them is legal and the other equitable.[2] Indeed, if one or more of the conflict-

Such being the theory of the remedy, it is not essential that any suit should have been actually commenced by either claimant against the plaintiff: Angell v. Hadden, 15 Ves. 244; Morgan v. Marsack, 2 Mer. 107; Farley v. Blood, 30 N. H. 354; Richards v. Salter, 6 Johns. Ch. 445; Yates v. Tisdale, 3 Edw. Ch. 71; Schuyler v. Pelissier, 3 Edw. Ch. 191; Strange v. Bell, 11 Ga. 103; Gibson v. Goldthwaite, 7 Ala. 281; 42 Am. Dec. 592. It is enough that the conflicting claimants make their respective claims and threaten suit: Langston v. Boylston, *supra;* Providence Bank v. Wilkinson, 4 R. I. 507; 70 Am. Dec. 160; Briant v. Reed, 14 N. J. Eq. 271; Yarborough v. Thompson, 3 Smedes & M. 291; 41 Am. Dec. 626. The plaintiff must, however, positively allege an actual claim made by each defendant: State Ins. Co. v. Gennett, 2 Tenn. Ch. 82.

[1] Lowndes v. Cornford, 18 Ves. 299.

[2] Lowndes v. Cornford, *supra;* Morgan v. Marsack, 2 Mer. 107; Wright v. Ward, 4 Russ. 215; Paris v. Gilham, Coop. 56; Martinius v. Helmuth, 2 Ves. & B. 412; Smith v. Hammond, 6 Sim. 10; Crawford v. Fisher, 10 Sim. 479; Hamilton v. Marks, 5 De Gex & S. 638; Prudential Ass. Co. v. Thomas, L. R. 3 Ch. 74; Duke of Bolton v. Williams, 4 Brown Ch. 297, 309; Farley v. Blood, 30 N. H. 354; Richards v. Salter, 6 Johns. Ch. 445; Yates v. Tisdale, 3 Edw. Ch. 71; Schuyler v. Pelissier, 3 Edw. Ch. 191; Lozier's Ex'rs v. Van Saun's Adm'rs, 3 N. J. Eq. 325; Oil Run Petroleum Co. v. Gale, 6 W. Va. 525; Strange v. Bell, 11 Ga. 103; Burton v. Black, 32 Ga. 53; Gibson v. Goldthwaite, 7 Ala. 281; 42 Am. Dec. 592; Whitney v. Cowan, 55 Miss. 626, 647; Newhall v. Kastens, 70 Ill. 156. In England the necessity of a resort to equity is removed, although the equity jurisdiction is not at all affected, by the statute of 1 & 2 Wm. IV., c. 58, sec. 1, as amended and enlarged by the common-law procedure act (23 & 24 Vict., c. 126, sec. 12), which enabled a court of law, on motion, to direct what amounts to an interpleader in actions of debt, assumpsit, trover, and detinue. Under the present system of procedure, equitable claims may be

ing claims are purely equitable, there is the stronger reason for a resort to the equity jurisdiction; and prior to recent legislation in England and in the United States, such a resort was indispensable under those circumstances.

§ 1322. **Essential Elements.**— From the description given in a previous paragraph, and from the whole course of authorities, it is clear that the equitable remedy of interpleader, independent of recent statutory regulations, depends upon and requires the existence of the four following elements, which may be regarded as its essential conditions: 1. The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; 2. All their adverse titles or claims must be dependent, or be derived from a common source; 3. The person asking the relief — the plaintiff — must not have nor claim any interest in the subject-matter; 4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stake-holder. As the original equitable jurisdiction is founded, to a great extent, upon these four propositions, I shall examine them separately.

§ 1323. **First. The Same Thing, Debt, or Duty.**—The same thing, debt, or duty must be claimed by both the parties against whom the interpleader is demanded.[1] This requi-

adjudicated upon in an interpleader issue connected with a legal action: Rusden v. Pope, L. R. 3 Ex. 269; Engelback v. Nixon, L. R. 10 Com. P. 645; Duncan v. Cashin, L. R. 10 Com. P. 554; Attenborough v. London and St. Katharine's Dock Co., L. R. 3 C. P. D. 450; see Langton v. Horton, 3 Beav. 464. Analogous statutes have been passed in many American states.

[1] Desborough v. Harris, 5 De Gex, M. & G. 439, 455. In Glyn v. Duesbury, 11 Sim. 139, 148, Shadwell, V. C., said: "*Where the claims made by the defendants are of different amounts, they can never be identical;* but where they are the same in amount, that circumstance goes far to determine their identity. The amount, however, may not be sufficient of itself to determine the identity; for the amount may be the same and the debt may be different." This *dictum* was approved in Pfister v. Wade, 56 Cal. 43. In my opinion, however, that portion of the *dictum* which is italicized — the statement that claims of different amounts can never be identical — is incorrect; it seems alike opposed to principle and to authority. Where both defendants claim one, single,

site results from the very nature and object of the remedy. If the subject in dispute has a bodily existence,— is a *thing*, — there can be no doubt nor question as to the identity. The difficulty in applying the rule arises where the subject is a chose in action; and then the identity must be determined in each particular case, not by any general rules, but by the nature, constitution, and incidents of the debt, demand, or duty itself.

undivided *debt*, technically so called, the statement is undoubtedly true; a difference in their amounts would be fatal to their identity. But it is clearly not necessarily so where the claims are for unliquidated damages. Where, for example, a chattel is in the plaintiff's hands, to which both defendants claim title, they do not sue to recover the article itself, but allege a *technical* conversion, and seek to recover damages,— the value of the chattel. Here the claim of the defendants would not be for a "thing," nor for a "debt," but it would be for a "duty,"— a *chose in action*. If each defendant alleged a different value, and claimed a different amount of damages, the *duty* asserted would still be identically the same in each demand. Another instance of difference in the amounts claimed by the different defendants, where the debt or duty may still be the same, occurs in cases where a fund being in plaintiff's hands, the whole of it is claimed by one defendant, and parts of it are claimed by the others. With regard to such cases, Christiancy, J., said, in School District v. Weston, 31 Mich. 85: "Upon the great weight of authority, both English and American, a much more liberal and reasonable rule has been established, and bills of interpleader have been frequently maintained, where the several claimants, instead of claiming the whole fund or matter in dispute, have claimed different portions of the fund, when the aggregate of all the claims exceeded the full amount of the fund; and the complainant being, as in the present case, virtually a stake-holder, and unable to determine to whom or in what proportions the payments should be made." In this case the plaintiff had let a contract for building a school-house for a specified sum to a contractor, and portions of this contract price were claimed by sub-contractors and material-men, the total amount of their claims exceeding the whole contract price. See also, as examples of such partial claims, Yates v. Tisdale, 3 Edw. Ch. 71; Fargo v. Arthur, 43 How. Pr. 193; Newhall v. Kastens, 70 Ill. 156; Board of Education v. Scoville, 13 Kan. 17. Where the same property had been taxed to the owner in two counties, in some cases for different amounts, in others for the same amount, a bill of interpleader by the owner to determine which of the counties was entitled to the tax has been maintained: See Thomson v. Ebbets, Hopk. Ch. 272; Mohawk etc. R. R. v. Clute, 4 Paige, 384, 391; Redfield v. Supervisors, Clarke Ch. 42; Dorn v. Fox, 61 N. Y. 264; but, *per contra*, see Greene v. Mumford, 4 R. I. 313. It is difficult to perceive how the tax levied by two different counties, even though the amount of each tax is the same, is one and the same debt or duty, so as to sustain a bill of interpleader.

§ 1324. **Second. Privity between the Opposing Claimants.** — A second requisite is, that the adverse titles of the claimants must be connected, or dependent, or one derived from the other, or both derived from a common source. It is not every instance of conflicting claims against a person for the same thing, debt, or duty which will entitle him to the remedy of an interpleader. Where there is no privity between the claimants, where their titles are independent, not derived from a common source, but each asserted as wholly paramount to the other, the stake-holder is obliged, in the language of the authorities, to defend himself as well as he can against each separate demand; a court of equity will not grant him an interpleader.[1]

Where a *chose in action* is the subject-matter, it is impossible to lay down any general rule by which its identity shall be determined. The circumstances of each case can alone disclose whether the same debt or duty is claimed by all the defendants: See City Bank v. Bangs, 2 Paige, 570; Briant v. Reed, 14 N. J. Eq. 271; Dodd v. Bellows, 29 N. J. Eq. 127; Leddel's Ex'r v. Starr, 20 N. J. Eq. 274; Salisbury Mills v. Townsend, 109 Mass. 115; Oil Run Petroleum Co. v. Gale, 6 W. Va. 525; Pfister v. Wade, 56 Cal. 43.

In other cases, one defendant claiming rent for certain premises, and the other claiming damages for their use and occupation, the demands were held not to be the same: Dodd v. Bellows, 29 N. J. Eq. 127; Johnson v. Atkinson, 3 Anstr. 798. If the conflicting claims relate to a specific "thing" in the plaintiff's possession, the identity is clear, and the value alleged is immaterial: Cady v. Potter, 55 Barb. 463. In Lozier's Ex'rs v. Van Saun's Adm'rs, 3 N. J. Eq. 325, a bill of interpleader was sustained, where the controversy was as to which of the defendants was entitled to receive payment of certain notes made by plaintiff's testator, although the amount to be paid was not ascertained; the amount, it was held, could not vary the rights of the claimants.

[1] Pearson v. Cardon, 2 Russ. & M. 606, 609-612; Crawshay v. Thornton, 2 Mylne & C. 1, 19-24; Nickolson v. Knowles, 5 Madd. 47; Cooper v. De Tastet, Tam. 177; Pfister v. Wade, 56 Cal. 43. This doctrine, which was left somewhat doubtful by the previous cases, was finally settled by the decision of Lord Brougham in Pearson v. Cardon, and of Lord Cottenham in Crawshay v. Thornton. It finds its most frequent application in cases of a tenant interpleading his landlord and a third person claiming under paramount title, of a bailee interpleading his bailor, and an adverse claimant asserting a paramount title, and of an agent interpleading his principal and an adverse paramount claimant. Examples of these cases are given in a subsequent paragraph.

Such being the doctrine, it is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be, and is, exposed to danger, vexation, and loss from conflicting *independent* claims to the same thing,

§ 1325. **Third. Plaintiff a Mere Stake-holder.**—The person seeking the relief must not have nor claim any interest in the subject-matter. He must occupy the position of a stake-holder. He must stand entirely indifferent between the conflicting claimants, and be ready and willing to surrender the entire thing in dispute, or to pay the entire debt, or render the entire duty, without any charge, deduction, or commission as against the one rightfully entitled. He cannot mingle up a demand of his own upon the property or fund, with the demand that the other persons shall interplead. As soon as the decree is made that the defendants

as well as from claims which are dependent; and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands. It is not surprising, therefore, that courts have sometimes ignored this doctrine in their decisions, or have been ready to admit exceptions to its operation. In the common-law procedure act of 1860, which provides for a summary interpleader by motion in legal actions, it was enacted that the order of interpleader may be made "though the titles of the claimants have not a common origin, but are adverse to and independent of each other." In Attenborough v. London etc. Dock Co., L. R. 3 C. P. D. 450, which was an interpleader proceeding in a legal action, the court of appeal held that the statute above quoted had abrogated this doctrine as laid down in Crawshay v. Thornton, at all events in the proceedings authorized by the statute. Bramwell, L. J., who was one of the commissioners who drew up the statute, said (p. 456): "From my own knowledge as one of the common-law commissioners, I can say that it was intended to do away with the effect of that decision." Baggallay, L. J., a very eminent equity lawyer, said (p. 458): "I may go further, and say that, in my opinion, if, after the common-law procedure act of 1860, a bill of interpleader had been filed, raising facts like those in Crawshay v. Thornton, any judge of the court of chancery would have felt himself no longer bound by the somewhat narrow principle laid down by Lord Cottenham, but would have acted upon the fuller powers contained in that statute." The Code of Civil Procedure of California, as lately amended, in section 386, goes even further, and provides for an interpleader, "although the titles or claims have not a common origin, *or are not identical.*" This last provision, that the claims need not be identical, is certainly unnecessary and most unreasonable; it violates the whole ground and reason upon which the remedy is based; if interpreted literally by the courts, it would remove almost every limitation upon this kind of suit, and render it a means of vexation and annoyance. There is no valid objection to the requisite that the opposing claims should be identical; the only question has been, What *is* such identity? Experience shows the danger of legislative intermeddling with doctrines long settled and approved by the consenting judgments of able courts.

do interplead, and that he be indemnified, the plaintiff must be wholly without the controversy.[1] The interest, however, which shall defeat the relief must be in the very *thing or fund* itself which is the subject-matter of the controversy and of the suit. An interest in the legal question at issue to be determined by the result of the litigation will not prejudice the plaintiff's right to the relief; nor, it seems, a charge, lien, or claim upon the very thing or

[1] Mitchell v. Hayne, 2 Sim. & St. 63; Langston v. Boylston, 2 Ves. 101; Moore v. Usher, 7 Sim. 383; Bignold v. Audland, 11 Sim. 23; Hoggart v. Cutts, Craig & P. 197; Lincoln v. Rutland etc. R. R., 24 Vt. 639; Atkinson v. Manks, 1 Cow. 691; Shaw v. Coster, 8 Paige, 339; 35 Am. Dec. 690; Lozier's Ex'rs v. Van Saun's Adm'rs, 3 N. J. Eq. 325; Kerr v. Union Bank, 18 Md. 396; Burton v. Black, 32 Ga. 53; Adams v. Dixon, 19 Ga. 513; 65 Am. Dec. 608; Anderson v. Wilkinson, 10 Smedes & M. 601; Cullen v. Dawson, 24 Minn. 66. While the plaintiff cannot set up a claim, charge, or lien upon the fund, which shall enter into the litigation, and form a part of the controversy: Wakeman v. Dickey, 19 Abb. Pr. 24; it seems this rule is not without exceptions. It does not apply where the claim is admitted by both defendants: Cotter v. Bank of England, 2 Dowl. Pr. 728; and see Attenborough v. London etc. Co., L. R. 3 C. P. D. 450; Gibson v. Goldthwaite, 7 Ala. 281; 42 Am. Dec. 592; Webster v. McDaniel, 2 Del. Ch. 297. If the plaintiff has a claim or charge on the fund, he may waive it, and maintain the suit: Jacobson v. Blackhurst, 2 Johns. & H. 486. It necessarily follows from the doctrine of the text that if the plaintiff expressly denies his liability in whole or in part to one of the defendants, he strikes at the very foundation of the remedy, and shows that he is not indifferent: Moore v. Usher, 7 Sim. 383; Greene v. Mumford, 4 R. I. 313; Patterson v. Perry, 14 How. Pr. 505; Cogswell v. Armstrong, 77 Ill. 139. As to the effect of a dispute or uncertainty with respect to the amount of the fund or debt for which plaintiff is liable, see City Bank v. Bangs, 2 Paige, 570; Consociated Pres. Soc. v. Staples, 23 Conn. 544; Chamberlain v. O'Connor, 1 E. D. Smith, 665; Bender v. Sherwood, 15 How. Pr. 258; Patterson v. Perry, 14 How. Pr. 505.

The stake-holder — the person in possession of the thing or fund, or from whom the debt or duty is owing, and against whom two or more conflicting claimants assert their demands — must necessarily be the plaintiff. No interpleader suit can be maintained by one of the contestants against the other contestant and the stake-holder: See Sprague v. West, 127 Mass. 471; Hyman v. Cameron, 46 Miss. 725; Hathaway v. Foy, 40 Mo. 540. Furthermore, the plaintiff must be in possession of the fund, or have it in his custody, so that he can deliver or pay it in pursuance of the decree. If he has already delivered the thing or paid the fund to one of the contestants, no suit for interpleader can be maintained: Mount Holly etc. Co. v. Ferree, 17 N. J. Eq. 117; Tiernan v. Rescaniere's Adm'rs, 10 Gill & J. 217; Vosburgh v. Huntington, 15 Abb. Pr. 254; Martin v. Maberry, 1 Dev. Eq. 169.

fund itself which is admitted to be valid by both the defendants. To sum up the doctrine, the plaintiff can only obtain the remedy of an interpleader; and the circumstances must be such that the entire rights of both defendants to the thing, fund, debt, or duty can be fully adjusted and determined in the one suit.[2]

§ 1326. **Fourth. No Independent Liability to One Claimant.**—The party seeking the relief must have incurred no independent liability to either of the claimants. Such an independent liability may be incurred in two classes of cases: 1. In the first place, the agent, depositary, bailee, or other party demanding an interpleader, in his dealings with one of the claimants, may have expressly acknowledged the latter's title, or may have bound himself by contract, so as to render himself liable upon such independent undertaking, without reference to his possible liability to the rival claimant upon the general nature of the entire transaction. Under these circumstances, as the plaintiff is liable at all events to one of the defendants, whatever may be their own respective claims upon the subject-matter as between themselves, he cannot call upon these defendants to interplead. He does not stand indifferent between the claimants, since one of them has a valid legal demand against him at all events.[1] Even if the acknowledgment or

[2] If, therefore, the plaintiff has, with respect to other property not the subject-matter of the present suit, an interest that one of the defendants shall succeed, because the decision thus made will be favorable to his own future litigation concerning that other property, — this is no objection to his maintaining a suit for an interpleader: Oppenheim v. Leo Wolf, 3 Sand. Ch. 571; McHenry v. Hazard, 45 Barb. 657; Gibson v. Goldthwaite, 7 Ala. 281; 42 Am. Dec. 592.

[1] Crawshay v. Thornton, 2 Mylne & C. 1, 19–24; Suart v. Welch, 4 Mylne & C. 305; Jew v. Wood, Craig & P. 185; Pfister v. Wade, 56 Cal. 43; Tyus v. Rust, 37 Ga. 574; 95 Am. Dec. 365; Hatfield v. McWhorter, 40 Ga. 269; Cullen v. Dawson, 24 Minn. 66. As to the effect produced by the English statute of 1860, interpreted by the decision in Attenborough v. London etc. Co., L. R. 3 C. P. D. 450, and the amendment of section 386 of the California Code of Civil Procedure, see *ante*, in note under § 1324. Another instance of the doctrine is, where the plaintiff, in stating the case in his bill, is obliged to admit himself to be a wrong-doer to either one of the defendants; he thus shows an

promise has been obtained by fraud or mistake, the right of the party thus deceived to be relieved in equity from his liability cannot be considered and sustained in an interpleader suit. 2. In the second class of cases, the independent liability of the plaintiff to one of the defendants arises from the very nature of the original relation subsisting between them, without reference to any collateral acknowledgment of title, or promise to be bound. The most important examples of such relations are those subsisting between a bailee and his bailor, an agent or attorney and his principal, a tenant and his landlord, and the like. In pursuance of the doctrine above stated, if a bailee is sued by his bailor, or an agent by his principal, or a tenant by his landlord, and at the same time a third person asserts a claim of title adverse and paramount to that of the bailor, principal, or landlord, a suit of interpleader cannot, in general, be maintained against the two conflicting claimants, since, from the very nature of the relation, there is an independent personal liability, with respect to the subject-matter, of the bailee to his bailor, of the agent to his principal, and of the tenant to his landlord.[2]

§ 1327. **By Bailees, Agents, Tenants, and Parties to Contracts.**— The general doctrine which determines the rights of bailees, agents, tenants, and contracting parties to interplead their principals, bailors, landlords, and the like, and claimants who assert antagonistic paramount titles, has

independent liability to that defendant, and is not entitled to an interpleader: Slingsby v. Boulton, 1 Ves. & B. 334; Morgan v. Fillmore, 18 Abb. Pr. 217; United States v. Vietor, 16 Abb. Pr. 153; Mount Holly etc. Co. v. Ferree, 17 N. J. Eq. 117; Dewey v. White, 65 N. C. 225; Hatfield v. McWhorter, 40 Ga. 269; Tyus v. Rust, 37 Ga. 574; 95 Am. Dec. 365. If the liability has been occasioned by some act of the plaintiff himself, he is not entitled to the remedy: See Desborough v. Harris, 5 De Gex, M. & G. 439, 455; Cochrane v. O'Brien, 2 Jones & L. 380.

[2] For cases illustrating this conclusion, see the next following paragraph and notes thereunder. Since the cases of bailees, agents, and tenants are so important, and since the chief difficulties connected with the remedy of interpleader have arisen in its application to such persons, I have given a separate paragraph to the examination of these relations.

been stated in the preceding paragraph.[1] The rule is not, however, of universal application. There are cases in which a bailee, agent, or tenant may interplead his bailor, principal, or landlord, and a third person setting up an opposing claim to the thing, fund, or duty. These cases may be described by one general formula, as those in which the title of the opposing claimant is *derivative* under, and not antagonistic and paramount to, that of the bailor,

[1] I have collected and arranged in this note some of the most important cases which deal with such classes of persons.

Bailees and agents. — A bailee or agent cannot maintain an interpleader suit against the bailor or the principal and a third person who asserts an independent, antagonistic, and paramount title to the fund: Nickolson v. Knowles, 5 Madd. 47; Dixon v. Hamond, 2 Barn. & Ald. 310, 313; Cooper v. De Tastet, Tam. 177, 181, 182; Smith v. Hammond, 6 Sim. 10; Pearson v. Cardon, 2 Russ. & M. 606, 609, 610, 612; Crawshay v. Thornton, 2 Mylne & C. 1, 19–24; Cook v. Earl of Rosslyn, 1 Giff. 167; Atkinson v. Manks, 1 Cow. 691, 703–706; United States Trust Co. v. Wiley, 41 Barb. 477; Lund v. Seamen's Bank, 37 Barb. 129; United States v. Vietor, 16 Abb. Pr. 153; Vosburgh v. Huntington, 15 Abb. Pr. 254; First Nat. Bank v. Bininger, 26 N. J. Eq. 345; Tyus v. Rust, 37 Ga. 574; 95 Am. Dec. 365; Hatfield v. McWhorter, 40 Ga. 269; Crane v. Burntrager, 1 Ind. 165; White Water etc. Co. v. Comegys, 2 Ind. 469. Nor can an attorney maintain such a suit against his client and a third person who claims the money which he has collected, by an independent and antagonistic title: Marvin v. Ellwood, 11 Paige, 365; but see, *per contra*, Goddard v. Leech, Wright, 476. For the same reason, where A claims as legatee under a will, and B claims the property by a title paramount to that of the testator, the executor cannot compel them to interplead; he is under a direct liability to the legatee: Adams v. Dixon, 19 Ga. 513; 65 Am. Dec. 608. On the other hand, there are cases in which a bailee or an agent may interplead his bailor or his principal with third persons claiming adversely. Wherever the third person claims the thing, fund, debt, or duty from the bailee or agent under a title *derived from* the bailor or the principal, created by the latter's own act subsequently to the bailment or agency, — such as his assignment, agreement, sale, mortgage, trust, or lien given by him, — the bailee or agent may compel the parties to interplead. There is in such a case no denial of the original title; the only dispute is concerning the effect of the subsequent act, and as to which of the claimants is thereby entitled to the thing or fund. On this general ground an attorney may interplead his client and a person who sets up a derivative claim from such client: Gibson v. Goldthwaite, 7 Ala. 281; 42 Am. Dec. 592. And where money is in the hands of an agent, and the principal has created a lien or charge on the fund, in favor of a third person, in respect to which a controversy has arisen, the agent may compel his principal and the other claimant to interplead: Smith v. Hammond, 6 Sim. 10; Wright v. Ward, 4 Russ. 215–220. And where the principal has assigned the fund in the agent's hands, or the bailor has transferred his interest in the

principal, or landlord. An interpleader is allowed wherever the adverse claim originates from some act of the bailor, principal, or landlord, done or suffered after the commencement of the bailment, agency, or tenancy, and causing a dispute as to which of the parties is entitled to the thing, fund, or duty. The claim of the third person, instead of being under an independent, antagonistic, para-

thing bailed: Crawford v. Fisher, 1 Hare, 436, 440; Smith v. Hammond; Wright v. Ward; Tanner v. European Bank, L. R. 1 Ex. 261; Gibson v. Goldthwaite. For a like reason an interpleader is permitted where a bailor or principal has given orders for the property to two different persons who set up conflicting claims, since their titles are derivative, and not antagonistic: Pearson v. Cardon, 2 Russ. & M. 606; 4 Sim. 218; Atkinson v. Manks, 1 Cow. 691. The decision in Schuyler v. Pelissier, 3 Edw. Ch. 191, goes too far. An interpleader by the bailee is also allowed where a joint bailment has been made, or a transaction in the nature of a joint bailment, to await the happening of some event or the determination of some dispute: Suart v. Welch, 4 Mylne & C. 305; City Bank v. Skelton, 2 Blatchf. 14; First Nat. Bank v. West River R. R., 46 Vt. 633; Perkins v. Trippe, 40 Ga. 225. For special cases, see Mason v. Hamilton, 5 Sim. 19; Crellin v. Leyland, 6 Jur. 733. It should be remembered that in all such cases if the bailee or agent has recognized the title of the assignee or other holder of a derivative title, and has stipulated to hold the property at his disposal, the independent liability thus assumed will prevent the bailee or agent from compelling the assignee to interplead with the bailor or principal who repudiates the transaction: See *ante*, § 1326; Tyus v. Rust, 37 Ga. 574; 95 Am. Dec. 365; Hatfield v. McWhorter, 40 Ga. 269.

Tenant and landlord. — The general doctrine is familiar, that a tenant cannot deny his landlord's title; he cannot therefore maintain a suit for interpleader against his landlord and a stranger who claims under a title antagonistic and paramount to that of the lessor: Dungey v. Angove, 2 Ves. 304, 310; Woolaston v. Wright, 3 Anstr. 801; Smith v. Target, 2 Anstr. 529; Johnson v. Atkinson, 3 Anstr. 798; Cook v. Earl of Rosslyn, 1 Giff. 137; Crawshay v. Thornton, *supra;* Seaman v. Wright, 12 Abb. Pr. 304; Crane v. Burntrager, 1 Ind. 165; Snodgrass v. Butler, 54 Miss. 45. But the tenant is entitled to interplead his landlord and an opposing claimant whenever there is some privity between the two,— when the title of the other claimant is derivative from that of the lessor,— as, for example, when the relation of mortgagor and mortgagee, trustee and *cestui que trust*, assignor and assignee, etc., has been created between the two. In such a case the tenant does not dispute his landlord's title: Dungey v. Angove, 2 Ves. 304, 310, 312; Metcalf v. Hervey, 1 Ves. Sr. 248; Cowtan v. Williams, 9 Ves. 107; Clarke v. Byne, 13 Ves. 383; Johnson v. Atkinson, 3 Anstr. 798; Seaman v. Wright, 12 Abb. Pr. 304; Snodgrass v. Butler, 54 Miss. 45; Oil Run Petro. Co. v. Gale, 6 W. Va. 525. Or where both contestants claim under the lessor by different titles; for example, one as heir and the other as devisee: Jew v. Wood, 3 Beav. 579; Badeau v. Tylee, 1 Sand. Ch. 270.

mount title, must be made under a title *derived* from that of the bailor, principal, or landlord; it must acknowledge, and not deny, such original title.

§ 1328. **Pleadings and Other Procedure.**— The bill of complaint must contain allegations which show that all of the requisites entitling the plaintiff to the remedy exist in the case. It must allege positively that conflicting claims

Parties to contracts. — As a general rule, where A and B are bound by express contract, A cannot maintain an interpleader suit against B or a person holding or claiming under him, and a stranger who asserts and claims under an antagonistic and paramount title. A is under an independent liability to B: *Ante*, § 1326. For example, a vendee of real or personal property, with respect to his liability to pay the purchase price, cannot interplead his vendor and a third person claiming to own the property by an independent antagonistic title: James v. Pritchard, 7 Mees. & W. 216; Trigg v. Hitz, 17 Abb. Pr. 436; Shehan's Heirs v. Barnett's Heirs, 6 T. B. Mon. 592. On the other hand, as in cases of bailees, agents, and tenants, a party to a contract may interplead his co-contractor and other persons in privity with him, or distinct claimants all of whom are in privity with his co-contractor, — that is, may interplead his co-contractor and persons who derive their title under him, or several claimants all of whom thus hold by derivative title. As example: A vendee may interplead his vendor and an attaching creditor of A, alleged to be the real owner, the sale being alleged to have been really made by the vendor as A's agent: Richards v. Salter, 6 Johns. Ch. 445; Johnston v. Lewis, 4 Abb. Pr., N. S., 150. A vendor of land may interplead the husband of the deceased vendee and her heirs, where both claimed to be entitled to a conveyance: Farley v. Blood, 30 N. H. 354. Insurance companies may compel opposing claimants of the insurance money to interplead when they claim by assignment from the assured, or by mortgage, or by attachment, etc.,— that is, when they claim *derivatively:* Nelson v. Barter, 2 Hem. & M. 334; Hamilton v. Marks, 5 De Gex & S. 638; Spring v. S. C. Ins. Co., 8 Wheat. 268. On like ground, corporations may interplead opposing claimants of stock or dividends, whose titles are derivative from a stockholder, by assignment, execution, attachment, trust, etc.: Salisbury Mills v. Townsend, 109 Mass. 115; Providence Bank v. Wilkinson, 4 R. I. 507; 70 Am. Dec. 160; Cady v. Potter, 55 Barb. 463. See Cheever v. Hodgson, 9 Mo. App. 565. A maker of a note may compel claimants holding under the payee by derivative title to interplead; for example, an attaching creditor of payee and an assignee: Briant v. Reed, 14 N. J. Eq. 271; Bryan v. Saltenstall, 3 J. J. Marsh. 672; Fahie v. Lindsay, 8 Or. 474. The administrator of a deceased guardian to whom the note was made payable, and a new guardian appointed in place of the one deceased: Van Buskirk v. Roy, 8 How. Pr. 425. A receiver has been held entitled to interplead opposing claimants of the fund in his hands: Winfield v. Bacon, 24 Barb. 154. (*Quære*, would not the court direct the proper distribution of the fund by the receiver?) Where suits by persons claiming to be owners of the cargo are instituted in admiralty against a ship, caus-

to substantially the same thing, fund, debt, or duty are set up by the defendants; that plaintiff claims no interest in the subject-matter; that he is indifferent between the claimants, and is ready and willing to deliver the thing or fund, or pay the debt, or render the duty to the rightful claimant, but that he is ignorant or in doubt which is the rightful one, and is in a real danger or hazard by means of such doubt, from their conflicting demands.[1] The bill need not show an apparent title in either of the defendants.[2] On the contrary, if the bill should show that plaintiff was fully informed of the defendants' rights and of his own liability, or if it should show that one of the defendants was certainly entitled, on the facts alleged, to the thing, debt, or duty, in either case it would be demurrable; there would be no ground for an interpleader.[3] It is the

ing her arrest, the master cannot maintain interpleader against these claimants, because, — 1. The claims are not against him, but against the ship; and 2. The court of admiralty has full jurisdiction to settle all the questions: Sablicich v. Russell, L. R. 2 Eq. 441. Independently of statute, it has generally been held that a sheriff levying on goods by execution against A, which are claimed by B to be his property, cannot compel the execution creditor and B to interplead: Slingsby v. Boulton, 1 Ves. & B. 334; Shaw v. Coster, 8 Paige, 339; 35 Am. Dec. 690; Quinn v. Green, 1 Ired. Eq. 229; 36 Am. Dec. 46; Quinn v. Patton, 2 Ired. Eq. 48; Dewey v. White, 65 N. C. 225. Nor can the sheriff compel the opposing claimants of a surplus in his hands after satisfying an execution to interplead; such claims can be adjusted by the court: Parker v. Barker, 42 N. H. 78; 77 Am. Dec. 789; McDonald v. Allen, 37 Wis. 108; 19 Am. Rep. 754. But see Kring v. Green's Ex'rs, 10 Mo. 195; Lawson v. Jordan, 19 Ark. 297; 70 Am. Dec. 596. Statutes in England and in many of the states have authorized the sheriff to interplead the claimants of property seized by him under process.

[1] Farley v. Blood, 30 N. H. 354; Parker v. Barker, 42 N. H. 78; 77 Am. Dec. 789; Atkinson v. Manks, 1 Cow. 691; Wilson v. Duncan, 11 Abb. Pr. 3; Lozier's Ex'rs v. Van Saun's Adm'rs, 3 N. J. Eq. 325; Briant v. Reed, 14 N. J. Eq. 271; Snodgrass v. Butler, 54 Miss. 45; Starling v. Brown, 7 Bush, 164; State Ins. Co. v. Gennett, 2 Tenn. Ch. 82; Pfister v. Wade, 56 Cal. 43.

[2] East & W. Ind. Dock Co. v. Littledale, 7 Hare, 57; Pfister v. Wade, *supra*.

[3] Parker v. Barker, 42 N. H. 78; 77 Am. Dec. 789; Mohawk etc. R. R. v. Clute, 4 Paige, 384; Morgan v. Fillmore, 18 Abb. Pr. 217; Wilson v. Duncan, 11 Abb. Pr. 3; Briant v. Reed, 14 N. J. Eq. 271; Barker v. Swain, 4 Jones Eq. 220. And if the plaintiff denies his liability to either of the defendants, he is not entitled to the remedy; he destroys the very foundation on which it rests: McHenry v. Hazard, 45 Barb. 657; 45 N. Y. 580. If the bill is taken

settled practice that the bill of complaint must be accompanied by an affidavit of the plaintiff, stating that the suit is not brought in collusion with either of the defendants; and the omission of such affidavit may generally be taken advantage of by demurrer.[4] The plaintiff must also bring or pay, or offer to bring or pay, the entire thing, fund, or money in controversy into court; an omission to do so renders the bill demurrable.[5] If the bill was properly filed, and if the plaintiff has acted in good faith, he is generally entitled to his costs out of the fund in controversy, which costs, as between the defendants, must ultimately be paid by the unsuccessful party.[6]

as confessed by one of the conflicting defendants, the fund indisputably belongs to the other. And where in such a case a stranger was afterwards admitted by the lower court, on petition, to contest the interest of the remaining defendant, it was held on appeal that there was no practice allowing a third person thus to come into the cause by petition; that the bill could not be amended to reach him, as it was filed to guard against *known* claims; the order that the remaining defendant and the third person should interplead was irregular: Michigan etc. Co. v. White, 44 Mich. 25. (*Quære*, would such a proceeding be allowed under the provision of the Iowa and California codes permitting *Intervention?*

[4] Hamilton v. Marks, 5 De Gex & S. 638; Farley v. Blood, 30 N. H. 354; Atkinson v. Manks, 1 Cow. 691; Beck v. Stephani, 9 How. Pr. 193; Mount Holly etc. Co. v. Ferree, 17 N. J. Eq. 117; Tyus v. Rust, 37 Ga. 574; 95 Am. Dec. 365; Snodgrass v. Butler, 54 Miss. 45; Starling v. Brown, 7 Bush, 164; Biggs v. Kouns, 7 Dana, 405, 411; but a contrary practice seems to prevail in Connecticut: Consociated Pres. Soc. v. Staples, 23 Conn. 544, 555; Nash v. Smith, 6 Conn. 421. The plaintiff's affidavit is conclusive; defendants cannot contradict it, even though the plaintiff has filed supplemental affidavits: Manby v. Robinson, L. R. 4 Ch. 347; Langston v. Boylston, 2 Ves. 101; Stevenson v. Anderson, 2 Ves. & B. 407; and see Fahie v. Lindsay, 8 Or. 474. If collusion appears on the face of the bill, relief will, of course, be denied: Marvin v. Ellwood, 11 Paige, 365; Kerr v. Union Bank, 18 Md. 396; Williams v. Halbert, 7 B. Mon. 184.

[5] The whole fund must be put at the disposal of the court; an offer to bring in what may be found due is not sufficient: Mohawk etc. R. R. v. Clute, 4 Paige, 384; Atkinson v. Manks, 1 Cow. 691; Williams v. Walker, 2 Rich. Eq. 291; 46 Am. Dec. 53; Snodgrass v. Butler, 54 Miss. 45; McGarrah v. Prather, 1 Blackf. 299; Starling v. Brown, 7 Bush, 164. It was held in Farley v. Blood, 30 N. H. 354, that in a suit concerning the defendants' rights to a conveyance under a land contract, the plaintiff must offer to convey, and must have the deeds executed ready for delivery.

[6] See Laing v. Zeden, L. R. 9 Ch. 736; Aldridge v. Thompson, 2 Brown Ch.

§ 1329. **Interpleader in Legal Actions.**— In England and in many of the American states a summary mode of interpleader by motion and order in certain legal actions is authorized.[1] These statutes substantially provide that in actions specified the defendant may show by affidavit that the same thing or money is claimed by another person besides the plaintiff; that he has sued or threatens to sue; that defendant is not in collusion with him; and that defendant is ready and willing to bring the thing or money into court. The court on motion may order such claimant to be substituted as defendant in the action in place of the original defendant. It is universally held that these statutes do not at all limit nor affect the equitable jurisdiction by suit; they merely furnish another special, cumulative,

149; Farley v. Blood, 30 N. H. 354; Manchester Print Works v. Stimson, 2 R. I. 415; Atkinson v. Manks, 1 Cow. 691; Canfield v. Morgan, Hopk. Ch. 224; Aymer v. Gault, 2 Paige, 284; Badeau v. Rogers, 2 Paige, 209; Spring v. S. C. Ins. Co., 8 Wheat. 268. As in all equity suits, costs are within the discretion of the court, and depend somewhat upon the circumstances of each case.

[1] The English statute of 1 & 2 Wm. IV., c. 58, sec. 1, allowed this proceeding in actions of assumpsit, debt, trover, and detinue. For the amendment made by the common-law procedure act of 1860, see *ante*, note under § 1324. The American statutes mainly differ with respect to the kinds of actions in which the proceeding is allowed. In a few states it is confined to actions on contract for money: *Alabama:* Code 1876, secs. 2906, 2907; or to actions for the recovery of personal property: *Arkansas:* Code 1874, secs. 4483, 4484; *Iowa:* 2 McClain's Stats. 1880, sec. 2572; *Oregon:* Gen. Laws 1872, p. 111, sec. 39. In several states the proceeding is allowed in actions on contract, and in those for the recovery of specific personal property: *California:* Code Civ. Proc., sec. 386 (for recent amendment, see *ante*, note under § 1324); *Idaho:* Gen. Laws 1880–81, sec. 201; *Kansas:* Dassler's Comp. Laws 1881, secs. 3564, 3565; *Nebraska:* Brown's Comp. Stats. 1881, pp. 535, 536, sec. 48; *Ohio:* 2 Rev. Stats. 1880, secs. 5016, 5017; *Mississippi:* Rev. Code 1880, sec. 1578. In others it embraces actions on contract, and actions for the recovery of real or of personal property: *Dakota:* Rev. Codes 1877, p. 491, sec. 91; *Minnesota:* Stats. 1878, p. 725, sec. 131; *New York:* Code Civ. Proc. (new code), sec. 820; *North Carolina:* Battle's Rev. 1873, p. 156, sec. 65; *South Carolina:* Rev. Stats. 1873, p. 597, sec. 145. In two states it is authorized "in any action": *Virginia:* Code 1873, c. 149, p. 1019; *West Virginia:* 1 Kelly's Rev. Stats. 1879, c. 7, p. 238. In some other states a similar proceeding is authorized by statute in certain special cases: *Colorado:* King's Code Civ. Proc. 1880, p. 151, sec. 404.

and concurrent remedy. The ordinary type of these statutes does not alter the settled doctrines concerning interpleader. The statutory remedy is a mere substitute for the equitable remedy by suit, in the kinds of actions to which it applies, and is governed by the same rules.[2] Of course, the statutes may change the equitable doctrines; may enlarge their scope of operation; and a few of them have doubtless produced this effect, as in the clauses introduced by amendment into the statutes of England and California, already noticed.[3]

[2] Oriental Bank v. Nicholson, 3 Jur., N. S., 857; Slaney v. Sidney, 14 Mees. & W. 800; Tauton v. Groh, 4 Abb. App. 358; Vosburgh v. Huntington, 15 Abb. Pr. 254; Johnson v. Maxey, 43 Ala. 521; Nelson v. Goree's Adm'r, 34 Ala. 565; Starling v. Brown, 7 Bush, 164; Board of Education v. Scoville, 13 Kan. 17; Pfister v. Wade, 56 Cal. 43.

[3] See *ante*, note under § 1324; Tanner v. European Bank, L. R. 1 Ex. 261. As to actions under codes of procedure adopting the reformed procedure, see Cady v. Potter, 55 Barb. 463; Washington etc. Ins. Co. v. Lawrence, 28 How. Pr. 435; St. Louis Life Ins. Co. v. Alliance Mut. L. Ins. Co., 23 Minn. 7; Board of Education v. Scoville, 13 Kan. 17; Pfister v. Wade, 56 Cal. 43. In volume 35 of the American Decisions, pp. 695–712, the reader will find a very able, exhaustive, and instructive note to the case of Shaw v. Coster, which discusses many points of practice, and questions arising under the statutes, which I have not touched upon. I have availed myself of the assistance furnished by this note in preparing the foregoing chapter, especially in its exhaustive collection of cases.

CHAPTER SECOND.

RECEIVERS.

ANALYSIS.

§ 1330. Definition, general nature, and objects.
§ 1331. The appointment discretionary.
§§ 1332–1335. Cases in which a receiver may be appointed.
§ 1332. First class.
§ 1333. Second class.
§ 1334. Third class.
§ 1335. Fourth class.
§ 1336. Their powers, rights, duties, and liabilities.

§ 1330. **General Nature and Objects.**— I purpose in this chapter to give a mere sketch of the general doctrines concerning this peculiar subject.[1] A receiver is a person standing indifferent between the parties, appointed by the court as a *quasi* officer or representative of the court, to hold, manage, control, and deal with the property which is the subject-matter of or involved in the controversy, under the direction of the court, during the continuance of the litigation, either where there is no person entitled competent to thus hold it,— as, for example, in the case of an infant, or in the interval before an executor or administrator of a deceased owner is appointed; or where two or more litigants are equally entitled, but it is not just and proper that either of them should retain it under his control,— as, for example, in some suits between partners; or where a person is legally entitled, but there is danger of his misapplying or misusing it,— as, for example, in some

[1] The subject of receivers has come to be one of great importance, owing especially to its vastly increased application of late in the winding up of corporations both in England and in this country. The remedy is so peculiar, and the rules regulating it in all its phases and applications are so special, that my limits of time and space will only permit a meager statement of its most general doctrines. The reader must be referred, for practical assistance in his professional work, to those treatises which deal with the subject in an exhaustive manner, of which Mr. Kerr's work is certainly one of the best.

suits against an executor or administrator, or, under some particular circumstances, in suits for the enforcement of a mortgage; or he is appointed in like manner and under like circumstances for the purpose of carrying into effect a decree of the court concerning the property,—as, for example, a decree for the winding up and settlement of a corporation, or the decree in a creditor's suit.[2]

§ 1331. **The Appointment Discretionary.**—The appointment of a receiver is, as a general rule, discretionary.[1] The discretion is not arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of promoting the ends of justice, and of protecting the rights of *all* the parties interested in the controversy and the subject-matter, and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding. One of the most material circumstances, without which the court would hardly make the appointment, is the reasonable probability that the plaintiff asking for a receiver will ultimately succeed in obtaining the general relief sought for by his suit.[2]

§ 1330, [2] Kerr on Receivers, 1, 2; Owen v. Homan, 3 Macn. & G. 378, 412; Bainbrigge v. Baddeley, 3 Macn. & G. 413, 419; Sturch v. Young, 5 Beav. 557; Ladd v. Harvey, 21 N. H. 514; Cheever v. Rutland etc. R. R., 39 Vt. 653; Bank of Miss. v. Duncan, 52 Miss. 740; Battle v. Davis, 66 N. C. 252; Twitty v. Logan, 80 N. C. 69; Crowder v. Moone, 52 Ala. 220 (not until the bill is filed); Delaware etc. R. R. v. Erie R. R., 21 N. J. Eq. 298; Blondheim v. Moore, 11 Md. 365; Haight v. Burr, 19 Md. 130; Voshell v. Hynson, 26 Md. 83; Beverley v. Brooke, 4 Gratt. 187, 208; Hand v. Dexter, 41 Ga. 454; Reid v. Reid, 38 Ga. 24; Dougherty v. McDougald, 10 Ga. 121; Mapes v. Scott, 4 Ill. App. 268; Richards v. Barrett, 5 Ill. App. 510; Baker v. Backus's Adm'r, 32 Ill. 79; Mays v. Wherry, 3 Tenn. Ch. 34; Cassetty v. Capps, 3 Tenn. Ch. 524; French v. Gifford, 30 Iowa, 148; Brown v. Home Sav. Bank, 5 Mo. App. 1; La Société Française v. District Court, 53 Cal. 495; Libby v. Rosekrans, 55 Barb. 202; Booth v. Clark, 17 How. 322, 331; Crane v. McCoy, 1 Bond, 422; Whelpley v. Erie R'y, 6 Blatchf. 271; Wilmer v. Atlanta etc. R'y, 2 Woods, 409.

§ 1331, [1] The discretion is not so absolute that it may not be reviewed, and its exercise, if improper, reversed: La Société Française v. Dist. Court, 53 Cal. 495; Milwaukee etc. R. R. v. Soutter, 2 Wall. 521.

§ 1331, [2] In Owen v. Homan, 3 Macn. & G. 378, 412, affirmed 4 H. L. Cas.

§ 1332. **Cases in Which a Receiver may be Appointed.**— As stated in a previous paragraph, the cases in which a receiver may be appointed, subject to the general rules regulating the exercise of the judicial discretion, may be reduced to four general classes. The first class contains those cases where there is no person entitled to the property who is at the same time competent to hold and manage it during the judicial proceeding. In instances of this class a receiver is appointed more readily and without proof of imminent danger, perhaps, than in any other. It includes, —1. Infants' estates.[1] A court of equity exercises control

997, the court said: "It is unnecessary to do more than to state that the granting a receiver is a matter of discretion to be governed by a view of the whole circumstances of the case; one most material of which circumstances is the probability of the plaintiff being ultimately entitled to a decree." In Bainbrigge v. Baddeley, 3 Macn. & G. 413, 419, the court, speaking of the general grounds for the appointment of a receiver, said: "There are, I apprehend, two grounds, and two only: 1. That there is a reasonable probability of success on the part of the plaintiff; and 2. That the property, the subject of the suit, is in danger." In Blondheim v. Moore, 11 Md. 365, the following rules controlling the exercise of the discretion were laid down, which have been frequently quoted as a correct generalization: "1. That the power of appointment is a delicate one, and is to be exercised with great circumspection; 2. That it must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property; 3. That there is no case in which the court appoints a receiver merely because the measure can do no harm; 4. That fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved; and 5. That unless the necessity be of the most stringent character, the court will not appoint a receiver until the defendant is first heard in response to the application." These rules, however, must be taken with some reservations; they are certainly too strong to be of universal application, especially the fourth. There are classes of cases in which a receiver is appointed almost as a matter of course, although no fraud nor *imminent* danger is proved. See, on the general matter of discretion, Earl Talbot v. Hope Scott, 4 Kay & J. 96; Whitworth v. Whyddon, 2 Macn. & G. 52, 55; Evans v. Coventry, 5 De Gex, M. & G. 911, 916, 917; Skip v. Harwood, 3 Atk. 564; Battle v. Davis, 66 N. C. 252; Hand v. Dexter, 41 Ga. 454; Crawford v. Ross, 39 Ga. 44; Crane v. McCoy, 1 Bond, 422; Nichols v. Perry Pat. Arm Co., 11 N. J. Eq. 126; Ladd v. Harvey, 21 N. H. 514; Orphan Asylum v. McCartee, Hopk. Ch. 429; Maynard v. Railey, 2 Nev. 313; Bank of Miss. v. Duncan, 52 Miss. 740.

[1] Gardner v. Blane, 1 Hare, 381; Butler v. Freeman, Amb. 301, 303; Duke of Beaufort v. Berty, 1 P. Wms. 703. The main reason for appointing a receiver, in the absence of a trustee, was that the guardian at common law

over the property of its infant ward, where there is no trustee, by means of a receiver, even though there is a guardian. 2. Lunatics' estates. The control of the court over the property of a lunatic is ordinarily exercised by means of a committee; but instead of a committee, and especially where no person will act as a committee, the court may appoint a receiver.[2] 3. Estates of decedents. During the litigation concerning the admission of a will to probate, and during the interval before an executor or administrator is appointed, a court of equity has power to appoint a receiver of the personal property and of the rents and profits of the real estate, where there is any danger of their loss, misuse, or misapplication. The necessity of such a receiver has been greatly lessened by modern statutes authorizing the probate court to appoint an administrator *ad litem,* and enlarging his powers.[3]

had not full power of control and management. The necessity of a receiver in such cases may have been obviated in many states by statutes enlarging the powers of guardians.

[2] See *ante,* § 1312, cases as to appointment of committees. A receiver will not be appointed after the death of a lunatic, during a controversy between persons claiming to be his heirs: In re Ferrior, L. R. 3 Ch. 175, 719. Where a suit was brought by the committee of a lunatic to set aside a conveyance of land alleged to have been obtained by defendant from the lunatic by fraud, undue influence, and defendant was in possession receiving the rents and profits, and was alleged to be insolvent, the appointment of a receiver of the property during the litigation was held proper: Mitchell v. Barnes, 22 Hun, 194.

[3] While this jurisdiction is well settled, the recent English decisions hold that it will not be exercised if the probate court has already appointed an administrator *ad litem;* but if no such temporary administrator has been appointed, the court of equity will still appoint a receiver: Whitworth v. Whyddon, 2 Macn. & G. 52, 55; King v. King, 6 Ves. 172; Richards v. Chave, 12 Ves. 462; Edmunds v. Bird, 1 Ves. & B. 542; Atkinson v. Henshaw, 2 Ves. & B. 85; Ball v. Oliver, 2 Ves. & B. 96; Rutherford v. Douglas, 1 Sim. & St. 111, note; Watkins v. Brent, 1 Mylne & C. 97, 102; Devey v. Thornton, 9 Hare, 222, 229; Anderson v. Guichard, 9 Hare, 275; Rendall v. Rendall, 1 Hare, 152; Jones v. Goodrich, 10 Sim. 327; Reed v. Harris, 7 Sim. 639; Wood v. Hitchings, 2 Beav. 289; Veret v. Duprez, L. R. 6 Eq. 329; Hitchen v. Birks, L. R. 10 Eq. 471; Parkin v. Seddons, L. R. 16 Eq. 34; Tewart v. Lawson, L. R. 18 Eq. 490; Flagler v. Blunt, 32 N. J. Eq. 518; Osborn v. United States Bank, 9 Wheat. 738; Schlecht's Appeal, 60 Pa. St. 172; Rachel Colvin's Case, 3 Md. Ch. 278.

§ 1333. **The Same. Second Class.**— The second class of cases is based upon the fact that all of the parties are equally entitled to the possession of the property which is the subject-matter of the controversy, but it is not just and proper, from the nature of the dispute and of their relations with each other, that either one of them should be allowed to retain possession and control during the litigation. While the foundation of the remedy is, of course, the danger, yet it is not always essential that there should be any element of actual fraud or breach of trust. The most important instances which do or may belong to this class are: 1. Suits between partners.[1] In suits for a dissolution or winding up of a partnership, and even in some very special cases without a dissolution, the court may appoint a receiver of the firm assets, when there is any misconduct on the part of the defendants, and even, perhaps, where the partners themselves are wholly unable to agree as to the management of the property and the settlement of the partnership affairs. The jurisdiction is,

[1] My limits do not permit a discussion of the particular circumstances under which a receiver will or will not be appointed; the cases cited furnish many illustrations. In general, a dissolution must have occurred, or must be asked; although in extreme cases of misconduct and danger therefrom, an *ad interim* receiver may be appointed without a dissolution. A disagreement among the partners themselves is essential: Hall v. Hall, 3 Macn. & G. 79; Fairburn v. Pearson, 2 Macn. & G. 144; Clegg v. Fishwick, 1 Macn. & G. 294 (after death of a partner); Roberts v. Eberhardt, Kay, 148; Sheppard v. Oxenford, 1 Kay & J. 491; Evans v. Coventry, 5 De Gex, M. & G. 911; Butchart v. Dresser, 4 De Gex, M. & G. 542; Smith v. Jeyes, 4 Beav. 503; Blakeney v. Dufaur, 15 Beav. 40; Hale v. Hale, 4 Beav. 369; Waters v. Taylor, 15 Ves. 10; Goodman v. Whitcomb, 1 Jacob & W. 589; Const v. Harris, Turn. & R. 496; Bard v. Bingham, 54 Ala. 463; Anderson v. Powell, 41 Iowa, 20; Law v. Ford, 2 Paige, 310; Marten v. Van Schaick, 4 Paige, 479; Garretson v. Weaver, 3 Edw. Ch. 385; Smith v. Lowe, 1 Edw. Ch. 33; Gregory v. Gregory, 1 Sweeny, 613; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; Randall v. Morrell, 17 N. J. Eq. 343, 346; Renton v. Chaplain, 9 N. J. Eq. 62; Birdsall v. Colie, 10 N. J. Eq. 63; Cox v. Peters, 13 N. J. Eq. 39; Wolbert v. Harris, 7 N. J. Eq. 605; Sloan v. Moore, 37 Pa. St. 217; Holden's Adm'rs v. McMakin, 1 Pars. Cas. 270; Whitman v. Robinson, 21 Md. 30; Walker v. House, 4 Md. Ch. 39; Drury v. Roberts, 2 Md. Ch. 157; Williamson v. Wilson, 1 Bland, 418; Speights v. Peters, 9 Gill, 472; Roys v. Vilas, 18 Wis. 169; Allen v. Hill, 16 Cal. 113; Todd v. Rich, 2 Tenn. Ch. 107.

however, always exercised with great carefulness and caution. 2. In suits for partition between co-owners.[2] In suits between co-owners of mines and collieries the English courts grant a receiver upon the same grounds and under the same circumstances as in those between partners; but in all ordinary cases of partition between legal co-owners of land, a receiver is not generally appointed unless some of the parties are in sole possession, to the exclusion of the others. 3. In suits between conflicting claimants of land, especially between parties claiming under legal titles, a receiver will not ordinarily be appointed. The remedy, however, may be granted under special circumstances, in cases of gross fraud, or great danger, or where possession is maintained by violence, and the like. In such cases the court acts with great caution, only where the plaintiff's rights are reasonably certain, and the danger is apparent.[3]

§ 1334. **The Same. Third Class.**— The third class embraces those cases in which the person holding title to the property is in a position of trust or of *quasi* trust, and is violating his fiduciary duties by misusing, misapplying, or wasting the property, and is thereby endangering the

[2] Mines and collieries. The working of a mine or colliery by co-owners is necessarily a business analogous to a partnership: Adams's Equity, 247, 354; Roberts v. Eberhardt, Kay, 148; Crawshay v. Maule, 1 Swanst. 405, 518, 523; Jefferys v. Smith, 1 Jacob & W. 298; Fereday v. Wightwick, 1 Russ. & M. 45; Bentley v. Bates, 4 Younge & C. 182; Vice v. Thomas, 4 Younge & C. 538. Partition between ordinary co-owners: Tyson v. Fairclough, 2 Sim. & St. 142; Evelyn v. Evelyn, 2 Dick. 800; Street v. Anderton, 4 Brown Ch. 414; Milbank v. Revett, 2 Mer. 405; Porter v. Lopes, L. R. 7 Ch. Div. 358 (Sir George Jessel spoke of the jurisdiction as enlarged by statute); Darcin v. Wells, 61 How. Pr. 259; Cassetty v. Capps, 3 Tenn. Ch. 524; Williams v. Jenkins, 11 Ga. 595; Brenan v. Preston, 2 De Gex, M. & G. 813 (a receiver appointed in a suit concerning title to machinery between part owners of a ship).

[3] Huguenin v. Baseley, 13 Ves. 105; Stilwell v. Wilkins, Jacob, 280; Clark v. Dew, 1 Russ. & M. 103; Jones v. Goodrich, 10 Sim. 327; Toldervy v. Colt, 1 Younge & C. 621; Earl Talbot v. Hope Scott, 4 Kay & J. 96; Hlawacek v. Bohman, 51 Wis. 92; Davis v. Reaves, 2 Lea. 649; Johnson v. Tucker, 2 Tenn. Ch. 398; Mays v. Wherry, 3 Tenn. Ch. 34; Mapes v. Scott, 4 Ill. App. 268; Rollins v. Henry, 77 N. C. 467; Battle v. Davis, 66 N. C. 252; Twitty v. Logan, 80 N. C. 69; Chappell v. Boyd, 56 Ga. 578; Williams v. Jenkins, 11 Ga. 595; Jones v. Dougherty, 10 Ga. 273; Guernsey v. Powers, 9 Hun, 78.

rights of other persons beneficially interested. In many, but not in all, the instances falling within this class, the plaintiff has, and is seeking to enforce, some equitable estate or interest; but whatever be the nature of his right, the ground of the remedy is always the misconduct of the party holding the title, and the consequent danger of loss. Among the more important instances of this class in which a receiver may be appointed are the following: 1. Suits against trustees who have been guilty of a breach of trust;[1] 2. Suits under like circumstances against executors or administrators;[2] 3. Suits to enforce a mortgage when the security is inadequate, the mortgagor is insolvent, or is committing acts of waste, and the like, depreciating the value of the property;[3] 4. Suits, under like circum-

[1] Courts will not interfere with trustees' possession by a receiver unless there is real danger from their misconduct: Evans v. Coventry, 5 De Gex, M. & G. 911, 916; Middleton v. Dodswell, 13 Ves. 266, 268; Browell v. Reed, 1 Hare, 434; Bainbrigge v. Blair, 3 Beav. 421; Skinners' Co. v. Irish Soc., 1 Mylne & C. 162; Richards v. Barrett, 5 Ill. App. 510; Bowling v. Scales, 2 Tenn. Ch. 63; Vose v. Reed, 1 Woods, 647.

[2] In administration suits a receiver will not be appointed unless the executor or administrator has been guilty of misconduct, waste, misuse of assets, and the like, and there is real danger of loss: Ibid.; Anonymous, 12 Ves. 4; In re Hopkins, L. R. 19 Ch. Div. 61; Nothard v. Proctor, L. R. 1 Ch. Div. 4; Randle v. Carter, 62 Ala. 95; Briarfield Iron Works Co. v. Foster, 54 Ala. 622; Du Val v. Marshall, 30 Ark. 230; Powell v. Quinn, 49 Ga. 523; Hoge v. Hollister, 8 Baxt. 533; Haines v. Carpenter, 1 Woods, 262; Beverley v. Brooke, 4 Gratt. 187; Leddel's Ex'r v. Starr, 19 N. J. Eq. 163.

[3] In England an equitable mortgagee alone is entitled to a receiver, because a legal mortgagee can at any time gain possession, and thus secure the rents and profits: Berney v. Sewell, 1 Jacob & W. 647; Brooks v. Greathed, 1 Jacob & W. 176; Reid v. Middleton, Turn. & R. 455; Truman v. Redgrave, L. R. 18 Ch. Div. 547; Peek v. Trinsmaran Iron Co., L. R. 2 Ch. Div. 115; Pease v. Fletcher, L. R. 1 Ch. Div. 273; Lord Crewe v. Edleston, 1 De Gex & J. 93 (mortgage of tolls). A receiver may also be appointed in suits to determine the priorities among several equitable mortgages or liens: Davis v. Duke of Marlborough, 2 Swanst. 108; Angel v. Smith, 9 Ves. 335; Pritchard v. Fleetwood, 1 Mer. 54; Smith v. Earl of Effingham, 2 Beav. 232; Brooks v. Greathed, *supra;* Cortleyeu v. Hathaway, 11 N. J. Eq. 39; 64 Am. Dec. 478. In this country no distinction is made between legal and equitable mortgages. The ground of appointing a receiver is the smallness of the security, and the danger lest it should be rendered more inadequate by the conduct of the mortgagor: Price v. Dowdy, 34 Ark. 285; Haas v. Chicago Build. Soc., 89 Ill. 498; Des Moines Gas Co. v. West, 44 Iowa, 23; Worrill v. Coker, 56 Ga. 666;

stances, to enforce equitable liens, including those by judgment creditors in the nature of an equitable execution;[4] 5. Suits, under like circumstances, and for a like reason, by a vendor to enforce the specific performance of a contract for the sale of land against a vendee who is in possession;[5] 6. In suits by creditors, although not strictly creditors' actions by judgment creditors, brought to enforce their demands from the debtors' property, under some very special circumstances involving great danger of loss, such as the debtors' non-residence, insolvency, and the like;[6] 7. Suits for the rescission of a contract for the sale of land under special circumstances;[7] 8. Suits to enforce payment of the arrears of annuities;[8] 9. Suits for the protection of remaindermen against the life tenant or other

Phillips v. Eiland, 52 Miss. 721; Brasted v. Sutton, 30 N. J. Eq. 462; Mahon v. Crothers, 28 N. J. Eq. 567; Johnson v. Tucker, 2 Tenn. Ch. 398; Williams v. Noland, 2 Tenn. Ch. 151 (of personal property); Moran v. Johnston, 26 Gratt. 108; Phœnix Mut. L. Ins. Co. v. Grant, 3 McAr. 220; Pullan v. Cincinnati etc. R. R., 4 Biss. 35; for cases of receivers over corporations in suits for the enforcement of a deed of trust in the nature of a mortgage, see Allen v. Dallas etc. R. R., 3 Woods, 316; Warner v. Rising etc. Iron Co., 3 Woods, 514; Wilmer v. Atlanta etc. R'y, 2 Woods, 409.

[4] Lien by deposit of title deeds: See Adams's Equity, 125. Suit by a holder of debentures secured by lien on assets of the corporation: Hopkins v. Worcester etc. Canal Prop'rs, L. R. 6 Eq. 437. Creditors' suits: Gage v. Smith, 79 Ill. 219; Kuhl v. Martin, 26 N. J. Eq. 60; Osborn v. Heyer, 2 Paige, 342; Anglo-Italian Bank v. Davies, L. R. 9 Ch. Div. 275, and cases cited.

[5] A receiver pending the suit is appointed only when the land is a doubtful or inadequate security, and the vendee is insolvent, or committing waste, etc.: Hall v. Jenkinson, 2 Ves. & B. 125; Boehm v. Wood, 2 Jacob & W. 236; Shakel v. Duke of Marlborough, 4 Madd. 463; Taylor v. Eckersley, L. R. 2 Ch. Div. 302 (contract concerning chattels); Phillips v. Eiland, 52 Miss. 721; Hughes v. Hatchett, 55 Ala. 631; Tufts v. Little, 56 Ga. 139; Gunby v. Thompson, 56 Ga. 316. In a suit to enforce a grantor's or vendor's lien, a receiver will not generally be appointed before a decree, but may be after the decree: Latimer v. Aylesbury etc. R'y, L. R. 9 Ch. Div. 385; Munns v. Isle of Wight R'y, L. R. 5 Ch. 414; Pell v. Northampton etc. R'y, L. R. 2 Ch. 100.

[6] The case must undoubtedly be very special, to warrant the appointment of a receiver in a suit by a simple creditor: Johnson v. Farnum, 56 Ga. 144; Ballin v. Ferst, 55 Ga. 546; Gregory v. Gregory, 1 Jones & S. 1.

[7] Gibbs v. David, L. R. 20 Eq. 373.

[8] In England only when the payment cannot be enforced by distress: Sollory v. Leaver, L. R. 9 Eq. 22; Buxton v. Monkhouse, Coop. 41; Probasco v. Probasco, 30 N. J. Eq. 108.

holder of the particular estate;[9] 10. Suits, under many circumstances, against corporations;[10] 11. Suits and proceedings in bankruptcy.[11]

§ 1335. **The Same. Fourth Class.**— This class contains those cases in which a receiver is appointed after judgment for the purpose of carrying the decree into effect. In some instances the receiver appointed on motion pending the action is continued in his office after the decree; in others, he is appointed after the decree, when no appointment would be made before the final hearing. In all instances the object of a receiver is to carry into effect a special decree, which could not otherwise be efficiently executed by ordinary process. Among the most important cases in which a receiver may thus be appointed are creditors' suits and suits to enforce other equitable liens, suits to enforce the contracts of married women against their separate estates, and suits or proceedings generally

[9] In re Fowler, L. R. 16 Ch. Div. 723.

[10] The following cases will illustrate many of the circumstances under which a receiver may be appointed over corporations or corporate property: Featherstone v. Cooke, L. R. 16 Eq. 298; Hopkins v. Worcester etc. Canal Prop'rs, L. R. 6 Eq. 437; Allen v. Dallas etc. R. R., 3 Woods, 316; Warner v. Rising etc. Iron Co., 3 Woods, 514; Wilmer v. Atlanta etc. R'y, 2 Woods, 409; North Car. etc. R. R. v. Drew, 3 Woods, 691; Union Tr. Co. v. St. Louis etc. R. R., 4 Dill. 114; Kennedy v. St. Paul etc. R. R., 2 Dill. 448; Whelpley v. Erie R'y, 6 Blatchf. 271; Bank of Bethel v. Pahquioque Bank, 14 Wall. 383; National Tr. Co. v. Miller, 33 N. J. Eq. 155; Freeholders of Middlesex v. State Bank, 28 N. J. Eq. 166; McCullough v. Merch. Loan etc. Co., 29 N. J. Eq. 217; In re Long Branch etc. R. R., 24 N. J. Eq. 398; Delaware etc. R. R. v. Erie R. R., 21 N. J. Eq. 298; La Société Française v. District Court, 53 Cal. 495; Kelly v. Alabama etc. R. R., 58 Ala. 489; Wilson v. Barney, 5 Hun, 257; Redmond v. Enfield Mfg. Co., 13 Abb. Pr., N. S., 332; Rochester v. Bronson, 41 How. Pr. 78; Brown v. Home Sav. Bank, 5 Mo. App. 1; Vermont etc. R. R. v. Vt. etc. R. R., 50 Vt. 500; Port Huron etc. R'y v. Judge of St. Clair Circuit. 31 Mich. 456; French v. Gifford, 30 Iowa, 148; Hand v. Dexter, 41 Ga. 454; People v. Security Ins. Co., 78 N. Y. 114; 34 Am. Rep. 522; 79 N. Y. 267.

[11] Salt v. Cooper, L. R. 16 Ch. Div. 544; Ex parte Browne, L. R. 16 Ch. Div. 497; In re Manchester etc. R'y, L. R. 14 Ch. Div. 645; Ex parte Rylands, L. R. 6 Ch. Div. 57; Taylor v. Eckersley, L. R. 5 Ch. Div. 740; Boyle v. Bettws etc. Co., L. R. 2 Ch. Div. 726; In re H.'s Estate, L. R. 1 Ch. Div. 276; Munns v. Isle of Wight R'y, L. R. 5 Ch. 414; Riches v. Owen, L. R. 3 Ch. 820; In re Johnson, L. R. 1 Ch. 325.

statutory for the winding up of corporations.[1] In the states adopting the reformed procedure, the codes of procedure generally contain provisions regulating the appointment of receivers.[2]

§ 1336. **Powers, Rights, Duties, and Liabilities.**— The appointment of a receiver during the pendency of a suit does not determine any rights or title of the litigant parties; it is made for the benefit of all. His possession, though impartial while the controversy is undecided, is regarded as on behalf of the one who is ultimately found to be entitled to the property.[1] He is in reality an officer of the

§ 1335, [1] Creditors' suits: See *post*, section on creditors' suits: Anglo-Italian Bank v. Davies, L. R. 9 Ch. Div. 275. On contracts of married women, see *ante*, section on married women's contracts: Bryant v. Bull, L. R. 10 Ch. Div. 153.

§ 1335, [2] These provisions are substantially alike in most of the codes; that of California may be taken as the type: *California:* Code Civ. Proc., sec. 564; *Arkansas:* Gantt's Dig. of Stats. 1874, secs. 4809, 4810; *Colorado:* King's Code Civ. Proc. 1880, sec. 138; *Dakota:* Hand's Code Civ. Proc. 1877, sec. 219; *Florida:* Code Civ. Proc. 1870, sec. 192; *Indiana:* 2 Davis's Rev. 1876, p. 114, sec. 199; *Iowa:* 2 Miller's Rev. Code 1880, sec. 2903; *Kansas:* Dassler's Comp. Laws 1881, p. 634, sec. 254; *Kentucky:* Bullitt's Code 1876, secs. 298, 299: *Minnesota:* Young's Stats. 1878, p. 739, sec. 207; *Missouri:* 1 Rev. Stats. 1879, secs. 3116, 3660; *Nebraska:* Brown's Comp. Stats. 1881, p. 565, sec. 266; *Nevada:* Comp. Laws 1873, p. 323, sec. 1207; *New York:* Code Civ. Proc., sec. 713; *North Carolina:* 1 Battle's Rev. 1873, p. 190, sec. 215; *Ohio:* 2 Rev. Stats. 1880, p. 1359, sec. 5587; *Oregon:* Gen. Laws 1872, p. 312, sec. 1029; *South Carolina:* Rev. Stats. 1873, p. 628, sec. 267; *Wisconsin:* Rev. Stats. 1878, p. 749, c. 126, sec. 2787. See also *Georgia:* Code 1882, p. 778, sec. 3098 (3043); p. 778, sec. 3149 (3092); *Texas:* Rev. Stats. 1879, p. 222, art. 1461.

§ 1336, [1] While my limits do not permit any discussion in detail of the receiver's powers, rights, and liabilities, the following cases, which are generally classified, will furnish many illustrations: *Who may be appointed:* In re Lloyd, L. R. 12 Ch. Div. 447; Perry v. Oriental Hotels Co., L. R. 5 Ch. 420; Benneson v. Bill, 62 Ill. 408. *When the appointment takes effect:* Edwards v. Edwards, L. R. 2 Ch. Div. 291 (not until security is given); Crowder v. Moore, 52 Ala. 220 (appointment before bill filed); Clark v. Brockway, 1 Abb. App. 351; Crane v. McCoy, 1 Bond, 422. *Effect of appointment:* Ex parte Evans, L. R. 13 Ch. Div. 252; Bolles v. Duff, 54 Barb. 215 (of consent to be a receiver). *Nature of receiver's office:* Jefferys v. Dickson, L. R. 1 Ch. 183; State v. Gambs, 68 Mo. 289 (is not a trustee of an express trust). *Interference with him, protection by the court:* Ex parte Cochrane, L. R. 20 Eq. 282; Russell v. East Anglian R'y, 3 Macn. & G. 104; Jordan v. Wells, 3 Woods, 527; Vermont etc. R. R. v. Vt. Cent. R. R., 46 Vt. 792.

court, and will be protected by it from interference by third persons in the discharge of his duties; indeed, such interference without permission of the court would be a contempt. The receiver, in all important matters, acts under special direction of the court. He must, in general, obtain its permission to bring suits, and suits cannot be

Powers, rights, and authority in general: In re Birmingham etc. R'y, L. R. 18 Ch. Div. 155; Campbell v. Compagnie Générale, L. R. 2 Ch. Div. 181; Ex parte Warren, L. R. 10 Ch. 222; Ex parte Jay, L. R. 9 Ch. 133; Armstrong v. Armstrong, L. R. 12 Eq. 614; Kennedy v. St. Paul etc. R. R., 5 Dill. 519; Stanton v. Ala. etc. R. R., 2 Woods, 506; Cowdery v. Railroad Co., 1 Woods, 331; Davis v. Gray, 16 Wall. 203; Heermans v. Clarkson, 64 N. Y. 171; Porter v. Williams, 9 N. Y. 142; 59 Am. Dec. 519; People v. Security Ins. Co., 78 N. Y. 114; 34 Am. Rep. 522; 79 N. Y. 267; Scott v. Elmore, 10 Hun, 68; Olcott v. Heermans, 3 Hun, 431; Simmons v. Wood, 45 How. Pr. 262; Elmira etc. Co. v. Erie R'y, 26 N. J. Eq. 284; Receivers v. Paterson Gas Light Co., 23 N. J. L. 283; Robinson v. Atlantic etc. R'y, 66 Pa. St. 160; Gibert v. Washington City etc. R. R., 33 Gratt. 586; Spinning v. Ohio etc. Tr. Co., 2 Disn. 336; Johnson v. Gunter, 6 Bush, 534; McCombs v. Merryhew, 40 Mich. 721; Newbold v. Peoria etc. R. R., 5 Ill. App. 367; Safford v. People, 85 Ill. 558; Tripp v. Boardman, 49 Iowa, 410; Bank of Montreal v. Chicago etc. R. R., 48 Iowa, 518; McIlrath v. Snure, 22 Minn. 391; Barron v. Mullin, 21 Minn. 374; Meredith Sav. Bank v. Simpson, 22 Kan. 414; Moseby v. Burrow, 52 Tex. 396; Weems v. Lathrop, 42 Tex. 207. *Powers to bring, maintain, or continue suits:* Campbell v. Fish, 8 Daly, 162; Donnelly v. West, 17 Hun, 564 (limited divorce); Albany etc. Ins. Co. v. Van Vranken, 42 How. Pr. 281; Calkins v. Atkinson, 2 Lans. 12; Rockwell v. Merwin, 8 Abb. Pr., N. S., 330; Garver v. Kent, 70 Ind. 428; Manlove v. Burger, 38 Ind. 211; Alexander v. Relfe, 9 Mo. App. 133; Lathrop v. Knapp, 37 Wis. 307; Miller v. Mackenzie, 29 N. J. Eq. 291; Battle v. Davis, 66 N. C. 252; Gadsden v. Whaley, 14 S. C. 210; Searles v. Jacksonville etc. R. R., 2 Woods, 621. *Particular powers.*— In the enforcement of payment of debts: Ex parte Harris, L. R. 2 Ch. Div. 423; Ex parte Hare, L. R. 10 Ch. 218; Jolly v. Arbuthnot, 4 De Gex & J. 224; Screven v. Clark, 48 Ga. 41; Seagram v. Tuck, L. R. 18 Ch. Div. 296 (right to set up statute of limitations); Ex parte Browne, L. R. 16 Ch. Div. 497 (lien on assets); Porter v. Kingman, 126 Mass. 141 (cancellation of mortgage); Pond v. Cooke, 45 Conn. 126; 29 Am. Rep. 668 (over property taken into another state); Hoover v. Montclair etc. R'y, 29 N. J. Eq. 4 (to make repairs); Mann v. Fairchild, 3 Abb. App. 152 (assignment of his right); Koontz v. Northern Bank, 16 Wall. 196 (of purchaser under receiver's deed). *His duties and liabilities in general:* Ex parte Gordon, L. R. 20 Eq. 291; Kain v. Smith, 80 N. Y. 458; Clark v. Bininger, 11 Jones & S. 126, 344; Corey v. Long, 12 Abb. Pr., N. S., 427; Coe v. N. J. etc. R. R., 27 N. J. Eq. 37; Klein v. Jewett, 26 N. J. Eq. 474; Commonwealth v. Young, 11 Phila. 606; Stewart v. Lay, 45 Iowa, 604; Demain v. Cassidy, 55 Miss. 320; Stanton v. Ala. etc. R. R., 2 Woods, 506; Davenport v. Receivers, 2 Woods, 519; Davis v. Gray, 16 Wall.

properly brought against him without permission. Although not strictly a trustee, because the legal title to the property is not vested in him, he occupies a fiduciary position, and must act with perfect good faith, and is liable to account. The exact nature of his duties depends upon the particular case.

203. *Suits against them:* Killmer v. Hobart, 8 Abb. N. C. 426; 58 How. Pr. 452 (foreign receivers); Barton v. Barbour, 3 McAr. 212; 36 Am. Rep. 104 (ditto); Express Co. v. Railroad Co., 99 U. S. 191 (for a specific performance); Palys v. Jewett, 32 N. J. Eq. 302 (at law for a tort); Hackley v. Draper, 60 N. Y. 88; 4 Thomp. & C. 614 (to set aside a fraudulent sale); De Graffenried v. Brunswick etc. R. R., 57 Ga. 22. *His liability for negligence, trespasses, etc.:* Newell v. Smith, 49 Vt. 255; Kain v. Smith, 11 Hun, 552; Henderson v. Walker, 55 Ga. 481; Meara's Adm'r v. Holbrook, 20 Ohio St. 137; 5 Am. Rep. 633; Potter v. Bunnell, 20 Ohio St. 150; Hills v. Parker, 111 Mass. 508; 15 Am. Rep. 63 (trespasses). *Particular liabilities, default in payments of balance:* In re Bell's Estate, L. R. 9 Eq. 172; Hobson v. Jones, L. R. 9 Eq. 456; Clark v. Bininger, 75 N. Y. 344. *For wrongful use of funds:* Cartwright's Case, 114 Mass. 230; Drake v. Goodridge, 6 Blatchf. 531; Wall v. Pulliam, 5 Heisk. 365 (for property lost); Hinckley v. Railroad Co., 100 U. S. 153 (for interest); Stretch v. Gowdey, 3 Tenn. Ch. 565 (failure to report); Cowdrey v. Galveston etc. R. R., 93 U. S. 352 (expenditure disallowed). *His compensation:* Hopfensack v. Hopfensack, 61 How. Pr. 498; Crook v. Findley, 60 How. Pr. 375; Gardiner v. Tyler, 2 Abb. App. 247; McArthur v. Montclair R. R., 27 N. J. Eq. 77; Jones v. Keen, 115 Mass. 170; Special Bank Comm'rs v. Cranston Sav. Bank, 12 R. I. 497; Special Bank Comm'rs v. Franklin Sav. Inst., 11 R. I. 557; Mabry v. Brown, 12 Heisk. 597; Brien v. Harriman, 1 Tenn. Ch. 467; Hutchinson v. Hampton, 1 Mont. Ter. 39.

SECOND GROUP.

REMEDIES PURELY PREVENTIVE.

CHAPTER FIRST.

INJUNCTIONS.

SECTION I.

TO PROTECT OR RESTRAIN THE VIOLATION OF OBLIGATIONS AND RIGHTS OF PROPERTY OR OF CONTRACT, EITHER LEGAL OR EQUITABLE.

ANALYSIS.

§ 1337. General nature and objects: Interdicts.
§ 1338. Fundamental principle.
§ 1339. To protect purely equitable estates or interests, and in aid of purely equitable remedies.
§ 1340. The same: Particular instances.
§§ 1341–1344. To prevent the violation of contracts.
§ 1341. General doctrine.
§ 1342. 1. Restrictive covenants creating equitable easements.
§ 1343. 2. Contracts for personal services or acts.
§ 1344. 3. Other agreements generally negative in their nature.
§ 1345. Miscellaneous cases: Corporations and their officers; between mortgagor and mortgagee; public officers; cloud on title; married women's property; partners, etc.

§ 1337. General Nature and Object.—The remedy of injunction was undoubtedly borrowed by the chancellors from the "interdicts" of the Roman law.[1] An injunction may

[1] As to "interdicts," see Gaius's Inst., lib. 4, secs. 138–170; Poste's ed., 492–520; Just. Inst., lib. 4, tit. 15, secs. 1–8; Sandars's ed., 1st Am. ed., 58, 570–580. The general definition as given by Gaius (Ibid., sec. 139) is as follows: "Under certain circumstances, chiefly when possession or *quasi* possession [i. e., possession of a servitude] is in dispute, the first step in the legal proceedings is the interposition of the prætor or pro-consul, who commands some performance or forbearance; which commands, formulated in solemn terms, are called interdicts." The most general formula was "*vim fieri veto, exhibeas, restituas,*" "I forbid you to use violence, you must pro-

be either a final remedy obtained by a suit, or a preliminary and interlocutory relief granted while the suit is pending. In the first case it is a decree, in the second, an order or writ. Whatever be its form, decree or order, the remedy by ordinary injunction is wholly preventive, prohibitory, or protective. The same is true in theory and in form of a mandatory injunction, which always by its language prohibits the continuance of an act or of a structure, although in effect and in its essential nature it is wholly restorative, and compels the defendant to restore the thing to its original situation. While injunctions may thus be final, or preliminary and ancillary to other final relief, they all depend upon the same *general* principles, doctrines, and rules which determine and regulate the exercise of the jurisdiction to award them. In the states adopting the reformed procedure, the codes contain general provisions describing the cases in which an injunction may be issued, but these provisions do not materially alter the settled equitable jurisdiction, except in reference to injunctions against actions or judgments at law.[2]

duce, you must restore." There were thus three distinct species of interdicts: 1. The prohibitory, where the defendant was commanded to refrain or desist from some act, answering to our ordinary injunction; 2. The exhibitory, where the defendant was commanded to produce and exhibit something in his possession,— *exhibeas*, which does not answer to any kind of injunction, but has some analogies with certain common-law writs; 3. The restorative, where the defendant was commanded to restore something to its original position, clearly resembling in its effect our mandatory injunction. Interdicts were granted where some danger was apprehended, or some injury was being done, to something of a *quasi* public character, as the stopping up of a highway, or to some private interest or right. One of the most common occasions of the interdict was to protect the plaintiff in his possession of a thing, in which case the interdict *uti possidetis* was used to protect possession of land and buildings, and the interdict *utrubi* for movables. In the interdict *uti possidetis*, the defendant was forbidden to interfere with the possession "*neo vi, nec clam, nec precario.*" The granting of interdicts belonged wholly to the "extraordinary" or equitable jurisdiction of the magistrate: See *ante*, vol. 1, § 6.

[2] *California:* Code Civ. Proc., sec. 526; Civ. Code, secs. 3420, 3422, 3423; *Arkansas:* Dig. of Stats. 1874, sec. 3450; *Colorado:* Code Civ. Proc. 1880, sec. 119; *Dakota:* Code Civ. Proc. 1877, p. 509, sec. 189; *Florida:* Code Civ. Proc. 1870, sec. 168; *Indiana:* 2 Davis's Stats. 1876, p. 93, sec. 137; *Iowa:* 2

§ 1338. **Fundamental Principle.**—In determining whether an injunction will be issued to protect any right of property, to enforce any obligation, or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any questions, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side.[1] The general principle may be stated as follows: Wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, *a violation of that right will be prohibited,* unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise.* This jurisdiction of equity to prevent the commission of wrong is, however, modified and restricted by considerations of expediency and of convenience which confine its application to those cases in which the legal remedy is not full and adequate. Equity will not interfere to restrain the

Miller's Rev. Code 1880, secs. 3386, 3388; *Kansas:* Dassler's Comp. Laws 1881, p. 632, sec. 238; *Kentucky:* Bullitt's Codes 1876, p. 59, sec. 272; *Minnesota:* Young's Stats. 1878, p. 738, sec. 200; *Missouri:* 1 Rev. Stats. 1879, p. 454, sec. 2703; *Nebraska:* Brown's Comp. Laws 1881, p. 563, sec. 251; *Nevada:* 1 Comp. Laws 1873, p. 314, sec. 1173; *New York:* Code Civ. Proc., secs. 603, 604; *North Carolina:* Battle's Rev. 1873, p. 183, sec. 189; *Ohio:* 2 Rev. Stats. 1880, p. 1353, sec. 5572; *Oregon:* Gen. Laws 1872, p. 194, sec. 407; *South Carolina:* Rev. Stats. 1873, p. 621, sec. 242; *Wisconsin:* Rev. Stats. 1878, sec. 2774. See also *Georgia:* Code 1882, p. 803, secs. 3210 (3149); *Texas:* Rev. Stats. 1879, p. 415, art. 2873.

[1] A comparison of the English and American reports will show that our courts have dwelt too much on the negative side of this principle, and have almost ignored its affirmative aspect. While the English judges have gradually but steadily enlarged the scope of the injunction, the tendency of the American decisions has been to narrow it even within the well-established limits of the jurisdiction. If "an ounce of prevention is worth a pound of cure," this tendency is clearly opposed to the best interests of society.

breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction.[2] In the treatment of this twofold principle, I shall state the general rules which have been derived from it, and which regulate the exercise of the jurisdiction, and shall illustrate these rules by enumerating the more important instances to which they have been applied. The general object of the discussion will be to show when an injunction may be granted.[3]

§ 1339. **To Protect Purely Equitable Estates or Interests, and in Aid of Purely Equitable Remedies.**— The jurisdiction to grant injunctions restraining acts in violation of trusts and fiduciary obligations, or in violation of any other purely equitable estates, interests, or claims in and to specific property, is really commensurate with the equitable

[2] Jersey City v. Gardner, 33 N. J. Eq. 622; Powell v. Foster, 59 Ga. 790; Johnson v. Conn. Bank, 21 Conn. 148, 157; Watson v. Sutherland, 5 Wall. 74. An injunction will not be granted to restrain arrests: Davis v. Am. Soc. etc., 6 Daly, 81; 75 N. Y. 362; Cohen v. Goldsboro, 77 N. C. 2; nor to restrain other mere criminal acts: Phillips v. Stone Mountain, 61 Ga. 386; Life Ass'n of Am. v. Boogher, 3 Mo. App. 173. As to injunction against threatened acts in another state, see Atlantic etc. Tel. Co. v. Baltimore & O. R. R., 14 Jones & S. 377; Western U. Tel. Co. v. Western etc. R. R., 8 Baxt. 54. As to the grounds and requisites for the granting of a preliminary injunction, see McHenry v. Jewett, 90 N. Y. 58; Sheridan v. Jackson, 72 N. Y. 170; Scofield v. Whitelegge, 49 N. Y. 259; N. Y. Printing etc. Estab. v. Fitch, 1 Paige, 98; Corporation of N. Y. v. Mapes, 6 Johns. Ch. 46; Ogden v. Kip, 6 Johns. Ch. 160; Babcock v. New Jersey etc. Co., 20 N. J. Eq. 296; Richard's Appeal, 57 Pa. St. 105; 98 Am. Dec. 202.

[3] The general effect produced by some text-books and judicial opinions might lead the reader to suppose that the main object of the writers or the judges was to show when injunctions could *not* be granted. The full force and effect of this most beneficial remedy, and the freedom with which it is granted by courts of the highest authority, can only be ascertained by an actual examination of the decided cases. It is for this reason that I have cited so many decisions under several of the subsequent heads. An exhaustive treatment of injunctions would require a whole volume, and would, in fact, be a review of the entire remedial department of equity.

remedies given to enforce trusts and fiduciary duties, or to establish and enforce any other equitable estates, interests, or claims, with respect to specific things, whether lands, chattels, securities, or funds of money, or to relieve against mistake, or fraud done or contemplated with respect to such things. In all such cases the question whether the remedy at law is adequate cannot arise; much less can it be the criterion by which to determine whether an injunction can be granted; for there is no remedy at law. Since the estate, interest, or claim of the complainant is purely equitable, it is exclusively cognizable by equity; and if its existence is shown, a court of equity not only has the jurisdiction, but is bound to grant every kind of remedy necessary to its complete establishment, protection, and enforcement according to its essential nature. Many breaches of trust are of such a nature that, if accomplished, they would completely defeat the right of the beneficiary to the specific trust property. The equitable reliefs against mistake or fraud with respect to specific equitable property, and the equitable remedies of all kinds to enforce trusts, express or by operation of law, and fiduciary duties concerning specific property, and to enforce any other equitable estate, interest, lien, or right in or over specific property, would be of comparatively little practical value, unless the court could by injunction restrain the alienation, transfer, or encumbrance of such property, and all other modes of dealing with it which would prejudice the rights of the complainant, and prevent him from acquiring the title, or from enjoying his estate, or from enforcing his claim, or from receiving the full benefits of his final relief.[1] It may therefore be stated as a general

[1] It is true that in suits concerning land, the statute authorizing a notice of *lis pendens* to be filed affords some security to the complainant against transfers and encumbrances pending the suit. But this statute does not affect the truth nor generality of the proposition contained in the text. *At the utmost*, it only shows that in such cases "*the aid of an injunction is not required.*" But the notice of *lis pendens* is, at best, only a partial relief; it does not prevent a transfer; it does not even obviate the necessity of an in-

proposition, that whenever the equitable relief against mistake or fraud with respect to specific property, or the equitable remedy of enforcing trusts or fiduciary duties concerning specific property, or of enforcing any other equitable estates, interests, or claims in or to specific property, *requires the aid of an injunction,* a court of equity has jurisdiction, and will exercise that jurisdiction, to grant an injunction, either pending the suit or as a part of the final decree, to restrain a breach of trust or of fiduciary duty, or to restrain an alienation, transfer, assignment, encumbrance, or other kind of dealing with the property, which would be in violation of the trust or fiduciary duty, or in fraud of the complainant's rights, and which would therefore interfere with and prejudice the ultimate remedies to which he may be entitled with respect to such property. The particular instances to which this doctrine is applied are almost numberless, and extend through the entire range of equitable remedies against mistake and fraud, or to enforce trusts and fiduciary duties, or to establish and enforce other equitable estates, interests, liens, and primary rights in and to specific property of any kind or form.

§ 1340. **The Same. Particular Instances.**—Among the instances in which equity will grant an injunction, preliminary or final, in pursuance of the general doctrine as stated in the foregoing paragraph, the following are some of the most important, and they fully illustrate and establish the doctrine itself, in all its generality, and the grounds upon which it rests: To prevent the transfer of negotiable instruments, at the suit of the defrauded maker or acceptor, or of the party claiming to be the true owner, or to have an interest in them;[1] or the transfer, under like

junction in many suits concerning land, and it does not generally extend to other suits at all.

[1] Lord Chedworth v. Edwards, 8 Ves. 46; Stead v. Clay, 1 Sim. 294; 4 Russ. 550; Smith v. Haytwell, Amb. 66; 3 Atk. 566; King v. Hamlet, 4 Sim. 223; Hood v. Aston, 1 Russ. 412; Thompson v. Smith, 1 Madd. 395; Lloyd v. Gurdon, 2 Swanst. 180; Patrick v. Harrison, 3 Brown Ch. 476; Thiedemann v.

circumstances, of stocks or other securities not strictly negotiable;[2] or even the transfer of chattels, when of a special nature and value, such as diamonds, and the like articles;[3] to prevent a payment of money in violation of a trust;[4] to restrain a breach of trust;[5] to prevent a defendant from affecting or encumbering the property in litigation by contract, conveyance, mortgage, or any other act;[6]

Goldschmidt, 1 De Gex, F. & J. 4, 10 (an injunction refused against a defendant who was a *bona fide* holder for value); Ferguson v. Fisk, 28 Conn. 501; Hile v. Davison, 20 N. J. Eq. 228; Metler's Adm'rs v. Metler, 18 N. J. Eq. 270; 19 N. J. Eq. 457; Zeigler v. Beasley, 44 Ga. 56; Hinkle v. Margerum, 50 Ind. 240; Osborn v. U. S. Bank, 9 Wheat. 738, 845; Deaderick v. Mitchell, 6 Baxt. 35; Bridges v. Robinson, 2 Tenn. Ch. 720; Belohradsky v. Kuhn, 69 Ill. 547.

This remedy is often used in connection with suits for cancellation: See *post*, chapter on cancellation.

[2] King v. King, 6 Ves. 172; Lord Chedworth v. Edwards, 8 Ves. 46; Stead v. Clay, 1 Sim. 294; 4 Russ. 550; Athenæum Life Ass. Co. v. Pooley, 3 De Gex & J. 294; Osborn v. U. S. Bank, 9 Wheat. 738, 844, 845; Hile v. Davison, 20 N. J. Eq. 228; Elder v. First Nat. Bank, 12 Kan. 238.

[3] The jurisdiction in such case depends upon the same reasons as the analogous jurisdiction to compel the delivery up of such unique chattels, or the specific performance of contracts for their sale: *Post*, § 1402; Ximenes v. Franco, 1 Dick. 149; Tonnins v. Prout, 1 Dick. 387.

[4] Reeve v. Parkins, 2 Jacob & W. 390; Green v. Lowes, 3 Brown Ch. 217; Whittingham v. Burgoyne, 3 Anstr. 900; Mathews v. Jones, 2 Anstr. 506; Hawkshaw v. Parkins, 2 Swanst. 539; Hine v. Handy, 1 Johns. Ch. 6. In Bank of Turkey v. Ottoman Co., L. R. 2 Eq. 366, an injunction was refused because the money was not shown to be impressed with a trust; if this fact had appeared, the opinion clearly indicates that an injunction would have been granted. See also Ernest v. Croysdill, 2 De Gex, F. & J. 175.

[5] Dance v. Goldingham, L. R. 8 Ch. 902; Brenan v. Preston, 2 De Gex, M. & G. 813; North Car. R. R. v. Drew, 3 Woods, 674. In suits by a beneficiary against his trustee, an injunction, if needed, would be granted as a matter of course. To restrain violations of confidence: See Little v. Kingswood Coll. Co., L. R. 20 Ch. Div. 733 (to prevent an attorney from acting against a former client); Lewis v. Smith, 1 Macn. & G. 417 (to prevent disclosure of confidential communications by an attorney); Brenan v. Preston, 2 De Gex, M. & G. 813 (against a ship's husband); Phelan v. Boylan, 25 Wis. 679 (by reversioner against life tenant to prevent his use of a tax title). To restrain the disclosure of confidential communications, trade secrets, private papers, etc.: See Yovatt v. Winyard, 1 Jacob & W. 394; Newbery v. James, 2 Mer. 446, 451; Williams v. Williams, 3 Mer. 157; Morison v. Moat, 9 Hare, 241; Peabody v. Norfolk, 98 Mass. 452; 96 Am. Dec. 664.

[6] Great West. R'y v. Birmingham etc. R'y, 2 Phill. Ch. 597, 602, 603, per Lord Cottenham; Echliff v. Baldwin, 16 Ves. 267; Curtis v. Marquis of Buck-

and, in general, in all suits to enforce an equitable right against specific property,— as to enforce an equitable estate and compel the conveyance of the legal title, to enforce a trust, or an equitable lien, to compel the specific performance of a contract, and the like,— the court will grant an injunction to restrain a threatened transfer of the property, whether land, chattels, or securities, during the pendency of the action.[7]

§ 1341. **To Prevent the Violation of Contracts.**—An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit. Where the agreement stipulates that certain acts shall not be done, an injunction preventing the commission of those acts is evi-

ingham, 3 Ves. & B. 168; Spiller v. Spiller, 3 Swanst. 556; and see cases in next following note.

[7] Fells v. Read, 3 Ves. 70; Lloyd v. Loaring, 6 Ves. 773; Nutbrown v. Thornton, 10 Ves. 159, 163; Echliff v. Baldwin, 16 Ves. 267; Daly v. Kelly, 4 Dow, 417, 440; Wood v. Rowcliffe, 3 Hare, 304, 308; Robinson v. Pickering, L. R. 16 Ch. Div. 371, 660 (in suit to enforce married woman's contract against her separate estate, an injunction restraining her from aliening her property will not be granted, because her contract creates no lien or charge on her estate); Lemprière v. Lange, L. R. 12 Ch. Div. 675 (injunction in suit for cancellation on account of fraud); Hart v. Herwig, L. R. 8 Ch. 860 (in specific performance of contract for sale of a ship); Beyfus v. Bullock, L. R. 7 Eq. 391 (in suit to set aside a deed for fraud); Hadley v. London Bank of Scotland, 3 De Gex, J. & S. 63 (in specific performance); De Mattos v. Gibson, 4 De Gex & J. 276 (ditto); Brenan v. Preston, 2 De Gex, M. & G. 813 (suit against trustee); Lemprière v. Lange, L. R. 12 Ch. Div. 675; Vavasseur v. Krupp, L. R. 9 Ch. Div. 351; Building Ass'n v. Ashmead, 7 Phila. 272; Joseph v. McGill, 52 Iowa, 127 (against fraudulent grantee); French v. Snell, 29 N. J. Eq. 95 (against assignee of a mortgage; the assignment void); Venable v. Everett, 63 Ga. 633; Sierra Nev. Min. Co. v. Sears, 10 Nev. 346; Vogler v. Montgomery, 54 Mo. 577.

dently the only mode of enforcement; but the remedy of injunction is not confined to contracts whose stipulations are negative; it often extends to those which are affirmative in their provisions, where the affirmative stipulation implies or includes a negative. The universal test of the jurisdiction, admitted alike by the courts of England and of the United States, is the inadequacy of the legal remedy of damages in the class of contracts to which the particular instance belongs.[1] This general doctrine is fully sustained by the cases cited in the succeeding paragraphs as illustrations of its application. A clearer notion of the doctrine will perhaps be obtained by considering the contracts to which it applies in three main classes: 1. Those restrictive covenants which create equitable easements; 2. Agreements stipulating for personal services or acts; 3. Other agreements, generally negative in their nature.

§ 1342. 1. **Restrictive Covenants Creating Equitable Easements.**— This doctrine has already been examined, and it has been shown that restrictive covenants in deeds, leases, and agreements limiting the use of land in a specified manner, or prescribing a particular use, which create equitable servitudes on the land, will be specifically enforced in equity by means of an injunction, not only between the immediate parties, but also against subsequent purchasers with notice, even when the covenants are not of the kind which technically run with the land.[1] The injunction in this class of cases is granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff

§ 1341, [1] The modern English decisions have been much more liberal than the American cases in applying this test, and the English courts have more freely used the injunction to prevent the violation of contracts than the majority of the American judges have been willing to go. The *tendency* of the American courts has been to limit, rather than to enlarge, the jurisdiction in cases of contracts. English courts will enjoin the violation of some contracts, even though they cannot be specifically enforced. The American decisions, with few exceptions, refuse to adopt this doctrine.

§ 1342, [1] See *ante*, vol. 2, § 689; vol. 3, § 1295.

has sustained *any* pecuniary damages, are wholly immaterial. In the words of one of the ablest of modern equity judges: "It is clearly established by authority that there is sufficient to justify the court interfering, if there has been a breach of the covenant. It is not for the court, but the plaintiffs, to estimate the amount of damages that arises from the injury inflicted upon them. The moment the court finds that there has been a breach of the covenant, that is an injury, and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract, although his remedy is that which I have described," namely, an injunction.[2]

§ 1343. 2. **Contracts for Personal Services or Acts.**— Where a contract stipulates for special, unique, or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party having special, unique, and extraordinary qualifications,— as, for example, by an eminent actor, singer, artist, and the like,— it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the

[2] Per Sir George Jessel, M. R., in Leech v. Schweder, L. R. 9 Ch. 463, 465, note, 468, note; Tipping v. Eckersley, 2 Kay & J. 264, 270, 273; Dickenson v. Grand Junc. C. Co., 15 Beav. 260, 270; Western v. MacDermot, L. R. 1 Eq. 499, 505; 2 Ch. 72, 75; Evans v. Davis, L. R. 10 Ch. Div. 747; Kemp v. Sober, 1 Sim., N. S., 517, 520. For illustrations of such restrictive covenants and of the general doctrine, see cases cited *ante*, under §§ 689, 1295; Lord Grey de Wilton v. Saxon, 6 Ves. 106; Fleming v. Snook, 5 Beav. 250; Hodson v. Coppard, 29 Beav. 4; Bramwell v. Lacy, L. R. 10 Ch. Div. 691; Evans v. Davis, L. R. 10 Ch. Div. 747; Master v. Hansard, L. R. 4 Ch. Div. 718 (injunction refused; no breach); Lord Manners v. Johnson, L. R. 1 Ch. Div. 673; Aspden v. Seddon, L. R. 10 Ch. 394 (no breach); Gearns v. Baker, 10 Ch. 355 (ditto); Booth v. Alcock, L. R. 8 Ch. 663 (ditto); Catt v. Tourle, L. R. 4 Ch. 654; Leader v. Moody, L. R. 20 Eq. 145 (injunction refused under very special facts); Telford v. Metrop. Board of Works, L. R. 13 Eq. 574; Feilden v. Slater, L. R. 7 Eq. 523; Peek v. Matthews, L. R. 3 Eq. 515 (injunction refused; plaintiff's acquiescence); Lloyd v. London etc. R'y, 2 De Gex, J. & S. 568; Piggott v. Stratton, 1 De Gex, F. & J. 33; Nicholson v. Rose, 4 De Gex & J. 10; Coles v. Sims, 5 De Gex, M. & G. 1; Hall v. Wesster, 7 Mo. App. 56; Steward v. Winters, 4 Sand. Ch. 587; Trustees etc. v. Thacher, 87 N. Y. 311; 41 Am. Rep. 365; and see cases cited in note under § 1344

same kind of services or acts elsewhere, or by employing any other person. It is, however, a familiar doctrine that a court of equity will not exercise its jurisdiction to grant the remedy of an *affirmative* specific performance, however inadequate may be the remedy of damages, whenever the contract is of such a nature that the decree for its specific performance cannot be enforced and its obedience compelled by the ordinary processes of the court. A specific performance in such cases is said to be impossible; and contracts stipulating for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel an actor to act, a singer to sing, or an artist to paint. Applying the same course of reasoning, the English courts formerly held that they could not *negatively* enforce the specific performance of such contracts by means of an injunction restraining their violation.[1] Those courts have, however, entirely receded from this latter conclusion. The rule is now firmly established in England that the violation of such contracts may be restrained by injunction, whenever the legal remedy of damages would be inadequate, and the contract is of such a nature that its negative specific enforcement is possible. This rule was first applied to stipulations which were in form expressly negative, but was soon extended to affirmative contracts which implied or involved negative stipulations.[2]

[1] Kemble v. Kean, 6 Sim. 333; Kimberley v. Jennings, 6 Sim. 340; for American decisions to the same effect, see next following notes.

[2] The leading case is Lumley v. Wagner, 1 De Gex, M. & G. 604, in which the defendant, a "prima donna," had agreed to sing for a certain specified period in the plaintiff's opera-house, and also that she would not sing elsewhere during that time. The opinion by Lord Chancellor St. Leonards contains a full review of the previous authorities, and a most able and convincing discussion of the principle. In Montague v. Flockton, L. R. 16 Eq. 189, the rule was extended to a contract by an actor which contained no negative stipulation. See also Wolverhampton etc. R'y v. London etc. R'y, L. R. 16 Eq. 433; Ward v. Beeton, L. R. 19 Eq. 207; Donnell v. Bennett, L. R. 22 Ch. Div. 835; Fothergill v. Rowland, L. R. 17 Eq. 132, 141; Garrett v. Banstead etc. R'y, 4 De Gex, J. & S. 462; Munro v. Wivenhoe etc. R'y, 4 De Gex, J. & S. 723; Jennings v. Brighton etc. Board, 4 De Gex, J. & S.

§ 1344. 3. **Other Agreements Generally Negative in their Nature.**—In all these agreements, where the stipulations are expressly negative in form, and where they belong to the class of which the specific performance would be enforced if they were affirmative in form, an injunction to restrain their violation will be granted as a general rule, and almost as a matter of course. The inadequacy of the legal remedy is the criterion; but the fact that the agreements belong to a class which would be specifically enforced necessarily shows that the legal remedy is inadequate. The particular instances of this class are very numerous, and some of the most important examples are placed in the foot-note.[1]

735; De Mattos v. Gibson, 4 De Gex & J. 276 (a charter-party); Johnson v. Shrewsbury etc. R'y, 3 De Gex, M. & G. 914; Stocker v. Brockelbank, 3 Macn. & G. 250; Sainter v. Ferguson, 1 Macn. & G. 286. The most recent English decisions interfere to restrain the violation of such contracts even while conceding that their specific performance could not be enforced. This doctrine has been adopted and acted upon to its full extent by a few modern American cases: Western U. Tel. Co. v. Union Pac. R'y, 1 McCrary, 558; Western U. Tel. Co. v. St. Jo. etc. R'y, 1 McCrary, 565; Singer etc. Co. v. Union etc. Co., 1 Holmes, 253. The American courts generally have either rejected the doctrine of Lumley v. Wagner entirely, or have accepted it only to a partial extent: See Sanquirico v. Benedetti, 1 Barb. 315; Bank of Cal. v. Fresno etc. Co., 53 Cal. 201; Western U. Tel. Co. v. Western etc. R. R., 8 Baxt. 54; Crutchfield v. Wason Car Works, 8 Baxt. 242; Smith v. McElwain, 57 Ga. 247; Hahn v. Concordia Soc., 42 Md. 460; Manhattan Mfg. etc. Co. v. N. J. Stock Yard etc. Co., 23 N. J. Eq. 161; Gallagher v. Fayette Co. R. R., 38 Pa. St. 102. In all cases, English and American, the inadequacy of the legal remedy is the sole criterion for interference by injunction to prevent the violation of any contract.

[1] Agreements not to carry on a trade: Barret v. Blagrave, 5 Ves. 555; 6 Ves. 104; Williams v. Williams, 2 Swanst. 253; Shackle v. Baker, 14 Ves. 468; Cruttwell v. Lye, 17 Ves. 335; Harrison v. Gardner, 2 Madd. 198; Ginesi v. Cooper. L. R. 14 Ch. Div. 596; Jones v. Heavens, L. R. 4 Ch. Div. 636; Altman v. Royal Aqua. Soc., L. R. 3 Ch. Div. 228; Clements v. Welles, L. R. 1 Eq. 200; Turner v. Evans, 2 De Gex, M. & G. 740; Cobbs v. Niblo, 6 Ill. App. 60; Ropes v. Upton, 125 Mass. 258; McNutt v. McEwen, 10 Phila. 112; Carroll v. Hickes, 10 Phila. 308; McClurg's Appeal, 58 Pa. St. 51; Harkinson's Appeal, 78 Pa. St. 196; 21 Am. Rep. 9; Richardson v. Peacock, 28 N. J. Eq. 151; 26 N. J. Eq. 40; Baumgarten v. Broadaway, 77 N. C. 8; Berger v. Armstrong, 41 Iowa, 447; Caswell v. Gibbs, 33 Mich. 331; Doty v. Martin, 32 Mich. 462; Butler v. Burleson, 16 Vt. 176; Guerand v. Dandelet, 32 Md. 561; 3 Am. Rep. 164. Not to build, etc.: Rankin v. Huskisson, 4

§ 1345. **Miscellaneous Cases.**—As has already been stated, an injunction will always be granted, if necessary, to protect, aid, or enforce any equitable estate, interest, or primary right, or to secure and render efficient any purely equitable remedy. Among the most important instances in which this general doctrine is applied, in addition to those already mentioned, are the following: Against *Corporations* and their directors and officers, to restrain acts which are illegal, *ultra vires*, or in violation of their fiduciary duties.[1] While the right to membership in a cor-

Sim. 13; Lloyd v. London etc. R'y, 2 De Gex, J. & S. 568; Bowes v. Law, L. R. 9 Eq. 636; St. Andrew's Church's Appeal, 67 Pa. St. 512. Not to run trains past a certain station without stopping: Hood v. North East. R'y, L. R. 8 Eq. 666; 5 Ch. 525; Phillips v. Great West. R'y, L. R. 7 Ch. 409; Rigby v. Great West. R'y, 2 Phill. Ch. 44. Not to ring a certain bell: Martin v. Nulkin, 2 P. Wms. 266. By an author, not to write or publish a rival work: Barfield v. Nicholson, 2 Sim. & St. 1; Morris v. Colman, 18 Ves. 437. See also, as further illustrations, Wolfe v. Matthews, L. R. 21 Ch. Div. 194; Aspden v. Seddon, L. R. 10 Ch. 394; Gearns v. Baker, L. R. 10 Ch. 355; Catt v. Tourle, L. R. 4 Ch. 654; Leader v. Moody, L. R. 20 Eq. 145; Jones v. North, L. R. 19 Eq. 426; Pattisson v. Gilford, L. R. 18 Eq. 259, 262, 263; Warne v. Routledge, L. R. 18 Eq. 497; Fothergill v. Rowland. L. R. 17 Eq. 132; Telford v. Metrop. Bd. of Works, L. R. 13 Eq. 574; Feilden v. Slater, L. R. 7 Eq. 523; Peek v. Matthews, L. R. 3 Eq. 515; Dyke v. Taylor, 3 De Gex, F. & J. 467; Nicholson v. Rose, 4 De Gex & J. 10; Shrewsbury etc. R'y v. London etc. R'y, 3 Macn. & G. 70; Wagner v. Meety, 69 Mo. 150; Hall v. Wesster, 7 Mo. App. 56; Gold etc. Tel. Co. v. Todd, 17 Hun, 548; Gillis v. Hall, 2 Brewst. 342; Beckwith v. Howard, 6 R. I. 1; Manhattan etc. Co. v. Van Keuren, 23 N. J. Eq. 251; Haskell v. Wright, 23 N. J. Eq. 389; Parker v. Garrison, 61 Ill. 250; Frank v. Brunnemann, 8 W. Va. 462.

Contracts which are entirely affirmative in form and language may imply and include a negative, so that their violation may be restrained by injunction. In Hamilton v. Hector, L. R. 6 Ch. 701, a husband and wife had stipulated in a separation deed that the children should attend such schools as their father should choose, and should spend their holidays where the trustees should direct; the trustees directed that they should spend one half their holidays with their father, and the rest with their mother: the father was restrained by injunction from interfering with the children during the time they were to spend with their mother, in violation of his agreement. See also Drury v. Molins, 6 Ves. 328; Pratt v. Brett, 2 Madd. 62; Briggs v. Law, 4 Johns. Ch. 22; Marvine v. Drexel's Ex'rs, 68 Pa. St. 362.

[1] The general subject of suits against corporations, and their managing officers, based upon their trust relations, and their acts in violation thereof, has already been considered: *Ante*, §§ 1091–1096. In all such suits an injunction may be granted either as the sole remedy, or in connection with

poration, or to be a corporation officer, cannot, in general, be tested by means of an injunction, the improper or unlawful expulsion of a member from a voluntary association without good cause, or in violation of its by-laws, may be restrained by injunction. Between *Mortgagors and Mortgagees.*[2] Against *Public Officers.* An injunction will not be granted, in general, to restrain persons from

the remedies of rescission, cancellation, accounting, etc. In connection with the cases there cited, see also the following as illustrations: To restrain *ultra vires* acts: Lord Aukland v. Westminster Board, L. R. 7 Ch. 597; Metts v. Northern R'y, L. R. 5 Ch. 621; Pudsey Gas Co. v. Corporation of Bradford, L. R. 15 Eq. 167; Pickering v. Stephenson, L. R. 14 Eq. 322; Kernaghan v. Williams, L. R. 6 Eq. 228; London etc. R'y v. London etc. R'y, 4 De Gex & J. 362; Ware v. Regent's Canal Co., 3 De Gex & J. 212; Rogers v. Oxford etc. R'y, 2 De Gex & J. 662; Hodgson v. Earl of Powis, 1 De Gex, M. & G. 6; Cohen v. Wilkinson, 1 Macn. & G. 481; Platteville v. Galena etc. R. R., 43 Wis. 493. To restrain unlawful acts of directors or managing officers in violation of their fiduciary duties: Cannon v. Trask, L. R. 20 Eq. 669; Dowling v. Pontypool etc. R'y, L. R. 18 Eq. 714; Featherstone v. Cooke, L. R. 16 Eq. 298; Mair v. Himalaya Tea Co., L. R. 1 Eq. 411; Carlisle v. South East. R'y, 1 Macn. & G. 689 (to restrain payment of dividends); Pond v. Vt. Valley R. R., 12 Blatchf. 280; Webb v. Ridgely, 38 Md. 364 (to restrain a fraudulent transferee of stock from voting). To restrain the minority of a religious corporation from interfering with the control of the majority: Cooper v. Gordon, L. R. 8 Eq. 249; Perry v. Shipway, 4 De Gex & J. 353. To restrain a corporation from committing a trespass: Eversfield v. Mid-Sussex R'y, 3 De Gex & J. 286; and see cases *post*, under head of Trespass. To restrain the expulsion of a member from a club or society: Labouchere v. Earl of Wharncliffe, L. R. 13 Ch. Div. 346; Fisher v. Keane, L. R. 11 Ch. Div. 353; Fisher v. Board of Trade, 80 Ill. 85; Gregg v. Mass. Med. Soc., 111 Mass. 185; 15 Am. Rep. 24; Lowry v. Read, 3 Brewst. 452. As to the use of an injunction to restrain a person from being, or from acting as, an officer of a corporation, see Aslatt v. Corpor. of Southampton, L. R. 16 Ch. Div. 143; Hussey v. Gallagher, 61 Ga. 86. See also, in general, Cromford etc. R'y v. Stockport etc. R'y, 1 De Gex & J. 326; Aurora etc. R. R. v. Lawrenceburgh. 56 Ind. 80.

[2] To restrain mortgagee from improper sale under a power of sale, by advertisement, etc.: Capehart v. Biggs. 77 N. C. 261; Purnell v. Vaughan, 77 N. C. 268; Haggerson v. Phillips, 37 Wis. 364; Collins v. Lamport, 4 De Gex, J. & S. 500. To restrain mortgagor from committing waste, under certain circumstances, or doing other acts to the property whereby the security would be imperiled: Bagnall v. Villar, L. R. 12 Ch. Div. 812 (cutting crops); Warner v. Jacob, L. R. 20 Ch. Div. 220; Truman v. Redgrave, L. R. 18 Ch. Div. 547; Mut. Life Ins. Co. v. Bigler, 79 N. Y. 568 (removing property); Taylor v. Collins, 51 Wis. 123 (same remedy on foreclosure of a land contract). See also cases cited *post*, under head of Waste.

acting as public officers;[3] but the illegal, unlawful, or improper acts of public officers may be restrained when they would produce irreparable injury, or create a cloud upon title, or when such remedy is necessary to prevent a multiplicity of suits.[4] To prevent a *Cloud upon Title.* The use of the injunction to prevent acts which would create a cloud upon title is governed by the same rules which control the

[3] The legal remedy is, in general, adequate to test the right to a public office: Campbell v. Taggart, 10 Phila. 443; Jones v. Comm'rs of Granville, 77 N. C. 280; Sneed v. Bullock, 77 N. C. 282; Stone v. Wetmore, 42 Ga. 601; Sanders v. Metcalf, 1 Tenn. Ch. 419 (no injunction to restrain a judge from acting).

[4] To restrain the imposition or enforcement of illegal taxes and other public burdens, at the suit of taxpayers: See *ante*, vol. 1, §§ 259, 260, 265, 266, where this subject is fully discussed, and the conflicting results of decisions in different states are formulated. In addition to the cases there cited, see Wagner v. Meety, 69 Mo. 150; Curtenius v. Grand Rapids etc. R. R., 37 Mich. 583; Cattell v. Lowry, 45 Iowa, 478; Albany etc. Min. Co. v. Auditor-General, 37 Mich. 391; Sinclair v. Comm'rs of Winona Co., 23 Minn. 404; 23 Am. Rep. 694; South Platte Land Co. v. Comm'rs of Buffalo County, 7 Neb. 253; Burlington etc. R. R. v. Comm'rs of York County, 7 Neb. 487; George v. Dean, 47 Tex. 73; Douglass v. Harrisville, 9 W. Va. 162; 27 Am. Rep. 548; Marsh v. Supervisors of Clark County, 42 Wis. 502; Schettler v. Fort Howard, 43 Wis. 48; Hagaman v. Comm'rs of Cloud County, 19 Kan. 394; Worthen v. Badgett, 32 Ark. 496; New Orleans etc. R. R. v. Dunn, 51 Ala. 128; Wells v. Dayton, 11 Nev. 161; Union Pacific R. R. v. Lincoln Co., 3 Dill. 300; Brown v. Concord, 56 N. H. 375; Savings Bank v. Portsmouth, 52 N. H. 17. To restrain the sale of land under an illegal tax or assessment: Kean v. Asch, 27 N. J. Eq. 57; Oliver v. Memphis etc. R. R., 30 Ark. 128 (a sale of a railroad); Deming v. James, 72 Ill. 78 (a sale of personal property not subject to tax); Abbott v. Edgerton, 53 Ind. 196 (same); Trowbridge v. Horan, 78 N. Y. 439. Instances of injunction refused: Against election officers: Roudanez v. New Orleans, 29 La. Ann. 271; Harris v. Schryock, 82 Ill. 119; Hardesty v. Taft, 23 Md. 512; 87 Am. Dec. 584. Against a city exercising legislative powers: Chicago v. Wright, 69 Ill. 318; and see Des Moines Gas Co. v. Des Moines, 44 Iowa, 505; 24 Am. Rep. 756: Hugg v. Camden, 29 N. J. Eq. 6; Brown v. Catlettsburg, 11 Bush, 435; People v. Canal Board, 55 N. Y. 390; Kelly v. Baltimore, 53 Md. 134. Miscellaneous instances in which an injunction has been granted: To prevent the removal of a public schoolhouse: District etc. of Lodomillo v. District etc. of Cass, 54 Iowa, 115; or the removal of a county seat: Stuart v. Bair, 8 Baxt. 141. To prevent taking of private property for public use without compensation: Folley v. Passaic, 26 N. J. Eq. 216; and see Tribune Ass'n v. Sun etc. Ass'n, 7 Hun, 175; Dairiese v. Cooke, 91 U. S. 580; Lewis v. Providence, 10 R. I. 97; People v. Chicago, 53 Ill. 424.

remedy of removing a cloud from title.[5] To protect *Married Women's* property.[6] In controversies between *Partners,* and in other special cases.[7]

SECTION II.

TO PREVENT OR RESTRAIN THE COMMISSION OF TORTS.

ANALYSIS.

§ 1346. The estates and interests generally legal.
§ 1347. Kinds and classes of torts restrained.
§ 1348. Waste.
§ 1349. Nuisance: Public.
§ 1350. Nuisance: Private; when restrained.
§ 1351. Same: Instances; violations of easements.
§ 1352. Patent rights and copyrights.
§ 1353. Literary property as distinct from copyright.
§ 1354. Trade-marks.
§ 1355. Good-will.
§ 1356. Trespasses.
§ 1357. General doctrine; cases in which trespass may be enjoined.
§ 1358. Slander of title; libels; wrongful use of name.

§ 1346. The Estates and Interests Generally Legal.— The estates, interests, and primary rights to be secured by injunctions of this kind are in most instances legal; and the injunctions themselves, as a class, are frequently described as those for the protection of legal rights and

[5] See *post, Removing Cloud,* and cases there cited; Lehman v. Roberts, 86 N. Y. 232; Strusburgh v. New York, 87 N. Y. 452; Dederer v. Voorhies, 81 N. Y. 154; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474.

[6] An injunction may be needed for this purpose; as, for example, to restrain the sale of her property for her husband's debts when her title is clear, but not unless it *is* clear: Allen v. Benners, 10 Phila. 10; Simson v. Bates, 10 Phila. 66; to prevent the collection of a mortgage assigned by a wife, when the assignment was void: French v. Snell, 29 N. J. Eq. 95.

[7] In settlement of partnership affairs after a dissolution: Large v. Ditmars, 27 N. J. Eq. 283. Special cases: When to restrain arbitration: Pickering v. Cape Town R'y, L. R. 1 Eq. 84; to prevent injury to the property of a foreign monarch, restraining the publication of spurious securities of the foreign government: Emperor of Austria v. Day, 3 De Gex, F. & J. 217; to prevent a person from taking letters from the post-office for fraudulent purposes: Zellenkoff v. Collins, 23 Hun, 156; and see Guion v. Trask, 1 De Gex, F. & J. 373.

interests. So far as they do thus sustain and enforce legal rights, they are, of course, supplementary to or in lieu of the legal remedies which courts of common law originally gave, and perhaps now give, by action, under the same circumstances. For this reason, the general test as stated in a former paragraph applies with special force. The inadequacy of the legal remedies is the criterion which determines the exercise of this preventive jurisdiction; and the criterion is enforced, especially by the American courts, with great strictness.

§ 1347. **Kinds and Classes of Torts Restrained.**—The legal remedy is ordinarily considered as adequate in cases of torts to the person, and to property held by a legal title, and equity does not interfere.[1] There are, however, certain species of torts, in respect to each of which, as a class, it is settled that the legal remedy is generally inadequate, so that equity will generally interfere to prevent the wrong by injunction. There are other species of torts, in respect to each of which, as a class, the legal remedy is adequate, but may become inadequate, in individual instances, from their particular circumstances, so that in those instances an injunction will be granted. In the kind of torts for which the legal remedy is generally inadequate, so that an injunction is a proper remedy, the title of the injured party must be clear, the injury real, and not merely temporary or transient. They are waste, nuisance, including interference with easements, servitudes, and similar rights, infringements of patent rights, of copyrights, of trademarks, and of other intangible property rights, the pecuniary value of which cannot be certainly estimated, such as literary property in manuscript writings and good-will.

[1] Injunction never granted to restrain criminal acts: Phillips v. Stone Mountain, 61 Ga. 386; Life Ass'n v. Boogher, 3 Mo. App. 173; nor arrests: Davis v. Am. Soc., 6 Daly, 81; 75 N. Y. 362; Cohen v. Comm'rs of Goldsboro, 77 N. C. 2. No preliminary injunction will be granted while the plaintiff's legal right is really doubtful and unsettled: Nat. Docks R. R. v. Central R. R., 32 N. J. Eq. 755; overruling Cent. R. R. v. Pa. R. R., 31 N. J. Eq. 475.

In ordinary trespasses the injured party is left to his remedy of damages, but the circumstances of a trespass to property — especially to real property — may be such that the compensatory remedy is inadequate, and a court of equity will prevent the wrong by injunction.

§ 1348. **Waste.**— Waste is the destruction or improper deterioration or material alteration of things forming an essential part of the inheritance, done or suffered by a person rightfully in possession by virtue of a temporary or partial estate,— as, for example, a tenant for life or for years. The rightful possession of the wrong-doer is essential, and constitutes a material distinction between waste and trespass.[1] The remedy by injunction is fully established, and has not only virtually superseded the old common-law "action of waste," but has to a great extent taken the place of the "action on the case" for damages. An injunction will be granted in all cases where a legal action would lie to recover possession of the land wasted, or to recover damages.[2] It will also be granted in many instances where no legal action can be maintained, although the interest of the injured party is legal;[3] and where the

[1] Many acts are not waste in this country which would be waste in England, such as cutting timber, and modes of using the soil, when done in accordance with the usual methods of good husbandry in the neighborhood: See Drown v. Smith, 52 Me. 141; Keeler v. Eastman, 11 Vt. 293; Gardiner v. Dering, 1 Paige, 573; Livingston v. Reynolds, 26 Wend. 115; Morehouse v. Cotheal, 22 N. J. Eq. 521; Lynn's Appeal, 31 Pa. St. 44; 72 Am. Dec. 721; McCullough v. Irvine, 13 Pa. St. 438; Crawley v. Timberlake, 2 Ired. Eq. 460; Alexander v. Fisher, 7 Ala. 514.

[2] Pulteney v. Shelton, 5 Ves. 260, note; Twort v. Twort, 16 Ves. 128; Hole v. Thomas, 7 Ves. 589; Smallman v. Onions, 3 Brown Ch. 621; Powys v. Blagrave, 4 De Gex, M. & G. 448; Kekewich v. Marker, 3 Macn. & G. 311; Hawley v. Clowes, 2 Johns. Ch. 122; Kane v. Vanderburgh, 1 Johns. Ch. 11; Watson v. Hunter, 5 Johns. Ch. 169; 9 Am. Dec. 295; Duvall v. Waters, 1 Bland, 569, 576; 18 Am. Dec. 350; Hill v. Bowie, 1 Bland, 593; Markham v. Howell, 33 Ga. 508; Peak v. Hayden, 3 Bush, 125; Northrup v. Trask, 39 Wis. 515; Mut. L. Ins. Co. v. Bigler, 79 N. Y. 568; Vandemark v. Schoonmaker, 9 Hun, 16; Williams v. Peabody, 8 Hun, 271; Le Roy v. Wright, 4 Saw. 530 (plaintiff's legal title disputed).

[3] Garth v. Cotton, 1 Ves. Sr. 524, 556; 1 Dick. 183; 1 Lead. Cas. Eq., 4th Am. ed., 955; Perrot v. Perrot, 3 Atk. 94; Robinson v. Litton, 3 Atk. 209;

estate of the injured party is wholly equitable;[4] and where the waste itself is entirely "equitable,"—that is, where, by the terms of the will, deed, settlement, or lease, the tenant holds the land "without impeachment of waste."[5] An injunction will also be granted to restrain threatened waste, although none has actually been committed.[6]

§ 1349. **Nuisance — Public.**— A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney-general in England, and at the suit of the state, or the people, or municipality, or some proper officer representing the common-

Farrant v. Lovel, 3 Atk. 723; Davis v. Leo, 6 Ves. 784, 787; Onslow v. ———, 16 Ves. 173; Pratt v. Brett, 2 Madd. 62; Clement v. Wheeler, 25 N. H. 361; Attaquin v. Fish, 5 Met. 140, 147; Kane v. Vanderburgh, 1 Johns. Ch. 11, 12; Douglass v. Wiggins, 1 Johns. Ch. 435; Kidd v. Dennison, 6 Barb. 10, 15; Sarles v. Sarles, 3 Sand. Ch. 601; Ware v. Ware, 6 N. J. Eq. 117; Duvall v. Waters, 1 Bland, 569, 576; 18 Am. Dec. 350; Lewis v. Christian, 40 Ga. 187; Smith v. Rome, 19 Ga. 89; Lyon v. Hunt, 11 Ala. 295, 305; 46 Am. Dec. 216.

[4] Garth v. Cotton, 1 Ves. Sr. 524, 556; 1 Dick. 183; 1 Lead. Cas. Eq. 955; Robinson v. Litton, 3 Atk. 209; Farrant v. Lovel, 3 Atk. 723; Stansfield v. Habergham, 10 Ves. 273, 277; Humphreys v. Harrison, 1 Jacob & W. 581; Wallington v. Taylor, 1 N. J. Eq. 314, 318; Brashear v. Macey, 3 J. J. Marsh. 89. At the suit of the vendee against the vendor under a land contract: Smith and Fleek's Appeal, 69 Pa. St. 474. Between mortgagee and mortgagor, to restrain waste of the mortgaged premises: Brady v. Waldron, 2 Johns. Ch. 148; Robinson v. Preswick, 3 Edw. Ch. 246; Ensign v. Colburn, 11 Paige, 503; Phœnix v. Clark, 6 N. J. Eq. 447; Nelson v. Pinegar, 30 Ill. 473; Bunker v. Locke, 15 Wis. 635; Robinson v. Russell, 24 Cal. 467; Cooper v. Davis, 15 Conn. 556; State v. North, etc. R'y, 18 Md. 193; Parsons v. Hughes, 12 Md. 1; and in other cases of injuries analogous to waste: Litka v. Wilcox, 39 Mich. 94; Patton v. Moore, 16 W. Va. 428; 37 Am. Rep. 789; Frank v. Brunnemann, 8 W. Va. 462.

[5] Garth v. Cotton, *supra;* Vane v. Lord Barnard, 2 Vern. 738; Prec. Ch. 454; Rolt v. Lord Somerville, 2 Eq. Cas. Abr. 759; Aston v. Aston, 1 Ves. Sr. 264; Burges v. Lamb, 16 Ves. 174, 185; Day v. Merry, 16 Ves. 375; Abrahall v. Bubb, 2 Swanst. 172; Morris v. Morris, 15 Sim. 505; Wellesley v. Wellesley, 6 Sim. 497; Micklethwait v. Micklethwait, 1 De Gex & J. 504, 519; Kekewich v. Marker, 3 Macn. & G. 311; Att'y-Gen. v. Duke of Marlborough, 3 Madd. 498, 538; Sowerby v. Fryer, L. R. 8 Eq. 417; Birch-Wolfe v. Birch, L. R. 9 Eq. 683; Bubb v. Yelverton, L. R. 10 Eq. 465; Clement v. Wheeler, 25 N. H. 361.

[6] Rodgers v. Rodgers, 11 Barb. 595; Duvall v. Waters, 1 Bland, 569, 576; 18 Am. Dec. 350; Loudon v. Warfield, 5 J. J. Marsh. 196; White Water etc. Co. v. Comegys, 2 Ind. 469.

wealth, in this country. A public nuisance must be established by clear evidence, before the preventive remedy will be granted.[1] A public nuisance will also be restrained at the suit of a private person who suffers therefrom a special and particular injury distinct from that suffered by him in common with the public at large; but this injury must be real, and such that the legal remedy of damages would not be adequate.[2]

§ 1350. **Private Nuisance — When Restrained.**— It is a well-settled doctrine that equity will restrain a private nuisance at the suit of the injured party. This remedy will not, however, be granted in every instance of alleged

[1] Att'y-Gen. v. Cleaver, 18 Ves. 211, 217; Att'y-Gen. v. Forbes, 2 Mylne & C. 123; Earl of Ripon v. Hobart, 3 Mylne & K. 169, 179; Att'y-Gen. v. Great East. R'y, L. R. 6 Ch. 572; Att'y-Gen. v. Eau Claire, 37 Wis. 400; State v. Eau Claire, 40 Wis. 533; Rochester v. Erickson, 46 Barb. 92; Coast Line R. R. v. Cohen, 50 Ga. 451; Pennsylvania v. Wheeling etc. Bridge Co., 13 How. 518; Miss. & Mo. R. R. v. Ward, 2 Black, 485; Att'y-Gen. v. Cohoes Co., 6 Paige, 133; 29 Am. Dec. 755; Mohawk Bridge Co. v. Utica etc. R. R., 6 Paige, 554; People v. Third Ave. R. R., 45 Barb. 63; Hinchman v. Paterson etc. R. R., 17 N. J. Eq. 75; 86 Am. Dec. 252; Craig v. People, 47 Ill. 487.

[2] Soltau v. De Held, 2 Sim., N. S., 133; Att'y-Gen. v. Sheffield Gas Co., 3 De Gex, M. & G. 304; Att'y-Gen. v. Cambridge Gas Co., L. R. 4 Ch. 71, 80; Att'y-Gen. v. Gee, L. R. 10 Eq. 131; Original Hartlepool etc. Co. v. Gibb. L. R. 5 Ch. Div. 713; Pettibone v. Hamilton, 40 Wis. 402; Coast Line R. R. v. Cohen, 50 Ga. 451; Thayer v. New Bedford R. R., 125 Mass. 253; Osborne v. Brooklyn etc. R. R., 5 Blatchf. 366; Hartshorn v. South Reading, 3 Allen, 501; Central Bridge Corp. v. Lowell, 4 Gray, 474; Rowe v. Granite Bridge Corp., 21 Pick. 344; Bigelow v. Hartford Bridge Co., 14 Conn. 565; 36 Am. Dec. 502; Frink v. Lawrence, 20 Conn. 117; 50 Am. Dec. 274; Milhau v. Sharp, 27 N. Y. 611: 84 Am. Dec. 314; Knox v. New York, 55 Barb. 404; Smith v. Lockwood, 13 Barb. 209; Mayor etc. v. Baumberger, 7 Rob. (N. Y.) 219; Hudson River R. R. v. Loeb, 7 Rob. (N. Y.) 418; Manhattan etc. Co. v. Barker, 7 Rob. (N. Y.) 523; Peck v. Elder, 3 Sand. 126; Corning v. Lowerre, 6 Johns. Ch. 439; Sparhawk v. Union Pass. R'y, 54 Pa. St. 401; Black v. Phila. etc. R. R., 58 Pa. St. 249; Philadelphia v. Collins, 68 Pa. St. 106; Buck Mt. etc. Co. v. Lehigh etc. Co., 50 Pa. St. 91, 99; 88 Am. Dec. 534; Higbee v. Camden etc. R. R., 19 N. J. Eq. 276; Allen v. Board of Freeholders, 13 N. J. Eq. 68, 74; Zabriskie v. Jersey City etc. R. R., 13 N. J. Eq. 314; Delaware etc. R. R. v. Stump, 8 Gill & J. 479; 29 Am. Dec. 561; Hamilton v. Whitridge, 11 Md. 128; 69 Am. Dec. 184; Savannah etc. R. R. v. Shiels, 33 Ga. 601; Columbus v. Jaques, 30 Ga. 506; Green v. Oakes, 17 Ill. 249; Smith v. Bangs, 15 Ill. 399; Ewell v. Greenwood, 26 Iowa, 377; Sheboygan v. Sheboygan etc. R. R., 21 Wis. 667.

nuisance. The present or threatened injury must be real, not trifling, transient, or temporary; it must be one for which, either on account of its essentially irreparable nature, or its repetition or continuance, the legal remedy of damages is inadequate. The title of the plaintiff must also be clear, or at least not subject to any substantial doubt or question. The equitable jurisdiction is therefore based upon the notion of restraining irreparable mischief, or of preventing vexatious litigation, or a multiplicity of suits.[1]

[1] According to the modern decisions, a *mere* denial of the plaintiff's title in defendant's pleading will not prevent an injunction; but if the plaintiff's title is really disputed, or is in any real doubt, it must first be established by a verdict, before equity will interfere with its preventive relief: Att'y-Gen. v. Nichol, 16 Ves. 338, 342; Wynstanley v. Lee, 2 Swanst. 333, 335; Fishmongers' Co. v. East India Co., 1 Dick. 163; Blakemore v. Glamorganshire Canal Navigation, 1 Mylne & K. 154; Squire v. Campbell, 1 Mylne & C. 459, 465, 467; Taylor v. Davis, 3 Beav. 388, note; Whittaker v. Howe, 3 Beav. 383, 387, 395, note; Spencer v. London etc. R'y, 8 Sim. 193; Soltau v. De Held, 2 Sim., N. S., 133; Wood v. Sutcliffe, 2 Sim., N. S., 163; Walter v. Selfe, 4 De Gex & S. 315; Bostock v. North Staffordshire R'y, 5 De Gex & S. 584; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; Broadbent v. Imperial Gas Co., 7 De Gex, M. & G. 436, 461, 462; 7 H. L. Cas. 600; Att'y-Gen. v. Sheffield Gas etc. Co., 3 De Gex, M. & G. 304; Crossley v. Lightowler, L. R. 2 Ch. 478; Robson v. Whittingham, L. R. 1 Ch. 442; Att'y-Gen. v. Cambridge etc. Gas Co., L. R. 4 Ch. 71; Goodson v. Richardson, L. R. 9 Ch. 221, 223, 226; Stanford v. Hurlstone, L. R. 9 Ch. 116, 118, 119; Inchbald v. Robinson, L. R. 4 Ch. 388, 395, 397; London etc. R'y v. Lancashire etc. R'y, L. R. 4 Eq. 174, 178; Mayor v. Cardiff Water Co., 4 De Gex & J. 596, 597–599; Elmhirst v. Spencer, 2 Macn. & G. 45, 50; Parker v. Winnipiseogee etc. Co., 2 Black, 545; Barnes v. Hathorn, 54 Me. 124; Coe v. Winnepiseogee etc. Co., 37 N. H. 254, 264; Eastman v. Amoskeag etc. Co., 47 N. H. 71; Burnham v. Kempton, 44 N. H. 78, 90; Bassett v. Salisbury etc. Co., 47 N. H. 426; Wilcox v. Wheeler, 47 N. H. 488; Wesson v. Washburn Iron Co., 13 Allen, 95; 90 Am. Dec. 181; Rhode Island etc. Bank v. Hawkins, 6 R. I. 198; Falls Village etc. Co. v. Tibbetts, 31 Conn. 165; Fish v. Dodge, 4 Denio, 311; 47 Am. Dec. 254; Catlin v. Valentine, 9 Paige, 575; 38 Am. Dec. 567; Brady v. Weeks, 3 Barb. 157; Auburn etc. Co. v. Douglass, 12 Barb. 553; Niagara Falls etc. Co. v. Great Western R'y, 39 Barb. 212; Gilbert v. Mickle, 4 Sand. Ch. 357; Peck v. Elder, 3 Sand. 126; Cleveland v. City Gas Light Co., 20 N. J. Eq. 201; Ross v. Butler, 19 N. J. Eq. 294; 97 Am. Dec. 654; Davidson v. Isham, 9 N. J. Eq. 186; Wolcott v. Melick, 11 N. J. Eq. 204; 66 Am. Dec. 790; Smith v. Cummings, 2 Pars. Cas. 92; Cunningham v. Rome R. R., 27 Ga. 499; Cotton v. Miss. etc. Co., 19 Minn. 497; Carlisle v. Cooper, 21 N. J. Eq. 576, 579, 580, 583–585, 587; Att'y-Gen. v. Steward, 21 N. J. Eq. 340; 20 N. J. Eq. 415; Holsman v. Boiling Spring etc.

§ 1351. **Same. Instances — Violations of Easements.**— Among the nuisances, or wrongs in the nature of nuisances, which equity readily prevents by injunction are those which consist in the interference with, disturbance, or destruction, actual or threatened, of easements and servitudes, whether created by grant or by covenant, or resulting from user. Some of the most common forms of such injuries which equity enjoins are the obstruction of ancient lights in England, and rights of air or of prospect, by erections of any kind; the removal of the lateral support of land by excavations; the interference with water rights by diverting or polluting streams. In fact, every disturbance of an easement or servitude, existing or threatened, will be thus restrained, whenever from the essential nature of the injury, or from its continuous character, the legal remedy is inadequate.[1] No sufficient notion can be ob-

Co., 14 N. J. Eq. 335, 342–345; Shimer v. Morris C. Co., 27 N. J. Eq. 363; Nat. Docks R'y v. Central R. R., 32 N. J. Eq. 755; Central R. R. v. Pa. R. R., 31 N. J. Eq. 475; Le Roy v. Wright, 4 Saw. 530; Perry v. Parker, 1 Wood. & M. 280, 282; Hart v. Mayor etc. of Albany, 3 Paige, 213; Tuolumne Water Co. v. Chapman, 8 Cal. 392; Hicks v. Michael, 15 Cal. 107, 116; Levaroni v. Miller, 34 Cal. 231; 91 Am. Dec. 692; Olmsted v. Loomis, 9 N. Y. 423: Hacker v. Barton, 84 Ill. 313; Robinson v. Baugh, 31 Mich. 290.

[1] The jurisdiction, where equitable servitudes have been impressed upon land by covenants in deeds of conveyance, etc., has already been examined: See *ante*, § 1342.

Interfering with easement of light and air: Att'y-Gen. v. Nichol, 16 Ves. 338; Wynstanley v. Lee, 2 Swanst. 333; Back v. Stacy, 2 Russ. 121; Tapling v. Jones, 11 H. L. Cas. 290; Aynsley v. Glover, L. R. 10 Ch. 283; Hackett v. Baiss, L. R. 20 Eq. 494; Smith v. Smith, L. R. 20 Eq. 500; Ecclesiastical Comm'rs v. Kino, L. R. 14 Ch. Div. 213; Thruston v. Minke, 32 Md. 487; Robeson v. Pittenger, 2 N. J. Eq. 57; 32 Am. Dec. 412; Irwin v. Dixion, 9 How. 10.

Removal of lateral support of land: Hunt v. Peake, Johns. 705; 6 Jur., N. S., 1071.

Interfering with water rights by diverting streams, polluting streams, etc.: The cases on this subject are very numerous. The jurisdiction is exercised alike against private persons and against public bodies, municipalities, boards, commissioners, etc.: Lane v. Newdigate, 10 Ves. 192; Chalk v. Wyatt, 3 Mer. 688; Att'y-Gen. v. Birmingham, 4 Kay & J. 528; Wood v. Sutcliffe, 2 Sim., N. S., 163; Lingwood v. Stowmarket Co., L. R. 1 Eq. 77, 336; Att'y-Gen. v. Richmond, L. R. 2 Eq. 306; Goldsmid v. Tunbridge etc. Comm'rs, L. R. 1 Ch. 349; 1 Eq. 161; Clowes v. Staffordshire etc. Co., L. R. 8 Ch. 125; Att'y-Gen. v. Guardians, L. R. 20 Ch. Div. 595, 604–610;

tained of the scope and efficiency of this injunctive jurisdiction, except from an actual examination of the numer-

Metropolitan Board v. London etc. R'y, L. R. 17 Ch. Div. 246; Att'y-Gen. v. Birmingham Board, L. R. 17 Ch. Div. 685, 691; Pugh v. Golden V. R'y, L. R. 15 Ch. Div. 330; Glassop v. Heston etc. Board, L. R. 12 Ch. Div. 102, 109; Newington etc. Board v. Cottingham etc. Board, 12 Ch. Div. 725, 734; West Cumberland etc. Co. v. Kenyon, L. R. 11 Ch. Div. 782; 6 Ch. Div. 773; Taylor v. Corporation of St. Helens, L. R. 6 Ch. Div. 264; Flower v. Local Board etc., L. R. 5 Ch. Div. 347, 352; Pennington v. Brinsopp etc. Co., L. R. 5 Ch. Div. 769; Att'y-Gen. v. Great East. R'y, L. R. 6 Ch. 572; Att'y-Gen. v. Leeds Corporation, L. R. 5 Ch. 583; Att'y-Gen. v. Colney Hatch etc. Asylum, L. R. 4 Ch. 146; Baxendale v. McMurray, L. R. 2 Ch. 790; Crossley v. Lightowler, L. R. 2 Ch. 478; Nuneaton L. Board v. General Sewage Co., L. R. 20 Eq. 127; Compton v. Lea, L. R. 19 Eq. 115, 121; Holt v. Corporation of Rochdale, L. R. 10 Eq. 354, 361; Carlisle v. Cooper, 21 N. J. Eq. 568, 579, 583, 585; Att'y-Gen. v. Steward, 21 N. J. Eq. 340; 20 N. J. Eq. 415; Shimer v. Morris Canal Co., 27 N. J. Eq. 363; Holsman v. Boiling Spring etc. Co., 14 N. J. Eq. 335; Jacobs v. Allard, 42 Vt. 303; 1 Am. Rep. 331; Bull v. Valley Falls Co., 8 R. I. 42; Frink v. Lawrence, 20 Conn. 117; 50 Am. Dec. 274; Fisk v. Wilber, 7 Barb. 395; Pollitt v. Long, 58 Barb. 20; Olmsted v. Loomis, 6 Barb. 152; Gardner v. Newburgh, 2 Johns. Ch. 162, 165; 7 Am. Dec. 526; Van Bergen v. Van Bergen, 2 Johns. Ch. 272; 3 Johns. Ch. 282; 8 Am. Dec. 511; Reid v. Gifford, Hopk. Ch. 416; Hammond v. Fuller, 1 Paige, 197; Arthur v. Case, 1 Paige, 447; Belknap v. Trimble, 3 Paige, 577, 600; Babcock v. New Jersey etc. Co., 20 N. J. Eq. 296; Spangler's Appeal, 64 Pa. St. 387; Sanderson v. Pennsylvania Coal Co., 86 Pa. St. 401; 27 Am. Rep. 711; Lewis v. Stein, 16 Ala. 214; 50 Am. Dec. 177; Burden v. Stein, 27 Ala. 104; 62 Am. Dec. 758.

The California reports are so rich in most instructive cases that I may properly cite freely from them: Fitzgerald v. Urton, 5 Cal. 308; Burdge v. Underwood, 6 Cal. 45; Tenney v. Miners' D. Co., 7 Cal. 335; Tuolumne W. Co. v. Chapman, 8 Cal. 392; Weimer v. Lowery, 11 Cal. 104; Boggs v. Merced M. Co., 14 Cal. 279, 379; Henshaw v. Clark, 14 Cal. 460; Hicks v. Michael, 15 Cal. 107; Weaver v. Eureka Lake Co., 15 Cal. 271; Hicks v. Compton, 18 Cal. 206; Bensley v. Mt. Lake W. Co., 13 Cal. 306; 73 Am. Dec. 575; Logan v. Driscoll, 19 Cal. 623; 81 Am. Dec. 90; McLaughlin v. Kelly, 22 Cal. 212; Kittle v. Pfeiffer, 22 Cal. 484; Rupley v. Welch, 23 Cal. 452; Robinson v. Russell, 24 Cal. 467; Wixon v. Bear River etc. Co., 24 Cal. 367; 85 Am. Dec. 69; Leach v. Day, 27 Cal. 643; Ferrea v. Knipe. 28 Cal. 340; 87 Am. Dec. 128; Grigsby v. Burtnett, 31 Cal. 406; More v. Massini. 32 Cal. 590; Hill v. Smith, 32 Cal. 166; Levaroni v. Miller, 34 Cal. 231; 91 Am. Dec. 692; Yolo Co. v. Sacramento, 36 Cal. 193; Grigsby v. Clear Lake W. Co., 40 Cal. 396; Gregory v. Nelson, 41 Cal. 278; Cowell v. Martin, 43 Cal. 605; Cave v. Crafts, 53 Cal. 135; Robinson v. Black Diamond Coal Co., 50 Cal. 460; 57 Cal. 412; 40 Am. Rep. 118; and see the very important case of Woodruff v. North Bloomfield etc. M. Co., 8 Saw. 628, to enjoin several hydraulic mining companies from discharging their mining *débris* into a river, by which the lands of the adjoining proprietors

ous and varying instances in which it has been exercised by the modern decisions.

below were destroyed, and the navigation of the river was impeded. Several of these California cases are very instructive with respect to injunctions against trespass.

Miscellaneous examples — Encroachments upon public parks, squares, and the like: Corning v. Lowerre, 6 Johns. Ch. 439; Hills v. Miller, 3 Paige, 254; 24 Am. Dec. 218; Trustees of Watertown v. Cowen, 4 Paige, 510.

Corporations encroaching upon the rights of adjoining proprietors: Coats v. Clarence R'y, 1 Russ. & M. 181; Bonaparte v. Camden etc. R. R., Bald. 205. 231; Mohawk etc. R. R. v. Artcher, 6 Paige, 83; Drake v. Hudson River R. R., 7 Barb. 508; Att'y-Gen. v. Tudor Ice Co., 104 Mass. 239; 6 Am. Rep. 227; Morris etc. R. R. v. Prudden, 20 N. J. Eq. 530.

Disturbance of a burying-ground: Beatty v. Kurtz, 2 Pet. 566, 584.

Ringing of church bells: Soltau v. De Held, 2 Sim., N. S., 133.

Illustrations of various other nuisances: Vernon v. Vestry of St. James, L. R. 16 Ch. Div. 449; Hedley v. Bates, L. R. 13 Ch. Div. 498; Sturges v. Bridgman, L. R. 11 Ch. Div. 852; Theed v. Debenham, L. R. 2 Ch. Div. 165: Broder v. Saillard, L. R. 2 Ch. Div. 692; Umfreville v. Johnson, L. R. 10 Ch. 580; Goodson v. Richardson, L. R. 9 Ch. 221; Att'y-Gen. v. Terry, L. R. 9 Ch. 423; Ball v. Ray, L. R. 8 Ch. 467; Thorpe v. Brumfitt, L. R. 8 Ch. 650; Gaunt v. Fynney, L. R. 8 Ch. 8; Hext v. Gill, L. R. 7 Ch. 699; Staight v. Burn, L. R. 5 Ch. 163; Inchbald v. Robinson, L. R. 4 Ch. 388; Att'y-Gen. v. Mid-Kent R'y, L. R. 3 Ch. 100; Clarke v. Clark, L. R. 1 Ch. 16; Tipping v. St. Helen's etc. Co., L. R. 1 Ch. 66; Ivimey v. Stocker, L. R. 1 Ch. 396; Smith v. Smith, L. R. 20 Eq. 500; Fenwick v. East London R'y, L. R. 20 Eq. 544; Allen v. Martin, L. R. 20 Eq. 462; Mott v. Shoolbred, L. R. 20 Eq. 22; Dyers's Co. v. King, L. R. 9 Eq. 438; Walker v. Brewster, L. R. 5 Eq. 25; Beadel v. Perry, L. R. 3 Eq. 465; Crump v. Lambert, L. R. 3 Eq. 409; Martin v. Headon, L. R. 2 Eq. 425, 434; Dent v. Auction Mart Co., L. R. 2 Eq. 238, 244, 246, 247; Broadbent v. Imperial Gas Co., 7 De Gex, M. & G. 436, 460, 462; 7 H. L. Cas. 600; St. Helen's etc. Co. v. Tipping, 11 H. L. Cas. 642; Watson v. Sutherland, 5 Wall. 74; Parker v. Winnipiseogee etc. Co., 2 Black, 545; Cadigan v Brown, 120 Mass. 493; Richmond Mfg. Co. v. Atlantic etc. Co., 10 R. I. 106; 14 Am. Rep. 658; Duncan v. Hayes, 22 N. J. Eq. 25; Meigs v. Lister, 23 N. J. Eq. 199; O'Riley v. McChesney, 3 Lans. 278; Snow v. Williams, 16 Hun, 468; Rothery v. N. Y. Rubber Co., 24 Hun, 172; Seaman v. Lee, 10 Hun. 607; Beach v. Elmira, 22 Hun, 158; Henderson v. N. Y. Cent. R. R., 78 N. Y. 423; Lynch v. Mayor etc., 76 N. Y. 60; 32 Am. Rep. 271; Adams v. Popham, 76 N. Y. 410; Campbell v. Seaman, 63 N. Y. 568; 20 Am. Rep. 567; Olmsted v. Loomis, 9 N. Y. 423; Davis v. Lambertson, 56 Barb. 480; Owen v. Phillips, 73 Ind. 284; Wahle v. Reinbach, 76 Ill. 322; Greene v. Nunnemacher, 36 Wis. 50; Pettibone v. Hamilton, 40 Wis. 402; Lewis v. Stein, 16 Ala. 214; 50 Am. Dec. 177; Ex parte Martin, 13 Ark. 198; 58 Am. Dec. 321; Lamborn v. Covington Co., 2 Md. Ch. 409.

It is only by examining a large number of decisions that any adequate notion can be obtained of the wide extent of this jurisdiction, as well as of

§ 1352. **Patent Rights and Copyrights.**— When the existence of a patent right or of a copyright is conceded, or has been established by an action at law, the jurisdiction of equity to restrain an infringement is too well settled and familiar to require the citation of authorities in its support. From the nature of the right and of the wrong,— the violation being a continuous act,— the legal remedy is necessarily inadequate. The ordinary form of relief is an accounting of profits and an injunction in equity; indeed, the action at law is seldom resorted to, except for the purpose of establishing the validity of the patent or copyright by the verdict of a jury when it is really contested. Under the constitution of the United States, the cognizance of suits for the infringement of these rights belongs exclusively to the federal courts.[1]

§ 1353. **Literary Property as Distinct from Copyright.**— In analogy to the protection of copyrights, a jurisdiction has become well established by modern decisions to restrain the invasion or piracy of literary property in the product of intellectual labor, which still remains in the form of manuscript, or which, if printed, has not been published, and over which, as a consequence, no statutory copyright has been obtained; and to restrain an invasion of the similar right which an artist has in his pictures, and other original works of his creative art. This jurisdiction belongs to the state courts. It will be exercised to restrain the unauthorized publication of *unpublished* manuscript or printed matter in violation of the rights of the person entitled thereto;[1] the unauthorized publication, perform-

its limitations. These cases show that the jurisdiction is not exercised merely in exceptional cases, as might be inferred from some judicial language.

§ 1352, [1] Hogg v. Kirby, 8 Ves. 215, 223; Nicol v. Stockdale, 3 Swanst. 687; Bacon v. Jones, 4 Mylne & C. 433, 436; Saunders v. Smith, 3 Mylne & C. 711, 728; Martin v. Wright, 6 Sim. 297. See Curtis on Patent and Copyrights, and Webster's Patent Cases.

§ 1353, [1] Duke of Queensberry v. Shebbeare, 2 Eden, 329; Pope v. Curl, 2 Atk. 342; Southey v. Sherwood, 2 Mer. 435, 437; Keene v. Wheatley, 9 Am. Law Reg. 33; Folsom v. Marsh, 2 Story, 100; Grigsby v. Breckenridge, 3 Bush, 480; 92 Am. Dec. 509.

ance, representation on the stage, or other similar uses of dramatic compositions which have not been "published" by the author or proprietor;[2] the unauthorized publication, delivery, or other like use of lectures which have been delivered by the author, but not otherwise published;[3] the unauthorized making, sale, or exhibition of copies of paintings, engravings, and other works of art, even though the originals may have been publicly exhibited;[4] and the unauthorized publication of private letters, whether on literary topics, or on matters of private business, friendship, or family.[5]

§ 1354. **Trade-marks.**—Somewhat akin to the protection of patent and copy rights is that which courts of equity give, by means of the injunction, to the peculiar species of right arising from the adoption and use of "trade-marks." Although some judicial opinions and some recent statutes speak of "property" in trade-marks, or call the right to their exclusive use a kind of property, yet in strictness the remedy does not depend upon any true *property* acquired in these symbols and names, but upon the broad principle that a court of equity will not permit fraud to be practiced upon the public nor upon private individuals.[1] It is well settled by modern decisions, that

[2] Keene v. Kimball, 16 Gray, 545; 77 Am. Dec. 426; Keene v. Clarke, 5 Rob. (N. Y.) 38; Palmer v. De Witt, 47 N. Y. 532; 7 Am. Rep. 480; 2 Sweeny, 530; 5 Abb. Pr., N. S., 130; Boucicault v. Fox, 5 Blatchf. 87; Keene v. Wheatley, 9 Am. Law Reg. 33; Crowe v. Aiken, 4 Am. Law Rev. 450.

[3] Abernethy v. Hutchinson, 1 Hall & T. 28, 40; 3 L. J. Ch. 209; Keene v. Kimball, 16 Gray, 545; 77 Am. Dec. 426, per Hoar, J.; Bartlett v. Crittenden, 4 McLean, 300.

[4] Prince Albert v. Strange, 1 Macn. & G. 25; 1 Hall & T. 1; 2 De Gex & S. 652; Turner v. Robinson, 10 Ir. Ch. 121, 510.

[5] The restraint may be at the suit of the writer against the person written to, or his assigns, or a stranger, or at the suit of the person written to, or his personal representatives against a stranger: Pope v. Curl, 2 Atk. 342; Gee v. Pritchard, 2 Swanst. 402; Thompson v. Stanhope, Amb. 737; Lord Perceval v. Phipps, 2 Ves. & B. 19, 24; Earl of Granard v. Dunkin, 1 Ball & B. 207; Folsom v. Marsh, 2 Story, 100, 113; Hoyt v. Mackenzie, 3 Barb. Ch. 320; Wetmore v. Scovell, 3 Edw. Ch. 515, 529; Woolsey v. Judd, 4 Duer, 379.

[1] The ground of the remedy was stated in Farina v. Silverlock, 6 De

when a trade-mark has been duly acquired by a manufacturer or dealer, an injunction will be granted at his suit to restrain other persons from using it upon their goods, or from using such imitations of it as will tend to mislead and deceive the public.[2] For a discussion of the numerous

Gex, M. & G. 214, 217: "This right cannot properly be described as a copyright; it is, in fact, a right which can be said to exist only, and can be tested only, by its violation; it is the right which any person designating his wares or commodities by a particular trade-mark, as it is called, has to prevent others from selling wares which are not his, marked with that trade-mark, in order to mislead the public, and so incidentally to injure the person who is owner of the trade-mark."

[2] Burgess v. Burgess, 3 De Gex, M. & G. 896; Rogers v. Nowill. 3 De Gex, M. & G. 614; Farina v. Silverlock, 6 De Gex, M. & G. 214; Edelsten v. Edelsten, 1 De Gex, J. & S. 185; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523; 4 De Gex, J. & S. 137; Flavel v. Harrison, 10 Hare, 467; Holloway v. Holloway, 13 Beav. 209; Cocks v. Chandler, L. R. 11 Eq. 446; Marshall v. Ross, L. R. 8 Eq. 651; Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345; Radde v. Norman. L. R. 14 Eq. 348; Hirst v. Denham, L. R. 14 Eq. 542; Seixo v. Provezende, L. R. 1 Ch. 192; Lee v. Haley, L. R. 5 Ch. 155; Wotherspoon v. Currie, L. R. 5 H. L. 508; Perry v. Truefitt, 6 Beav. 66; Collins Co. v. Brown, 3 Kay & J. 423; Collins Co. v. Cowen, 3 Kay & J. 428; Singer Mfg. Co. v. Loog, L. R. 18 Ch. Div. 395; Hendriks v. Montagu, L. R. 17 Ch. Div. 638 (using a name); Orr Ewing v. Johnston, L. R. 13 Ch. Div. 434; Civil Service etc. Ass'n v. Dean, L. R. 13 Ch. Div. 512; Boulnois v. Peake, L. R. 13 Ch. Div. 513, note; Day v. Brownrigg, L. R. 10 Ch. Div. 294; Merch. Bank Co. v. Merch. Bank, L. R. 9 Ch. Div. 560 (using name); Seigert v. Findlater, L. R. 7 Ch. Div. 801; Linoleum Mfg. Co. v. Nairn, L. R. 7 Ch. Div. 834; Braham v. Beachim, L. R. 7 Ch. Div. 848; Moet v. Pickering, L. R. 6 Ch. Div. 770; Cheavin v. Walker, L. R. 5 Ch. Div. 850; Hirsch v. Jonas, L. R. 3 Ch. Div. 584; Singer Mfg. Co. v. Wilson, L. R. 2 Ch. Div. 434; Estcourt v. Estcourt etc. Co., L. R. 10 Ch. 276; Upmann v. Elkan, L. R. 7 Ch. 130; 12 Eq. 140; Ford v. Foster, L. R. 7 Ch. 611; Cope v. Evans, L. R. 18 Eq. 138; Raggett v. Findlater, L. R. 17 Eq. 29; James v. James, L. R. 13 Eq. 421; Hall v. Barrows, 4 De Gex, J. & S. 150; Coffeen v. Brunton, 5 McLean, 256; Canal Co. v. Clark, 13 Wall. 311; Ames v. King, 2 Gray, 379; Boardman v. Meriden Britannia Co., 35 Conn. 402; 95 Am. Dec. 270; Bradley v. Norton, 33 Conn. 157; 87 Am. Dec. 200; Congress etc. Spring Co. v. High Rock etc. Co., 45 N. Y. 291; 6 Am. Rep. 82: Smith v. Woodruff, 48 Barb. 438; Samuel v. Berger, 24 Barb. 163; Howard v. Henriques, 3 Sand. 725; Palmer v. Harris, 60 Pa. St. 156; 100 Am. Dec. 557; Rowley v. Houghton, 2 Brewst. 303; Dixon Crucible Co. v. Guggenheim, 2 Brewst. 321; McCartney v. Garnhart, 45 Mo. 593; 100 Am. Dec. 397; Filley v. Fassett, 44 Mo. 168; 100 Am. Dec. 275; Gillott v. Esterbrook, 48 N. Y. 374; 8 Am. Rep. 553; 47 Barb. 455; Godillot v. Harris, 81 N. Y. 263; Burnett v. Phalon, 3 Keyes, 594; Gillott v. Kettle, 3 Duer, 624; Amoskeag Mfg. Co.

questions concerning the nature and validity of trade-marks, who may acquire them, how they may be acquired, what imitations are wrongful, and the like, the reader must be referred to the special treatises upon the subject.

§ 1355. **Good-will.**— Another intangible kind of property which will be protected from invasion by injunction is "good-will." The peculiar right, or rather expectancy, called "good-will," assumes that a certain business has been established and carried on at some specific place. It consists in the probability, based upon the habits of men, that the persons who have been accustomed to deal with that business at that specific place, as well as others, will continue to come to such place and deal in the future. When such a business is transferred, the good-will may be assigned with it.[1] If a good-will is thus assigned with a business, interference with it by the assignor will generally be restrained by injunction.[2]

§ 1356. **Trespasses.**— At an early day the court of chancery refused to interfere and restrain any trespasses.

v. Spear, 2 Sand. 599; Lockwood v. Bostwick, 2 Daly, 521; Curtis v. Bryan, 2 Daly, 312; Fetridge v. Wells, 4 Abb. Pr. 144; Coats v. Holbrook, 2 Sand. Ch. 586; Taylor v. Carpenter, 2 Sand. Ch. 603; 11 Paige, 292; 42 Am. Dec. 114; Woodward v. Lazar, 21 Cal. 448; 82 Am. Dec. 751; Derringer v. Plate, 29 Cal. 292; 87 Am. Dec. 170; Falkinburg v. Lucy, 35 Cal. 52; 95 Am. Dec. 76; Choynski v. Cohen, 39 Cal. 501; 2 Am. Rep. 476; Burke v. Cassin, 45 Cal. 467; 13 Am. Rep. 204; Coffeen v. Brunton, 4 McLean, 516; Walton v. Crowley, 3 Blatchf. 440; Hostetter v. Vowinkle, 1 Dill. 329; Heath v. Wright, 3 Wall. Jr. 141; Taylor v. Carpenter, 3 Story, 458; 2 Wood. & M. 1; Moorman v. Hoge, 2 Saw. 78; Taylor v. Gillies, 59 N. Y. 331; 17 Am. Rep. 333; Gouraud v. Trust, 6 Thomp. & C. 133; 3 Hun, 627; Meneely v. Meneely, 3 Thomp. & C. 540; 1 Hun, 367.

[1] Independently of statute, a good-will by itself, without the business on which it depends, cannot be assigned: See Cal. Civ. Code, secs. 992, 993.

[2] When a person who had carried on a business at a certain locality transfers the business with its good-will, if he should set up the same business again so near the locality as to draw off the customers from the old place, this would be an infringement of the good-will. The legal remedy would be inadequate, for it would always be very difficult, if not impossible, to estimate the pecuniary damages upon any certain basis. The gist of the injury is undoubtedly the breach of an implied contract arising from the transfer; and often there is an express stipulation: See *ante*, under § 1344, cases concerning contracts in restraint of trade.

Lord Thurlow broke through this rule, and began to use the preventive relief against such wrongs. He was followed by Lord Eldon;[1] and the jurisdiction is now firmly established in its principles, although there is no little disagreement among the courts — and especially the American courts — in applying these principles.

§ 1357. **General Doctrine — Cases in Which Trespass may be Enjoined.**— If a trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere. The *principle* determining the jurisdiction embraces two classes of cases, and may be correctly formulated as follows: 1. If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable,— that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced, by means of compensation in money,— then the wrong will be prevented or stopped by injunction. 2. If the trespass is *continuous* in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act *if it stood alone,* then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the inadequacy of the legal remedy.[1] All the cases, English and American, have

§ 1356, [1] See opinion of Lord Eldon in Thomas v. Oakley, 18 Ves. 184; Hanson v. Gardiner, 7 Ves. 305.

§ 1357, [1] The legal remedy is not adequate simply because a recovery of pecuniary damages is possible. It is only adequate when the injured party can, *by one action at law,* recover damages which constitute a complete and certain relief for the whole wrong, — a relief virtually as efficient as that given by a court of equity. This conclusion is sustained by the consensus of modern decisions of the highest authority; although it cannot be claimed that the cases are unanimous in its acceptance. The principle, so far as it applies to the first class of trespasses — those *essentially* destructive — was stated by Chancellor Kent in two leading cases, which may be regarded as

professed to adopt the inadequacy of legal remedies as the test and limit of the injunctive jurisdiction; but in applying this criterion, the modern decisions, with some exceptions among the American authorities, have certainly held the injury to be irreparable and the legal remedy inadequate in many instances and under many circumstances where Chancellor Kent would probably have refused to interfere. It is certain that many trespasses are now enjoined which, if committed, would fall far short of *destroying* the property, or of rendering its restoration to its original condition impossible. The injunction is granted, not merely because the injury is *essentially* destructive, but because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages.[2] While the same formula is employed

the counterparts of each other: Livingston v. Livingston, 6 Johns. Ch. 497, 499; 10 Am. Dec. 353; and Jerome v. Ross, 7 Johns. Ch. 315, 333; 11 Am. Dec. 484. In Livingston v. Livingston, he granted an injunction, citing and relying upon the following English cases, among others: Mitchell v. Dors, 6 Ves. 147; Hamilton v. Worsefold, cited 10 Ves. 290; Crockford v. Alexander, 15 Ves. 138; Twort v. Twort, 16 Ves. 128; Kinder v. Jones, 17 Ves. 110; Earl Cowper v. Baker, 17 Ves. 128; Gray v. Duke of Northumberland, 17 Ves. 281; and Thomas v. Oakley, 18 Ves. 184. In Jerome v. Ross, *supra*, he refused to enjoin canal commissioners, acting under color of a state statute, from quarrying a ledge of rocks on complainant's land, it not appearing that the stone had any market value, or that its removal would injure the freehold. He cited Stevens v. Beekman, 1 Johns. Ch. 318, and distinguished Gardner v. Newburgh, 2 Johns. Ch. 162, and Belknap v. Belknap, 2 Johns. Ch. 463. Whatever may be thought of the actual decision in Jerome v. Ross, it cannot be denied that the tendency of Chancellor Kent's opinion in narrowing the jurisdiction to the comparatively few trespasses of an extraordinary and specially aggravated nature is opposed to the modern decisions of the highest ability and authority.

[2] Illustrations: Injury to houses, fixtures, land, etc.: De Veney v. Gallagher, 20 N. J. Eq. 33; Witmer's Appeal, 45 Pa. St. 455; 84 Am. Dec. 505; Frederick v. Groshon, 30 Md. 436; 96 Am. Dec. 591; Ryan v. Brown, 18 Mich. 196; 100 Am. Dec. 154; Echelkamp v. Schrader, 45 Mo. 505. Injuring a party-wall: Phillips v. Bordman, 4 Allen, 147. Cutting off an aqueduct or water supply: Wilcox v. Wheeler, 47 N. H. 488; Wright v. Moore, 38 Ala. 593; 82 Am. Dec. 731; Pettigrew v. Evansville, 25 Wis. 223; 3 Am. Rep. 50. Obstructing a railroad, or access to it: London etc. R'y v. Lancashire etc. R'y, L. R. 4 Eq. 174; Clark v. Jeffersonville etc. R. R., 44 Ind. 248. Destroying trees, ornamental or timber: Sarles v. Sarles, 3 Sand. Ch. 601; Daubenspeck v. Grear, 18 Cal. 443. Excavating ore, coal,

by the courts of equity in defining their jurisdiction, the jurisdiction itself has practically been enlarged; judges have been brought to see and to acknowledge — contrary to the opinion held by Chancellor Kent — that the common-law theory of not *interfering* with persons until they shall have actually committed a wrong is fundamentally erroneous, and that a remedy which *prevents* a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess. The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed. I have placed in the foot-note some illustrations of numerous particular cases in which the injunction has been granted, all depending upon their own circumstances, but all resting upon the same general principle, that the legal remedy of damages

stones, etc.: West Point Iron Co. v. Reymert, 45 N. Y. 703; Anderson v. Harvey's Heirs, 10 Gratt. 386; Merced etc. Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262; Real Del Monte etc. Co. v. Pond etc. Co., 23 Cal. 82; More v. Massini, 32 Cal. 590. Diverting a stream from a mill: Corning v. Troy etc. Factory, 40 N. Y. 191. Continuous or repeated trespasses: Martyr v. Lawrence, 2 De Gex, J. & S. 261, 271; Allen v. Martin, L. R. 20 Eq. 462; Carpenter v. Gwynn, 35 Barb. 395; Musselman v. Marquis, 1 Bush, 463; 89 Am. Dec. 637.

Examples of cases where an injunction was *refused:* Smith v. Pettingill, 15 Vt. 82; 40 Am. Dec. 667; Attaquin v. Fish, 5 Met. 140, 147; Blake v. Brooklyn, 26 Barb. 301; Hart v. Albany, 9 Wend. 571: Southard v. Morris Canal Co., 1 N. J. Eq. 519, 521; Lutheran Church v. Maschop, 10 N. J. Eq. 57; Cross v. Morristown, 18 N. J. Eq. 305; Torrey v. Camden etc. R. R., 18 N. J. Eq. 293; Colwell v. Mays Landing etc. Co., 19 N. J. Eq. 245; Mulvany v. Kennedy, 26 Pa. St. 44; Georges Creek etc. Co. v. Detmold, 1 Md. Ch. 371; Duvall v. Waters, 1 Bland, 569, 577; 18 Am. Dec. 350; Davis v. Reed, 14 Md. 152; Cherry v. Stein, 11 Md. 1; Shipley v. Ritter, 7 Md. 408; 61 Am. Dec. 371; Gause v. Perkins, 3 Jones Eq. 177; 69 Am. Dec. 728; Scofield v. Van Bokkelen, 5 Jones Eq. 342; Thomas v. James, 32 Ala. 723; Lyon v. Hunt, 11 Ala. 295, 306; 46 Am. Dec. 216; Indianapolis etc. Co. v. Indianapolis, 29 Ind. 245; Blanchard v. Doering, 23 Wis. 200; Weigel v. Walsh, 45 Mo. 560. See also the following cases, illustrating, — 1. Trespasses which, though single, wrought great injury to property; and 2. Trespasses which were continuous: Powell v. Aiken, 4 Kay & J. 343, 355; Great North. etc. R'y v. Clarence R'y, 1 Coll. C. C. 507; Phillips v. Truby, 8

is not adequate, and the ends of justice require the relief of prevention in place of mere compensation.

§ 1358. **Slander of Title — Libels — Wrongful Use of Name.** — Partly by analogy with the restraint of trespasses, and partly by analogy with the restraint of that fraud upon the public and upon the proprietor which is involved in the use of counterfeited trade-marks, the English courts have, by recent decisions, exercised the injunctive jurisdiction to restrain injurious publications concerning property which operate as a slander of the owner's title, and libelous publications which are injurious to the plaintiff's business, trade, or profession, and the wrongful use of a name by which the public would be misled, and the plaintiff injured in his business.[1] This extension of the juris-

Jur., N. S., 999; Manchester etc. R'y v. Worksop Board of Health, 23 Beav. 198, 209; Corning v. Troy Iron and Nail Factory, 40 N. Y. 191, 205, 206; 39 Barb. 311, 319, 325–328; 34 Barb. 485, 491, 492; 6 How. Pr. 89; Davis v. Lambertson, 56 Barb. 480, 485; Niagara Falls etc. Co. v. Great W. R'y, 39 Barb. 212, 224. Further illustrations: Stannard v. Vestry of St. Giles, L. R. 20 Ch. Div. 190, 196; Strelley v. Pearson, L. R. 15 Ch. Div. 113, 116; Hall v. Byron, L. R. 4 Ch. Div. 667; Stanford v. Hurlstone, L. R. 9 Ch. 116; Hext v. Gill, L. R. 7 Ch. 699; Lord Auckland v. Westminster Board, L. R. 7 Ch. 597; London etc. R'y v. Lancashire etc. R'y, L. R. 4 Eq. 174; Bowser v. Maclean, 2 De Gex, F. & J. 415; Lloyd v. London etc. R'y, 2 De Gex, J. & S. 568, 578; Watson v. Sutherland, 5 Wall. 74; Chapman v. Toy Long, 4 Saw. 28; Patton v. Moore, 16 W. Va. 428; 37 Am. Rep. 789; Pierpont v. Harrisville, 9 W. Va. 215; West v. Smith, 52 Cal. 322; Gilman v. Sheboygan etc. R. R., 40 Wis. 653; Carpenter v. Grisham, 59 Mo. 247; Clark v. Jeffersonville etc. R. R., 44 Ind. 248; Folley v. Passaic, 26 N. J. Eq. 216; Southmayd v. McLaughlin, 24 N. J. Eq. 181; Johnston v. Hyde, 25 N. J. Eq. 454; 33 N. J. Eq. 632; Echelkamp v. Schrader, 45 Mo. 505; Hacker v. Barton, 84 Ill. 313; Bohlman v. Green Bay etc. R'y, 40 Wis. 157, 169; Wilson v. Mineral Point, 39 Wis. 160; Avery v. Empire Woolen Co., 82 N. Y. 582; Henderson v. N. Y. Cent. R. R., 78 N. Y. 423; Prot. Ref. Dutch Church v. Bogardus, 5 Hun, 304; Morgan v. Palmer, 48 N. H. 336; Creely v. Bay State B. Co., 103 Mass. 514; and see the California cases cited *ante*, under Private Nuisance.

[1] Such publications may be restrained by preliminary as well as by final injunction. The jurisdiction is exercised with great caution, and only where the facts are clearly established, and the untruth of the publication is satisfactorily shown. The following are the most important cases: Quartz Hill etc. Co. v. Beall, L. R. 20 Ch. Div. 501, 507 (libel on a corporation); Halsey v. Brotherhood, L. R. 19 Ch. Div. 386; 15 Ch. Div. 514 (slander of title to a patent right); Dicks v. Brooks, L. R. 15 Ch. Div.

diction is not based, as it seems, upon any statutory enlargement of the inherent powers of equity; but is the result of the new system by which the one court is empowered to administer both legal and equitable remedies in any and all actions. The American courts seem, thus far, unwilling to follow the example of the recent English decisions, and they decline to extend the jurisdiction so as to restrain such torts as libels on business, slanders of title, and the like.[2]

22 (same); Thomas v. Williams, L. R. 14 Ch. Div. 864, 871, 872 (libel injurious to a trade); Thorley's Cattle Food Co. v. Massam, L. R. 14 Ch. Div. 763, reversing L. R. 6 Ch. Div. 582 (same; a leading case). In Prudential Ass. Co. v. Knott, L. R. 10 Ch. 142, Fisher v. Appollinaris Co., L. R. 10 Ch. 297, Clover v. Royden, L. R. 17 Eq. 190, and Mulkern v. Ward, L. R. 13 Eq. 619, the jurisdiction to enjoin such libelous publications was denied; while in Dixon v. Holden, L. R. 7 Eq. 488, and Springhead etc. Co. v. Riley, L. R. 6 Eq. 551, it had been exercised. See also Shaw v. Earl of Jersey, L. R. 4 C. P. D. 120, 359; Saxby v. Easterbrook, L. R. 3 C. P. D. 339. As to restraining the use of plaintiff's name by defendant in his own business, see Fullwood v. Fullwood, L. R. 9 Ch. Div. 176; James v. James, L. R. 13 Eq. 421; Massam v. Thorley's etc. Co., L. R. 6 Ch. Div. 574; Day v. Brownrigg, L. R. 10 Ch. Div. 294. In Emperor of Austria v. Day, 3 De Gex, F. & J. 217, it was held that an injunction would be granted at the suit of a foreign sovereign to restrain the manufacture and issue, within English territory, of spurious notes and securities of the foreign government.

[2] In Massachusetts these decisions are expressly repudiated: Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69; 19 Am. Rep. 310; Whitehead v. Kitson, 119 Mass. 484. Injunctions to restrain libelous publications concerning the plaintiff's business were also refused in Life Ass'n v. Boogher, 3 Mo. App. 173; Mauger v. Dick, 55 How. Pr. 132; and Singer Mfg. Co. v. Domestic etc. Co., 49 Ga. 70; 15 Am. Rep. 674. In Celluloid Mfg. Co. v. Goodyear etc. Co., 13 Blatchf. 375, the jurisdiction is recognized to restrain such publications when they are not only false and injurious, but also malicious.

SECTION III.

MANDATORY INJUNCTIONS.

ANALYSIS.

§ 1359. Nature and object; when granted.

§ 1359. **Nature and Object — When Granted.**— This term, in strictness, is confined to interlocutory or preliminary injunctions. Where, on the final hearing in a case of nuisance, or interference with easements, or continued trespass analogous to nuisance, the relief is granted compelling the defendant to remove his obstructions or erections, and to restore the plaintiff to his original condition, and thereby to end the wrong, the remedy is in fact an ordinary decree for an abatement, and is in no proper sense an injunction of any kind. But in these and similar cases the *preliminary* injunction, while purporting simply to restrain the wrong, and while negative in its terms, may be so framed that it restrains the defendant from permitting his previous wrongful act to operate, and therefore virtually compels him to undo it by removing the obstructions or erections, and by restoring the plaintiff to his former condition. Such an injunction is termed mandatory, and resembles in its effect the restorative interdict of the Roman law. It is used where the injury is immediate, and pressing, and irreparable, and clearly established by the proofs, and not acquiesced in by the plaintiff, since an order directly compelling an abatement of the nuisance, or a removal of the obstructions, cannot be made upon interlocutory motion.[1]

[1] Preliminary mandatory injunctions have undoubtedly been granted more freely by the English courts than by the American. Indeed, it has been said in some American decisions that a mandatory *interlocutory* injunction would never be granted. This doctrine is not only opposed to the overwhelming weight of authority, but is contrary to the principle which regulates the administration of preventive relief, and is manifestly absurd. In Robinson v. Lord Byron, 1 Brown Ch. 588, Lord Eldon granted a

The rule is fully established, at least by the English decisions, and is not controverted by American authority, that in such cases, where the facts are clearly established and the injury is real, and the plaintiff acted promptly upon his acquiring knowledge of the defendant's proceeding, a preliminary mandatory injunction may be granted, although the act complained of was fully completed before

preliminary injunction restraining defendant "from using and maintaining certain dams, gates, etc., so as to prevent water from flowing to plaintiff's mill as it had done." This was done for the express purpose of compelling defendant to remove the dams, gates, etc., which he had constructed. In Lane v. Newdigate, 10 Ves. 192, Lord Eldon granted a preliminary injunction restraining defendant "from impeding plaintiff from navigating [a certain canal] by continuing to keep the canal banks and works out of repair, by diverting the water, or by continuing the removal of the stop-gate." Lord Eldon said this would have the effect of causing defendant to restore the stop-gate and repair the banks; and he avowedly granted the injunction for that express object. These two cases are among the earliest, if not the very earliest, instances of preliminary injunctions intentionally and expressly mandatory in their operation. The following cases will furnish numerous illustrations, and will also show the limitations placed upon their use: Rankin v. Huskisson, 4 Sim. 13; Hervey v. Smith, 1 Kay & J. 389, 392; Att'y-Gen. v. Metropolitan Board of Works, 1 Hem. & M. 298, 312; Hepburn v. Lordan, 2 Hem. & M. 345, 352; Earl of Mexborough v. Bower, 7 Beav. 127, 133; Greatrex v. Greatrex, 1 De Gex & S. 692; Green v. Green, 5 Hare, 400, note; Great North of England R'y v. Clarence R'y. 1 Coll. C. C. 507, 517, 521, 526; Blakemore v. Glamorganshire Canal Nav., 1 Mylne & K. 154, 183; Spencer v. Birmingham R'y, 8 Sim. 193, 198; Att'y-Gen. v. Manchester R'y, 8 Sim. 436; Hooper v. Brodrick, 11 Sim. 47; Gaskin v. Balls, L. R. 13 Ch. Div. 324; Krehl v. Burrell, L. R. 7 Ch. Div. 551; Cooke v. Chilcott, L. R. 3 Ch. Div. 694; Lord Manners v. Johnson, L. R. 1 Ch. Div. 673; City of London etc. Co. v. Tennant, L. R. 9 Ch. 212; Holmes v. Upton, L. R. 9 Ch. 214, note; Goodson v. Richardson, L. R. 9 Ch. 221; Att'y-Gen. v. Mid-Kent R'y, L. R. 3 Ch. 100; Durell v. Pritchard, L. R. 1 Ch. 244; Smith v. Smith, L. R. 20 Eq. 500; Lady Stanley v. Earl of Shrewsbury, L. R. 19 Eq. 616; Bowes v. Law, L. R. 9 Eq. 636; Senior v. Pawson, L. R. 3 Eq. 330; Beadel v. Perry, L. R. 3 Eq. 465; Martin v. Headon, L. R. 2 Eq. 425; Spokes v. Banbury Board of Health, L. R. 1 Eq. 42; Curriers' Co. v. Corbett, 4 De Gex, J. & S. 764; Jacomb v. Knight, 3 De Gex, J. & S. 533; Low v. Innes, 4 De Gex, J. & S. 286; Isenberg v. East India House Co., 3 De Gex, J. & S. 263; Kernot v. Potter, 3 De Gex, F. & J. 447; Black v. Good Intent etc. Co., 31 La. Ann. 497; Longwood etc. R. R. v. Baker, 27 N. J. Eq. 166; Rogers Locomotive Works v. Erie R. R., 20 N. J. Eq. 379; Cole etc. Min. Co. v. Virginia etc. Water Co., 1 Saw. 685; Corning v. Troy Iron etc. Factory, 40 N. Y. 191, 205; Auburn etc. P. R. v. Douglass, 12 Barb. 553; Penniman v. N. Y. Balance etc. Co., 13 How. Pr. 40.

the suit was commenced. It should be observed, however, that no other equitable remedy is more liable to be defeated by acquiescence, or by delay on the plaintiff's part from which acquiescence may be inferred. The cases require of the plaintiff a promptness in objecting and in taking steps to enforce his objection, upon receiving notice of the defendant's structures or erections which are sought to be restrained, if the circumstances are such that the defendant would be unnecessarily prejudiced by the plaintiff's delay.[2]

SECTION IV.

TO RESTRAIN ACTIONS OR JUDGMENTS AT LAW.

ANALYSIS.

§ 1360. Origin of the jurisdiction.
§ 1361. When the jurisdiction is not exercised: General doctrine.
§ 1362. When the jurisdiction may be exercised: First class; exclusive equitable interests or rights involved.
§ 1363. The same: Second class; legal remedies inadequate.
§ 1364. The same: Third class; fraud, mistake, or accident in the trial at law.
§ 1365. Jurisdiction to grant new trials at law in the United States.

§ 1360. Origin of the Jurisdiction.— The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction. Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and

[2] See *ante*, vol. 2, § 817. In some cases a delay by the plaintiff would clearly not be prejudicial to defendant. For example, in Greatrex v. Greatrex, 1 De Gex & S. 692, one partner had wrongfully removed the partnership books from the place of business, and a preliminary injunction was granted, restraining him "from keeping them or permitting them to be kept at any other place than the place of business," thus compelling him to restore the books. Here a delay of weeks or even months could work the defendant no harm. Where the injunction is sought to compel the removal of structures, walls, buildings, and the like, if the plaintiff knowingly permit the defendant to go on and incur any considerable further expenditure of money before he makes objection, he will generally lose his right to the somewhat special remedy of a mandatory injunction.

enforced its own jurisdiction.[1] It is no exaggeration to say that, during its formative periods, the equitable jurisdiction was built up through the instrumentality of the injunction restraining the prosecution of legal actions, where the defendants sought the aid of chancery, which alone could take cognizance of the equities that would defeat a recovery at law against them. This was not accomplished, however, without a long and severe opposition from the common-law judges, which continued until the reign of James I.[2] The jurisdiction then firmly established by judicial authority has never since been questioned.[3] The reasons urged by the common-law judges were frivolous. The injunction is not addressed to, nor does it operate upon, the courts of law; instead of denying or interfering with, it virtually admits and assumes, their jurisdiction. It is addressed to the litigant parties, and prohibits them from resorting to the legal jurisdiction, because their controversies, depending upon equitable principles, or involving equitable features, can only be fully and finally determined by a tribunal having the equitable jurisdiction. Injunction is the remedy which, above all others, necessarily operates *in personam.*

§ 1361. **When the Jurisdiction is not Exercised — General Doctrine.**— Where a court of law can do as full justice to the parties and to the matter in dispute as can be done in equity, a court of equity will not stay proceedings at law.[1] Equity will not restrain a legal action or judgment where the controversy would be decided by the court of equity upon a ground equally available at law, unless the party invoking the aid of equity can show some special *equitable* feature or ground of relief; and in the case assumed, this special fea-

§ 1360, [1] See 1 Spence's Eq. Jur. 674.

§ 1360, [2] For a full account of this memorable contest, and its settlement under James I., see 1 Lord Campbell's Lives of the Chancellors, 235; 1 Spence's Eq. Jur. 675; 1 Hallam's Const. Hist. 472.

§ 1360, [3] Ayloffe v. Duke, 2 Freem. Ch. 152 (A. D. 1655); Hawkshaw v. Parkins, 2 Swanst. 539, 548; Franklyn v. Thomas, 3 Mer. 225, 234.

§ 1361, [1] Southampton Dock Co. v. Southampton etc. Board, L. R. 11 Eq. 254.

ture or ground must necessarily be something connected with the mode of trying and deciding the legal action, and not with the cause of action or the defense themselves.[2] It is not such a special equitable ground of interference that the party has, by his own act or omission, failed to effectually avail himself of a valid defense at law, nor that the court of law has decided a question of law or of fact erroneously.[3] The principle is well established, and is uni-

[2] Because it is assumed that the ground of decision is equally available at law and in equity, and therefore the special equitable feature must be something *dehors* the very issues and merits of the controversy: See Harrison v. Nettleship, 2 Mylne & K. 423.

[3] Simpson v. Lord Howden, 3 Mylne & C. 97, 108; Protheroe v. Forman, 2 Swanst. 227, 233; Ware v. Horwood, 14 Ves. 28, 31; Bateman v. Willoe, 1 Schoales & L. 201, 204, 206. In the last-named case Lord Redesdale stated this rule in language which has ever since been regarded as a correct exposition of the principle: "It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. Because if a matter has already been investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. Rules are established, some by the legislature, some by the courts themselves, for the purpose of putting an end to litigation, and it is more important that an end should be put to litigation than that justice should be done in every case. . . . . The inattention of parties in a court of law can scarcely be made a subject for the interference of a court of equity. There may be cases cognizable at law and also in equity, and of which cognizance cannot be *effectually* taken at law; and therefore equity does sometimes interfere, as in cases of complicated accounts, where the party has not made a defense, because it was impossible for him to do it effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will put out of the way or restrain him from using. But without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law, — a matter capable of being discussed there, and over which a court of law had full jurisdiction." It should be carefully observed that the chancellor is not speaking of those cases which involve, in their very cause of action or defense, features or interests cognizable only by courts of equity; nor of the other class of cases which, in ordinary phraseology, belong to the concurrent jurisdiction both of law and equity; he refers to cases which in *themselves* present no equitable aspect, and properly come within the jurisdiction of the law, but which, for some reason or another, *have been wrongly tried and decided by the court of law.* There must have been some special *equitable* ground connected with this wrongful trial and decision, in order that equity may interfere and restrain the judg-

versal in its application, that when a cause belongs to the jurisdiction of the law courts, equity will never interfere to restrain the prosecution of the action, nor to stay proceedings on the judgment or execution, *upon any mere legal grounds,* although it may be demonstrated that the complainant in equity (generally the defendant at law) had a valid legal defense, which was not made available either through the error of the court in determining the law or the facts, or the omissions of himself or his counsel in presenting it, or in obtaining the evidence by which it could have been supported.[4]

ment. See also Holmes v. Stateler, 57 Ill. 209; McClure v. Miller, Bail. Eq. 107; 21 Am. Dec. 522; New Orleans v. Morris, 3 Woods, 103; Hungerford v. Sigerson, 20 How. 156; Tyler v. Hamersley, 44 Conn. 419; 26 Am. Rep. 479; Wallack v. Soc. Ref. Juv. Del., 67 N. Y. 23; Jackson v. Bell, 31 N. J. Eq. 554; 32 N. J. Eq. 411; Holmes v. Steele, 28 N. J. Eq. 173; Van Syckel v. Emery, 18 N. J. Eq. 387; Vanarsdalen v. Whitaker, 10 Phila. 153; Nelson v. Turner, 2 Md. Ch. 73; Chambers v. Penland, 78 N. C. 53; Att'y-Gen. v. Baker, 9 Rich. Eq. 521; Williams v. Stewart, 56 Ga. 663; Brown v. Wilson, 56 Ga. 534; Shaw v. Lindsey, 60 Ala. 344; Womack v. Powers, 50 Ala. 5; O'Connor v. Sheriff, 30 La. Ann., pt. 1, 441; Graham v. Roberts, 1 Head, 56, 59; Chadwell v. Jordan, 2 Tenn. Ch. 635; Hartman v. Heady, 57 Ind. 545; Comstock v. Henneberry, 66 Ill. 212; La Crosse etc. Co. v. Reynolds, 12 Minn. 213; Kemp v. Tucker, L. R. 8 Ch. 369; Baron de Womes v. Millier, L. R. 16 Eq. 554.

[4] Hendrickson v. Hinckley, 17 How. 443, 445; Walker v. Robbins, 14 How. 584; Creath's Adm'r v. Sims, 5 How. 192; Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Barker v. Elkins, 1 Johns. Ch. 465; Windwart v. Allen, 13 Md. 196; Katz v. Moore, 13 Md. 566; Lyday v. Douple, 17 Md. 188; Methodist Church v. Baltimore, 6 Gill, 391; 48 Am. Dec. 540; Brandon v. Green, 7 Humph. 130; Duckworth v. Duckworth's Adm'r, 35 Ala. 70; Holmes v. Stateler, 57 Ill. 209; Vennum v. Davis, 35 Ill. 568; Hinrichsen v. Van Winkle, 27 Ill. 334; Johnson v. Lyon, 14 Iowa, 431. In Hendrickson v. Hinckley, *supra,* Mr. Justice Curtis stated the principle in a very concise manner: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law which he was prevented from availing himself of by fraud or accident unmixed with negligence of himself or his agents."

It is immaterial whether the question or matter relied upon by the complainant in equity was considered by the law court or not. Omission to present or to make out a defense at law is not a ground for equitable relief: Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Day v. Cummings, 19 Vt. 496; Peace v. Nailing, 1 Dev. Eq. 289; Champion v. Miller, 2 Jones Eq. 194; White v. Cahal's Adm'r, 2 Swan, 550.

§ 1362. When the Jurisdiction may be Exercised — First Class — Equitable Rights.— I pass from this negative view to consider the doctrine on its affirmative side. The cases in which, according to its original jurisdiction unaffected by statute, equity may interfere by injunction, and restrain an action at law either before or after judgment, may be

The error of the court of law in admitting or excluding evidence, or in instructing the jury, is no ground for the interposition of equity: Ferrine v. Striker, 7 Paige, 598; Hartshorn v. Davenport, 2 Barb. Ch. 77; Vilas v. Jones, 1 N. Y. 274; Vaughn v. Johnson, 9 N. J. Eq. 173; Clapp v. Ely, 10 N. J. Eq. 178; Hood v. New York etc. R. R., 23 Conn. 609; Dilly v. Barnard, 8 Gill & J. 170; Prather v. Prather's Adm'r, 11 Gill & J. 170; Harnsbarger's Adm'r v. Kinney, 13 Gratt. 511; Powell v. Watson, 6 Ired. Eq. 94; Yarborough v. Thompson, 3 Smedes & M. 291; 41 Am. Dec. 626; Paynter v. Evans, 7 B. Mon. 420; Shortridge v. Bartlett, 14 B. Mon. 200; Price v. Johnson Co., 15 Mo. 433; Danaher v. Prentiss, 22 Wis. 311.

That the legal defense was not successful, through the ignorance, negligence, or mistake of the party's own attorney or counsel, is no ground for interference: Warner v. Conant, 24 Vt. 351; 58 Am. Dec. 178; Burton v. Wiley, 26 Vt. 430; Emerson v. Udall, 13 Vt. 477; 37 Am. Dec. 604; Powell v. Stewart, 17 Ala. 719; Jamison v. May, 13 Ark. 600; Graham v. Roberts, 1 Head. 56.

Ignorance of the facts constituting the defense does not excuse the omission of the party to make it, nor entitle him to the aid of equity, unless it can be shown that the party could not have acquired the information by the diligent and careful labor in preparing the cause for trial which he is bound to use: Ocean Ins. Co. v. Fields, 2 Story, 59; Truly v. Wanzer, 5 How. 141; Emerson v. Udall, 13 Vt. 477; 37 Am. Dec. 604; Slack v. Wood, 9 Gratt. 40; Allen v. Hamilton, 9 Gratt. 255; Miller v. Gaskins, Smedes & M. Ch. 524; Moran v. Woodyard, 8 B. Mon. 537; Smith v. Allen, 63 Ill. 474; Holmes v. Stateler, 57 Ill. 209; Hinrichsen v. Van Winkle, 27 Ill. 334.

Criminal proceedings will never be enjoined: Kerr v. Corporation of Preston, L. R. 6 Ch. Div. 463; Saull v. Browne, L. R. 10 Ch. 64; Portis v. Fall, 34 Ark. 375; Phillips v. Stone Mt., 61 Ga. 386.

An injunction will not ordinarily be granted to restrain an action in a foreign country or in another state, but may be, under special circumstances: In re Boyse, L. R. 15 Ch. Div. 591; Moor v. Anglo-Italian Bank, L. R. 10 Ch. Div. 681; Hope v. Carnegie, L. R. 1 Ch. 320; In re Chapman, L. R. 15 Eq. 75; Ostell v. Le Page, 2 De Gex, M. & G. 892; Kittle v. Kittle, 8 Daly, 72; Cole v. Young, 24 Kan. 435.

Proceedings in another *equitable* action may, in a proper case, be enjoined: Prudential Assur. Co. v. Thomas, L. R. 3 Ch. 74; Mann v. Flower, 26 Minn. 479; Bond v. Greenwald, 7 Baxt. 466; Haescig v. Brown, 34 Mich. 503. And see Erie R'y v. Ramsey, per Folger, J., quoted *post*, in note under § 1371; but see Endter v. Lennon, 46 Wis. 299. Restraining proceedings in probate courts for want of jurisdiction, see Wright v. Fleming, 76 N. Y. 517.

reduced to three general classes: 1. Where the controversy, in addition to its legal aspect, involves some equitable estate, right, or interest which is exclusively cognizable by a court of equity, so that a complete determination of the issues cannot be made by a court of law, it is well settled that equity not only may, but must, interfere at the suit of the party in whom the equitable estate or right is vested, and restrain the action at law, and decide the whole controversy. This is so when the defendant at law has a purely equitable defense which the court of law will not recognize or enforce, and especially when he is entitled to some affirmative equitable relief which will clothe him with a legal right or title, and thus defeat the legal action brought against him. Cases of this kind belong to the first branch of the exclusive jurisdiction of equity as described in the first volume.[1] This rule assumes

[1] See *ante*, § 219, and cases cited in note. The cases to which this doctrine is applicable are numberless, and in fact cover the entire domain of equitable estates, interests, and primary rights which constitute the first branch of the exclusive jurisdiction. The following cases give examples of equitable rights which have thus been protected: Hibbard v. Eastman, 47 N. H. 507; 93 Am. Dec. 467; Ross v. Harper, 99 Mass. 175; Fanning v. Dunham, 5 Johns. Ch. 122; 9 Am. Dec. 283; Skinner v. White, 17 Johns. 357; Varick v. Edwards, Hoff. Ch. 382; 11 Paige, 289; 5 Denio, 664, 679; County of Armstrong v. Brinton, 47 Pa. St. 367, 374; Jones v. Slubey, 5 Har. & J. 372; White v. Crew, 16 Ga. 416; Pollock v. Gilbert, 16 Ga. 398; 60 Am. Dec. 732; Frith v. Roe, 23 Ga. 139; Greenlee v. Gaines, 13 Ala. 198; 48 Am. Dec. 49; Henwood v. Jarvis, 27 N. J. Eq. 247; Wyckoff v. Victor etc. Co., 43 Mich. 309; Scrivin v. Hursh, 39 Mich. 98; Detroit etc. R. R. v. Brown, 37 Mich. 533; Haescig v. Brown, 34 Mich. 503; Pindell v. Quinn, 7 Ill. App. 605; Hager v. Buechler, 6 Ill. App. 462; Moses v. Sanford, 2 Lea, 655; Breeden v. Grigg, 8 Baxt. 163; Deaderick v. Mitchell, 6 Baxt. 35; Frank v. Morris, 9 W. Va. 664; Hill v. Billingsly, 53 Miss. 111; Texas Land Co. v. Turman, 53 Tex. 619; Earl of Aylesford v. Morris, L. R. 8 Ch. 484; Lord Tredegar v. Windus, L. R. 19 Eq. 607; Crofts v. Middleton, 8 De Gex, M. & G. 192; Evans v. Bremridge, 8 De Gex, M. & G. 100; and see *ante*, vol. 2, cases in note under § 914.

Under the application of this doctrine, an action at law may be enjoined, in order to avoid a multiplicity of suits, or a circuity of action: See *ante*, vol. 1, §§ 245 *et seq.;* Oelrichs v. Spain, 15 Wall. 211, 228; Penn. etc. Co. v. Delaware etc. Co., 31 N. Y. 91; Eldridge v. Hill, 2 Johns. Ch. 281; Tice v. Annin, 2 Johns. Ch. 125; Trustees etc. v. Nicoll, 3 Johns. 566; West v. Mayor etc., 10 Paige, 539; Jumel v. Jumel, 7 Paige, 591; Heyer

that the equitable questions contained in the defense extend to the entire cause, so that their decision determines the controversy. When the cause contains both legal and equitable questions which are distinct, the court of equity, while taking jurisdiction, may not restrain the proceedings at law prior to the obtaining of judgment.[2]

§ 1363. **The Same. Second Class.**— 2. The second general class includes those cases which belong to the second branch of the *exclusive* jurisdiction of equity as heretofore described;[1] or, in the ordinary nomenclature of the books, cases over the facts of which both courts of law and of equity have a concurrent jurisdiction to grant their respective and distinctive remedies; for example, cases involving actual fraud, such as suits upon instruments, where the defense is fraud in procuring their execution. Where the jurisdiction is thus said to be concurrent, or in other words, where the interests and primary rights of the parties are legal, and the only question between the two courts relates to the adequacy of their respective remedies, as a

v. Pruyn, 7 Paige, 465; 34 Am. Dec. 355; Marsh v. Pike, 10 Paige, 595; Woodruff v. Fisher, 17 Barb. 224; Third Ave. R. R. v. The Mayor etc., 54 N. Y. 159; Paterson etc. R. R. v. Jersey City, 9 N. J. Eq. 434; Stevenson v. Black, 1 N. J. Eq. 338; Klapworth v. Dressler, 13 N. J. Eq. 62; 78 Am. Dec. 69; Woods v. Monroe, 17 Mich. 238; Scott v. Shreeve, 12 Wheat. 605. And also in suits brought to obtain a discovery in aid of the defense at law: Boughton v. Phillips, 6 Paige, 433; King v. Clark, 3 Paige, 76; Williams v. Harden, 1 Barb. Ch. 298.

[2] See Williams v. Earl of Jersey, Craig & P. 91; Gridley v. Garrison, 4 Paige, 647; Mitchell v. Oakley, 7 Paige, 68; Ragsdale v. Hagy, 9 Gratt. 409; Justice v. Scott, 4 Ired. Eq. 108; Hill v. Billingsly, 53 Miss. 111.

In the cases referred to, it is supposed that there are both legal and equitable issues which may be tried and decided separately, and the decision of neither determines the whole controversy. Of course, if the equitable issues are really the very gist of the cause, and upon their decision the whole case really turns, and the ends of justice demand it, the court of equity may take control of the entire controversy by enjoining the further prosecution of the action at law. It is only where the decision of the equitable issues would necessarily defeat the whole right at law and destroy the entire legal cause of action, that the chancellor *must* take the entire controversy under his own control. It is then a matter of right, and not of discretion.

[1] See *ante*, §§ 220, 221, and cases cited in note 2, under § 221.

general rule the tribunal which first exercises jurisdiction is entitled, or at least permitted, to retain an exclusive control of the issues.[2] It is therefore a well-settled doctrine that in cases of this kind, where the primary rights of both parties are legal, and courts of law will grant their remedies, and courts of equity may also grant their peculiar remedies, equity will not interfere to restrain the action or judgment at law, *provided the legal remedy will be adequate;* that is, provided the judgment at law will do full justice between the parties, and will afford a complete relief; the adequacy or inadequacy of the legal remedy is the sole and universal test.[3] On the other hand, in cases of this general class, equity will enjoin the action at law, and will determine the whole cause, whenever the legal remedy is inadequate; and the legal remedy is deemed to be inadequate if the ends of justice would not be satisfied by a mere judgment for the defendant in the action at law, but would require that some distinctively equitable relief, such as a cancellation or a reformation of the instrument sued upon, be conferred upon him. If any affirmative equitable relief is necessary to a full settlement of the controversy, and to a complete protection of the defendant's rights, a court of equity will interfere, entertain a suit for such relief, and enjoin the action at law.[4] The scope of this

[2] See *ante*, § 179; Mallett v. Dexter, 1 Curt. 178; Stearns v. Stearns, 16 Mass. 167, 171; Winn v. Albert, 2 Md. Ch. 42; Merrill v. Lake, 16 Ohio, 373; 47 Am. Dec. 377; Thompson v. Hill, 3 Yerg. 167.

[3] See *ante*, §§ 220, 221, and cases cited; Insurance Co. v. Bailey, 13 Wall. 616; Grand Chute v. Winegar, 15 Wall. 373; Hipp v. Babin, 19 How. 271; Smith v. McIver, 9 Wheat. 532; Russell v. Clark's Ex'rs, 7 Cranch, 69; Bank of Bellows Falls v. Rutland etc. R. R., 28 Vt. 470; Hazard v. Irwin, 18 Pick. 95; Fleming v. Slocum, 18 Johns. 403; 9 Am. Dec. 224; Roberts v. Anderson, 3 Johns. Ch. 371; 18 Johns. 515; Crane v. Bunnell, 10 Paige, 333; Camden etc. R. R. v. Stewart, 18 N. J. Eq. 489; Gould v. Hayes, 19 Ala. 438; Bumpass v. Reams, 1 Sneed, 595; Mason v. Piggott, 11 Ill. 85; Ross v. Buchanan, 13 Ill. 55; Southerland v. Harper, 83 N. C. 200; Jackson v. Bell, 31 N. J. Eq. 554; 32 N. J. Eq. 411; Imperial Fire Ins. Co. v. Gunning, 81 Ill. 236; Hoare v. Bremridge, L. R. 8 Ch. 22; 14 Eq. 522; Ochsenbein v. Papelier, L. R. 8 Ch. 695.

[4] Glastenbury v. McDonald's Adm'r, 44 Vt. 453; Atlantic etc. Co. v. Tredick.

particular doctrine is plainly identical with that which governs the second branch of the exclusive jurisdiction of equity as described in the first volume. Whenever a court of equity exercises its jurisdiction over a case involving only *legal* interests and primary rights, for the purpose of awarding its exclusively equitable remedies, because the legal remedies would be inadequate, it will always, if necessary, enjoin an action at law which interrupts the full exercise of its jurisdiction.

§ 1364. **The Same. Third Class.**— 3. In the two preceding classes of cases the ground for interference was some equitable element or feature involved in the very subject-matter of the controversy, or in the remedies appropriate thereto, which constituted an equitable defense in full or in part to the legal action, and over which the court of equity had either a concurrent or an exclusive jurisdiction. In the present class there is no such equitable element or

5 R. I. 171; Bissell v. Beckwith, 33 Conn. 357; Hamilton v. Cummings, 1 Johns. Ch. 517; Bushnell v. Harford, 4 Johns. Ch. 301; Dale v. Roosevelt, 5 Johns. Ch. 174; Metler v. Metler's Adm'rs, 19 N. J. Eq. 457; Morris v. Barnwell, 60 Ga. 147; Mitchell v. Word, 60 Ga. 525; Radcliffe v. Varner, 56 Ga. 222; Scott v. Scott, 33 Ga. 102; Coville v. Gilman, 13 W. Va. 314; Henwood v. Jarvis, 27 N. J. Eq. 247; Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215; London etc. Ins. Co. v. Seymour, L. R. 17 Eq. 85; Traill v. Baring, 4 De Gex, J. & S. 318; Athenæum L. Ass. Soc. v. Pooley, 3 De Gex & J. 294; and cases cited *ante*, in note under § 914.

There is some disagreement among the decisions upon the question of equity taking jurisdiction to compel the cancellation of an instrument, when the contracting party who seeks this relief might set up the same defense in an action at law and defeat a recovery. Compare Insurance Co. v. Bailey, 13 Wall. 616, and Grand Chute v. Winegar, 15 Wall. 373, with Franklin v. Green, 2 Allen, 519, 522, and Commercial etc. Ins. Co. v. McLoon, 14 Allen, 351.

Within the scope of this doctrine, a court of equity will restrain the transfer of negotiable paper, or things in action, or chattels, or sometimes land, by one who has obtained their title fraudulently, to persons who would take them as *bona fide* purchasers for value, and thus hold them freed from existing equities: See *ante*, § 1340; Poor v. Carleton, 3 Sum. 70; Glastenbury v. McDonald's Adm'r, 44 Vt. 453; Bank of Bellows Falls v. Rutland etc. R. R., 28 Vt. 470; Franklin v. Green, 2 Allen, 519; Sherman v. Fitch, 98 Mass. 59; Ferguson v. Fisk, 28 Conn. 501; Hamilton v. Cummings, 1 Johns. Ch. 517; Delafield v. Illinois, 26 Wend. 192; Van Doren v. The Mayor etc., 9 Paige, 388; Cox v. Clift, 2 N. Y. 118; Metler's Adm'rs v. Metler, 18 N. J. Eq. 270; 19 N. J. Eq. 457; Bell v. Gamble, 9 Humph. 117.

feature of the controversy; there is no equitable defense embraced in any possible issues, no equitable right or interest of the defendant which defeats or modifies the legal cause of action; all the issues are wholly legal. The ground for the equitable jurisdiction to interfere is, therefore, something *dehors* the issues, something arising out of or connected with the *trial* itself of the legal action in the court of law. It was a settled doctrine of the equitable jurisdiction — and is still the subsisting doctrine except where it has been modified or abrogated by statute, or has become obsolete through the enlarged powers of the law courts to grant new trials — that where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part, or on the part of his agents, then a court of equity will interfere at his suit, and restrain proceedings on the judgment which cannot be conscientiously enforced. From the very nature of the case, this interference takes place after the judgment, and not while the action at law is pending.[1]

[1] Truly v. Wanzer, 5 How. 141; David v. Tileston, 6 How. 114; Hendrickson v. Hinckley, 17 How. 443; 5 McLean, 211; Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Ocean Ins. Co. v. Fields, 2 Story, 59; Robinson v. Wheeler, 51 N. H. 384; Wingate v. Haywood, 40 N. H. 437, 441; Emerson v. Udall, 13 Vt. 477; 37 Am. Dec. 604; Gainty v. Russi, 40 Conn. 450; Dobson v. Pearce, 12 N. Y. 156; 62 Am. Dec. 152; Mann v. Worrall, 16 Barb. 221; Foster v. Wood, 6 Johns. Ch. 87; Tomkins v. Tomkins, 11 N. J. Eq. 512, 514; Gifford v. Thorn, 9 N. J. Eq. 703; Moore v. Gamble, 9 N. J. Eq. 246; Glover v. Hedges, 1 N. J. Eq. 113, 119; Boulton v. Scott's Adm'rs, 3 N. J. Eq. 231, 236, 241; Wistar v. McManes, 54 Pa. St. 318; 93 Am. Dec. 700; Webster v. Skipworth, 26 Miss. 341; Humphries v. Bartee, 10 Smedes & M. 282, 295; Pelham v. Moreland, 11 Ark. 442; Nelson v. Rockwell, 14 Ill. 375; How v. Mortell, 28 Ill. 479; New Orleans v. Morris, 3 Woods, 103; Smith v. McLain, 11 W. Va. 654; Shields v. McClung, 6 W. Va. 79; Crim v. Handley, 94 U. S. 652.

Among the examples of the fraud, etc., which are a ground for this equitable jurisdiction, are the following: Where the defendant is prevented from defending by false and fraudulent promises or representations that the proceeding will not be carried on against him, and, relying thereon, he does not contest the case, as he might have done, and a judgment is thus

§ 1365. Jurisdiction to Grant New Trials at Law in the United States.— How far does the doctrine of this third general class of cases operate under the modern legislation, and the principles of equity jurisprudence as administered in the United States? The jurisdiction of the English chancery to enjoin judgments at law, not by reason of any equitable right involved in the controversy itself, but on account of wrongful acts or omissions accompanying the trial at law, originated at a time when the law courts had little or no power to grant new trials for such causes. To

obtained against him: Pearce v. Olney, 20 Conn. 544; Huggins v. King, 3 Barb. 616; Powers's Ex'rs v. Butler's Adm'r, 4 N. J. Eq. 465; Holland v. Trotter, 22 Gratt. 136; Booth v. Stamper, 6 Ga. 172; Brooks v. Whitson, 7 Smedes & M. 513; How v. Mortell, 28 Ill. 479; Perry v. Siter, 37 Mo. 273; Jarboe v. Kepler, 4 Ind. 177; McLeran v. McNamara, 55 Cal. 508; Miller v. Harrison, 32 N. J. Eq. 76; Cregar v. Cramer, 31 N. J. Eq. 375; Purviance v. Edwards, 17 Fla. 140; Hinckley v. Miles, 15 Hun, 170; Scriven v. Hursh, 39 Mich. 98; Harris v. Western etc. R. R., 59 Ga. 830; Baker v. Redd, 44 Iowa, 179; Markham v. Angier, 57 Ga. 43; Ellis v. Kelly, 8 Bush, 621, 631. The same would be true of fraudulent practices by which the defendant's witnesses were tampered with or removed, or his evidence was destroyed, so that he was unable to substantiate his defenses.

Accident, if without any negligence on the part of the one who asks the relief,—as, for example, sickness preventing a defendant from making his legal defense: Bell v. Cunningham, 1 Sum. 89; Devoll v. Scales, 49 Me. 320; Carrington v. Holabird, 17 Conn. 530; 19 Conn. 87; Forrester v. Wilson, 1 Duer, 624; Griffith v. Brown, 3 Rob. (N. Y.) 627; Aaron v. Baum, 7 Rob. (N. Y.) 340; Owen v. Ranstead, 22 Ill. 161; Rice v. R. R. Bank, 7 Humph. 39. Also surprise, ignorance, etc.: Roach v. Duckworth, 61 How. Pr. 128; Beveridge v. Hewitt, 8 Ill. App. 467; Miller v. Harrison, 32 N. J. Eq. 76; Stanton v. Embry, 46 Conn. 65; Markham v. Angier, 57 Ga. 43; Smith v. Pearce, 6 Baxt. 72 (the judge incompetent to sit). Failure to summon, notify, or serve process on the defendant, so that he was ignorant of the proceedings against him: Crafts v. Dexter, 8 Ala. 767; 42 Am. Dec. 666; Stubbs v. Leavitt, 30 Ala. 352; Bell v. Williams, 1 Head, 229; Ridgeway v. Bank of Tenn., 11 Humph. 523, 525; Owens v. Ranstead, 22 Ill. 161; Harshey v. Blackmarr, 20 Iowa, 161; 89 Am. Dec. 520; Walker v. Gilbert, Freem. (Miss.) 85; McNeill v. Edie. 24 Kan. 108; Ryan v. Boyd, 33 Ark. 778; Blakeslee v. Murphy, 44 Conn. 188; see Graham v. Roberts, 1 Head, 56, 59. In general, the party seeking the aid of equity to enjoin a judgment at law against him must not only show some ground for interference, within the doctrine of the text, but must also show that he has a good and sufficient defense to the cause of action, so that on a re-examination and retrial the result would be different: Bradley v. Richardson, 23 Vt. 720; Tomkins v. Tomkins, 11 N. J. Eq. 512, 514; Reeves v. Cooper, 12 N. J. Eq. 223; Dawson v. Merch. etc. Bank, 30 Ga. 664; Saunders v. Albritton. 37 Ala. 716; Way

prevent a failure of justice, a distinct head of equitable jurisdiction was admitted, that of virtually granting new trials — of entertaining suits for a new trial — when a judgment at law had been thus obtained by fraud, mistake, or accident; and the injunction against further proceedings on the judgment was a mere incident of the broader relief which set aside the judgment and granted a rehearing of the controversy in the court of chancery. The original occasion for this special jurisdiction has disappeared. In England, and in most if not all of the American states, either through statutes or through judicial action, the courts of law have acquired, and constantly exercise, full powers to grant new trials, whenever from the wrongful acts or omissions of the successful party, or from accident or the mistake of the other party, or from error or misconduct of

v. Lamb, 15 Iowa, 79, 83; Stokes v. Knarr, 11 Wis. 389; Payne v. Dudley, 1 Wash. (Va.) 196; Sauer v. Kansas, 69 Mo. 46; Lemon v. Sweeney, 6 Ill. App. 507.

The party seeking the aid of equity must also show diligence. A judgment will not be enjoined for any defense or right which could be asserted in the court of law, unless such party can show,— 1. That he was prevented by fraud, mistake, or accident from maintaining his legal rights; and 2. That the obstacle which prevented him could not have been overcome or avoided by any reasonable diligence or care on his part. These requisites are absolutely indispensable; the rule is inflexible, and it is enforced with special strictness when the ground relied upon for relief is newly discovered evidence, which the party had failed to obtain, through ignorance amounting to accident or through fraud: Fletcher v. Warren, 18 Vt. 45; Emerson v. Udall, 13 Vt. 477; 37 Am. Dec. 604; Warner v. Conant, 24 Vt. 351; 58 Am. Dec. 178; Floyd v. Jayne, 6 Johns. Ch. 479; Foster v. Wood, 6 Johns. Ch. 87; Duncan v. Lyon, 3 Johns. Ch. 351; 8 Am. Dec. 513; Graham v. Stagg, 2 Paige, 321; Vilas v. Jones, 1 N. Y. 274; Vaughn v. Johnson, 9 N. J. Eq. 173; Bierne v. Mann, 5 Leigh, 364; Meem v. Rucker, 10 Gratt. 506; Bellamy v. Woodson, 4 Ga. 175; 48 Am. Dec. 221; Robb v. Halsey, 11 Smedes & M. 140; Williams v. Jones, 10 Smedes & M. 108; Conway v. Ellison, 14 Ark. 360; Paynter v. Evans, 7 B. Mon. 420; Thompson v. Meek, 3 Sneed, 271; Smith v. Allen, 63 Ill. 474; Smith v. Powell, 50 Ill. 21; Ruppertsberger v. Clark, 53 Md. 402; Kirby v. Pascault, 53 Md. 531; Hays v. Urquhart, 63 Ga. 323; Carolus v. Koch, 72 Mo. 645; Devinney v. Mann, 24 Kan. 682; Noble v. Butler, 25 Kan. 645; Burke v. Wheat, 22 Kan. 722; Wilson v. Coolidge, 42 Mich. 112; Hannon v. Maxwell, 31 N. J. Eq. 318; Jackson v. Bell, 31 N. J. Eq. 554; 32 N. J. Eq. 411; Holmes v. Steele, 28 N. J. Eq. 173; Earl v. Matheney, 60 Ind. 202; Kern v. Strausberger, 71 Ill. 413; Higgins v. Bullock, 73 Ill. 205; Fuller v. Little, 69 Ill. 229; Newman v.

the judge or the jury, there has been a failure of justice. In other words, the powers of the law courts to set aside verdicts or judgments are so ample as to meet all the requirements of equity and justice, and the special equitable jurisdiction with respect to this matter has become obsolete in the very large majority of the states, if not in all of them.[1] The result is, in my opinion, that practically the only jurisdiction now exercised by courts of equity to enjoin judgments at law, where no equitable right or interest is involved in the controversy, on account of wrongful acts or omissions connected with the trial, is a part of and incidental to the broad jurisdiction which equity possesses to set aside and cancel judgments, deeds, contracts, and the like which have been obtained through fraud, undue influence, or mistake. A court of equity, in general, no longer assumes control over a legal judgment for the purpose of a new trial or any similar relief; it will, in a proper case of fraud or mistake, set aside such judgment; and wherever it will grant this final remedy, it will, as a preliminary and incidental relief, restrain by injunction all proceedings upon the judgment.[2] How far the jurisdiction to enjoin actions and judgments at law in the two other general classes of cases above described has been affected by the reformed procedure, in the states where that procedure prevails, is discussed in the next following chapter.

Morris, 52 Miss. 402; New York etc. R. R. v. Haws, 56 N. Y. 175; Richmond Enquirer Co. v. Robinson, 24 Gratt. 548; Rogers v. Parker, 1 Hughes, 148.

[1] As an illustration, the California Code of Civil Procedure, sec. 657, authorizes a new trial to be granted for the following causes: 1. Irregularity in the proceedings of the court, jury, or adverse party, or misconduct of the court; 2. Misconduct of the jury; 3. Accident or surprise; 4. Newly discovered evidence; 5. Excessive damages; 6. Insufficiency of the evidence; 7. Error of law.

[2] The modern cases, where such judgments at law have been enjoined, will be found, on examination, to have arisen under the more general power, which equity clearly possesses, of setting aside the most solemn proceedings when tainted by fraud. The equitable jurisdiction to entertain bills for a new trial, if it exist at all, must be confined to a very few states.

CHAPTER SECOND.

EQUITABLE DEFENSES INTERPOSED IN LEGAL ACTIONS AS A SUBSTITUTE FOR INJUNCTIONS.

ANALYSIS.

§ 1366. General object.
§ 1367. Equitable pleas under the common-law procedure.
§ 1368. Equitable defenses under the reformed procedure.
§ 1369. Meaning and nature of an equitable defense.
§ 1370. General effect: Injunction against actions at law unnecessary.
§ 1371. Cases in which an injunction may still be necessary: First class; to avoid multiplicity of suits.
§ 1372. The same: Second class; new parties needed.
§ 1373. The same: Third class; no affirmative relief.
§ 1374. Some illustrations of equitable defenses.

§ 1366. **General Object.**—I shall not attempt in this chapter any general discussion of "equitable defenses" as provided for by the reformed procedure; such a discussion would be foreign to the purposes of this work.[1] My sole object is to consider, and if possible to answer, the more narrow questions: How far do equitable defenses interposed in legal actions, under the reformed procedure, interfere with, supersede, or abrogate the jurisdiction to enjoin actions and judgments at law in the first and second classes of cases mentioned in the last preceding section? and in what cases, if any, does that jurisdiction still remain operative, notwithstanding this peculiar feature of the reformed procedure? These inquiries are practically important only in the states and territories which have adopted the new procedure.

§ 1367. **Equitable Pleas under the Common-law Procedure.**—In some states where the two jurisdictions of law and equity are still kept distinct and separate, an equitable de-

[1] The subject of "equitable defenses" includes that of equitable "counterclaims," and both are treated of at large in my work on Remedies by the Civil Action.

fense may be allowed by statute to be pleaded in a legal action pending in a court of law. Would this legislation modify the first two general doctrines formulated in §§ 1362 and 1363 of the last section? A similar statute in England was held to produce no effect whatever upon the equitable jurisdiction; and the same interpretation must undoubtedly be given to any such enactment in the United States.[1]

§ 1368. **Equitable Defenses under the Reformed Procedure — Legislation.**— The provisions of the reformed procedure are much broader, and must *practically* modify to a great extent the original jurisdiction of equity over actions at law. In the single "civil action" which it establishes, legal and equitable causes of action may be united and remedies obtained; legal and equitable defenses may be combined; equitable defenses may be set up to defeat a strictly legal cause of action, in actions which are otherwise wholly legal; and finally, either under the name of "equitable defense" or of "counterclaim," the defendant, as against a legal cause of action and in an action otherwise legal, may obtain the affirmative equitable relief, connected with the subject-matter, which under the former system he could only obtain by a separate suit brought in a court of equity.[1]

§ 1369. **Meaning and Nature of an Equitable Defense.**— It is important to determine, in the first place, the nature and

§ 1367, [1] The common-law procedure act of 1854 (17 & 18 Vict., c. 125, sec. 83) authorized pleas upon equitable grounds. In Jeffs v. Day, L. R. 1 Q. B. 372, the court held that such equitable defenses only were admissible which would be a simple bar to the action, and would entitle defendant to the common-law judgment "that the plaintiff take nothing by his writ." That the equitable jurisdiction was unaffected, see Gompertz v. Pooley, 4 Drew. 448, 453; Kingsford v. Swinford, 28 L. J. Ch. 413; Waterlow v. Bacon, L. R. 2 Eq. 514; Terrell v. Higgs, 1 De Gex & J. 388; Evans v. Bremridge, 8 De Gex, M. & G. 100.

§ 1368, [1] Legal and equitable defenses may also be united in the same answer: See New York, Code Proc., sec. 150; Code Civ. Proc. (new code), secs. 501, 507; Wisconsin, c. 125. sec. 13; Ohio, sec. 93; Missouri, art. 5, secs. 13, 14 (secs. 3522, 3523); Minnesota, c. 66, sec. 98; Florida, sec. 101; Oregon, sec. 72; California. sec. 441; North Carolina, sec. 102; South Carolina, sec. 173; Dakota, sec. 119; Kansas, sec. 94 (3621); Indiana (1881), sec. 347; Iowa, sec. 2655.

meaning of an "equitable defense." A defense is a right possessed by the defendant, arising from the facts alleged in his pleadings, which defeats the plaintiff's cause of action or claim for the remedy demanded by his action. An equitable defense is such a right, which exists solely by virtue of equitable doctrines, and which was originally recognized by courts of equity alone. The right constituting an equitable defense may be one which, when consummated and enforced, confers upon the defendant some affirmative equitable relief clothing him with a paramount *legal* title or estate, and thus defeating the plaintiff's claim; or it may be one which is purely defensive, which entitles the defendant to no affirmative relief, and which simply operates to bar the plaintiff's action. The general term "equitable defense" plainly includes both of these classes.[1] This conclusion has not, however, been uniformly accepted. The doctrine is supported by the decisions of able courts, and seems to be settled in some of the states, that a defendant cannot avail himself of a defense as equitable, unless the facts thereof entitle him to equitable relief against the plaintiff's legal cause of action, nor unless he demands and obtains that specific remedy which, when granted, destroys the cause of action. In other words, he cannot invoke the

[1] Under the English statute of 1854 allowing equitable pleas in actions at law, the courts recognized the fact that some equitable defenses would only operate to bar the plaintiff's action, and would entitle the defendant to no affirmative specific relief, and held that such equitable defenses alone could be pleaded: See *ante*, § 1367. In Dobson v. Pearce, 12 N. Y. 156, 168, 62 Am. Dec. 152, Johnson, J., said: "An equitable defense to a civil action is now as available as a legal defense. The question now is, *Ought the plaintiff to recover?* and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or of legal cognizance." See also Chase v. Peck, 21 N. Y. 581, 586; Wismer v. Ocumpaugh, 71 N. Y. 113, 117; Webster v. Bond, 9 Hun, 437; Wa Ching v. Constantine, 1 Idaho, 266; Harrington v. Fortner, 58 Mo. 468, 474; Holland v. Johnson, 51 Ind. 346; Maxwell v. Campbell, 45 Ind. 360, 363; Hammond v. Perry, 38 Iowa, 217; Crary v. Goodman, 12 N. Y. 266; 64 Am. Dec. 506; Seeley v. Engell, 13 N. Y. 542; New York Cent. Ins. Co. v. Nat. Protec. Ins. Co., 14 N. Y. 85; Despard v. Walbridge, 15 N. Y. 374; Carpenter v. Oakland, 30 Cal. 439, 442; Harris v. Vinyard, 42 Mo. 568; Kennedy v. Daniels, 20 Mo. 104; Carman v. Johnson, 20 Mo. 108; 61 Am. Dec. 593.

right as a mere defense, or as long as he treats it and relies upon it as a mere defense. If he simply avers facts as a negative defense, he will not be permitted to rely upon them and to defeat the plaintiff's recovery by that means.[2]

§ 1370. **General Effect — Injunctions against Actions at Law Unnecessary.**— The provisions of the codes, mentioned in the last paragraph but one, render the equitable jurisdiction to restrain legal actions in the great majority of instances wholly useless; and as a matter of fact such jurisdiction, if not actually abrogated, has become practically obsolete, except when certain special circumstances may require its exercise. Whether the defendant's case involves equitable elements which belong to either branch of the exclusive jurisdiction of equity, or has features which bring it within the concurrent jurisdiction, the defendant may, as a general rule, set up his equitable estate, interest, right, or claim by way of defense, and procure the entire controversy to be decided, and the affirmative equitable relief awarded, in the one civil action. There is thus no need of a separate equitable suit and an injunction restraining the legal action; and any resort to the former jurisdiction of equity for such a purpose will be discountenanced and repressed by the courts, unless it should be necessary, from special circumstances, to prevent a failure of justice.[1]

[2] Among the decisions tending to support this view, see Follett v. Heath, 15 Wis. 601; Lombard v. Cowham, 34 Wis. 486, 492; Du Pont v. Davis, 35 Wis. 631, 639; Hicks v. Sheppard, 4 Lans. 335, 337; Cramer v. Benton, 60 Barb. 216; Dewey v. Hoag, 15 Barb. 365; Conger v. Parker, 29 Ind. 380; Kenyon v. Quinn, 41 Cal. 325; Bruck v. Tucker, 42 Cal. 346, 352; Miller v. Fulton, 47 Cal. 146; McClane v. White, 5 Minn. 178, 190. In Wisconsin the defendant is required by statute to demand affirmative relief in pleading an equitable defense: Rev. Stats., c. 141, sec. 7. See also, on the general question, Webster v. Bond, 9 Hun, 437; Quebec Bank v. Weyand, 30 Ohio St. 126; Hinkle v. Margerum, 50 Ind. 240; Winslow v. Winslow, 52 Ind. 8; Hampson v. Fall, 64 Ind. 382; Pennoyer v. Allen, 51 Wis. 360; 50 Wis. 308; Lawe v. Hyde, 39 Wis. 345; Kentfield v. Hayes, 57 Cal. 409; Hatcher v. Briggs, 6 Or. 31; Ten Broeck v. Orchard, 74 N. C. 409; Pomeroy on Remedies, sec. 91.

[1] Under the new procedure all the courts of general original jurisdiction

§ 1371. **Cases in Which an Injunction may Still be Necessary. First Class — Multiplicity of Suits.—** There are, however, special circumstances in which a resort to the injunctive jurisdiction may still be necessary, in order to prevent a failure of justice. These cases may, I think, be reduced to a few general classes: 1. Where it is essential to promote the ends of justice that an entire controversy should be determined in one proceeding, so that the rights and duties of all parties interested may be finally settled, it may be necessary to restrain other suits, so as to prevent the pendency of two or more actions involving the same subject-matter, or to prevent a partial litigation of the controversy, or to prevent a multiplicity of suits depending upon the same facts or principles. In short, the jurisdiction must sometimes be exercised to prevent a multiplicity of actions, or partial investigations which would work injustice.[1] It should be observed that the proceeding en-

possess full equity powers; and this fact somewhat enlarges the scope of the chancery rule, that one court of equity will not, in general, enjoin the proceedings in another tribunal having the same equitable powers. As illustrations of the text, see Grant v. Quick, 5 Sand. 612; Carpenter v. Keating, 10 Abb. Pr., N. S., 223, 228; Minor v. Webb, 10 Abb. Pr. 284; Harman v. Remsen, 23 How. Pr. 174; Bowers v. Tallmadge, 16 How. Pr. 325; Arndt v. Williams, 16 How. Pr. 244; Bennett v. Le Roy, 14 How. Pr. 178; Hunt v. Farmers' L. & T. Co., 8 How. Pr. 416; Dederick v. Hoysradt, 4 How. Pr. 350; Platto v. Deuster, 22 Wis. 482; Anthony v. Dunlap, 8 Cal. 26; Revalk v. Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Gorham v. Toomey, 9 Cal. 77; Uhlfelder v. Levy, 9 Cal. 607; Wood v. Swift, 81 N. Y. 31.

[1] Erie R'y v. Ramsey, 45 N. Y. 637; Uhlfelder v. Levy, 9 Cal. 607, 615; Engels v. Lubeck, 4 Cal. 31. In the first of these cases the whole subject of the jurisdiction as modified by the new procedure was so fully and ably examined that I shall quote from the opinion of Folger, J., at some length. Ramsey had commenced an equitable suit against the Erie railroad before the supreme court in one district (the sixth). The company thereupon brought another equitable suit against Ramsey before the same court in a different district (the first), and obtained a preliminary injunction restraining Ramsey from the further prosecution of *his* action. Ramsey was adjudged by the court in the first district to have violated this injunction, and was fined for the contempt. He appealed to the court of appeals. It held that the supreme court in the first district had jurisdiction to grant the injunction, so that it was not void. The opinion of Folger, J., discusses the doctrines which I have stated in the text: "In this state, since the adop-

joined under this doctrine may be equitable as well as legal.

§ 1372. **The Same. Second Class — New Parties.** — 2. A second possible case for injunction may arise under the codes in some of the states. It is suggested in the opinion

tion of the system of practice now existing, the equitable jurisdiction of a court to restrain proceedings at law in another court can be but seldom invoked. For there are but few courts, and they inferior, which have only a common-law jurisdiction. The courts of original jurisdiction are mostly possessed of both equitable and common-law powers, and they are, moreover, mostly of co-ordinate jurisdiction. So that it may have been well held that one court of equitable jurisdiction may not, as a usual procedure, restrain the proceedings in another court of equal powers. For one, as much as the other, has, in most cases, the means of doing exact justice to all the suitors before it, and may, as well as the other, afford to the suitor any remedy, equitable or legal, to which he is entitled, and in any proceeding consistent with its established rules and practice, though it would be too much to say that in no case can a court restrain the suitors in another court of co-ordinate powers. Thus the jurisdiction of a court of equity to interfere to prevent a multiplicity of suits, or to draw to one action cognate questions and interests sought to be litigated in many actions, is well established. But is it to be held that the exercise of this jurisdiction is thwarted when the numerous suits are divided among several courts of co-ordinate law and equity powers? The suit to bring to one judgment all the actions must be in one of the courts, and to make that suit effectual to the end sought, the power must be in that court to enjoin the parties to the suits in the co-ordinate courts from proceeding therein. An instance of the exercise of one branch of this power sanctioned by this court is found in the case of N. Y. & N. H. R. R. Co. v. Schuyler, 17 N. Y. 592. Nor is it without other precedent that a court of equity, by action instituted before it, may question the proceedings in another court of equity. Thus one court of equity has overhauled the decree of another court of equity for fraud, contrivance, or covin in the obtaining of it: Earl of Bandon v. Becher, 3 Clark & F. 479; Manaton v. Molesworth, 1 Eden, 25. If it may entertain an action for that purpose, in which its decree, if favorable to the moving party, will have the effect to forever restrain the execution of the decree, the validity of which is brought into question, why may it not, pending the suit before it, restrain, by temporary injunction, the execution and enforcement of that decree? If it may thus restrain the proceedings in another court of equity to *enforce* the decree of that court, may it not restrain the proceedings in that court to obtain the decree?" I remark that this consequence by no means necessarily follows. The reasons for attacking and setting aside a decree already obtained, on account of fraud, after the litigation is ended, do not necessarily apply to an interference with the litigation while pending in another court having full powers to deal with all questions which may arise. "We speak of it, not as a power usually to be exercised, but as one beyond the jurisdiction of the court. The affirm-

of Mr. Justice Folger, quoted in the foot-note, that whenever the decision of all the matters embraced within the equitable defense would require the presence of other parties besides those who are parties to the legal action, the defendant is not bound to set up the facts constituting his

ative answer to this query is found in the fact that it has done so: Jackson v. Leaf, 1 Jacob & W. 229–232; Clarke v. Earl of Ormonde, Jacob, 546; Earl of Newburg v. Wren, 1 Vern. 220, and notes; Vendall v. Harvey, Nels. 19–21; Booth v. Leycester, 3 Mylne & C. 459; Beckford v. Kemble, 1 Sim. & St. 7; Beauchamp v. Marquis of Huntley, Jacob, 546; Schuyler v. Pelissier, 3 Edw. Ch. 191, 192. But this ground of equitable jurisdiction, viz., that to restrain proceedings in a court of law, is not removed when the same court is clothed with powers both at law and in equity. Granted that since the conjunction in this state of law and equity powers in nearly all courts of original jurisdiction, one court may not, as a usual thing, interfere with the proceedings in another court co-ordinate in power, yet the jurisdiction to restrain proceedings at law remains. A court, upon its equity side, may enjoin its own suitors proceeding upon its law side. The only question can be as to the method in which it shall be done. Is the method this alone: that in the action on the law side of the court, the facts be set up by answer, and affirmative equitable relief being prayed for upon them, the action be transformed into an equitable one, and thus there be, though not formally, yet practically, an injunction upon the party plaintiff from enforcing his strict legal right, until there shall be a determination of the claim of the party defendants for equitable relief? In a case in which all parties and all interests necessary to a full and complete determination of the controversy were or could be brought before the court in the original action in a proper attitude to each other, there could be such a determination: Dobson v. Pearce, 12 N. Y. 156; 62 Am. Dec. 152; Despard v. Walbridge, 15 N. Y. 374; Chase v. Peck, 21 N. Y. 581. But this is not always practicable." It should be remembered that several of the state codes provide for bringing in all necessary new parties in such cases. "If it be said, as is said, that a court cannot restrain itself, the answer is, that a court of equity never sought or claimed to restrain a court of law, but did enjoin the suitors in it. If it be said that the court can act upon its suitors by way of restraint in the very action which they are then prosecuting before it, one answer is, that all the persons to be restrained and affected by injunction, temporary and perpetual, may not be parties to that action, and so not in the power of the court. And another answer is, that a party defendant may sometimes, for immediate or full remedy, need relief against as well a co-defendant in the original action as the plaintiff therein, and that he cannot always have relief against this co-defendant, based upon the allegations of new matter in his own answer, inasmuch as the co-defendant may not in that action have opportunity of taking and contesting an issue upon those allegations, and the transaction out of which the equity arises may be of too complicated a nature to be investigated on a motion in the same court for summary relief: Decker v. Judson, 16 N. Y. 439–450, per Denio, C. J.; Jones v. Grant, 10

equitable claim for relief as a defense to the legal action, but may, and indeed must, institute a separate equitable suit, and enjoin, if necessary, the further prosecution of the legal action. The resort, under such circumstances, to a second equitable suit and an injunction against the prior action at law, may be proper in the states whose codes of procedure make no provision whatever for bring-

Paige, 348. So that it may well be that in an action pending in a court of both law and equity powers, the tribunal may not be able to mete out full justice to the parties litigant in the action pending before it, without entertaining a cross-action, in which other facts shall be presented and other persons made parties, and in which last action it may be needful that an injunction order issue restraining the prosecution of the first." The codes of several states provide that, in addition to an "equitable defense" and a "counterclaim," one or more defendants may file a cross-complaint against any or all of the plaintiffs, and any or all of the co-defendants, and against additional parties, for the purpose of obtaining equitable relief connected with the subject-matter of the action.

The same general doctrine, including the same single exception of restraining a multiplicity of actions, is fully sustained by California decisions: Uhlfelder v. Levy, 9 Cal. 607, 614, 615; Crowley v. Davis, 37 Cal. 268, 269; Hockstacker v. Levy, 11 Cal. 76; Gorham v. Toomey, 9 Cal. 77; Anthony v. Dunlap, 8 Cal. 26; Rickett v. Johnson, 8 Cal. 34, 36; Revalk v. Kraemer, 8 Cal. 66, 71; 68 Am. Dec. 304; Chipman v. Hibbard, 8 Cal. 268, 270; Flaherty v. Kelly, 51 Cal. 145; Agard v. Valencia, 39 Cal. 292, 303; and see Cal. Civ. Code, sec. 3423, subd. 1.

The general doctrine of the text is also approved in Wisconsin: Platto v. Deuster, 22 Wis. 482; Farmers' etc. Bank v. Luther, 14 Wis. 96; State ex rel. Mills v. Kispert, 21 Wis. 387; Wilson v. Jarvis, 19 Wis. 597; and in Indiana: Ricker v. Pratt, 48 Ind. 73; Hardy v. Stone, 23 Ind. 597.

While the strong current of the authorities is in this direction, the decisions are not wholly uniform. For example, in Kentucky, the case of Dorsey v. Reese, 14 B. Mon. 127, goes to the full length of the old chancery methods, and declares: "There is nothing, however, contained in the code which precludes him [the defendant], if he fails to avail himself of this privilege [i. e., the provision allowing equitable defenses and counterclaims], and permits a judgment to go against him, from bringing an equitable action to obtain relief against the judgment."

It should be added that the codes in some of the states expressly require every cross-right in the shape of a counterclaim to be interposed as such by a defendant, and if he fails to do so, he cannot enforce it by direct action. This provision, of course, includes all cases of equitable affirmative relief which might be set up as an equitable defense in a legal action, since such defenses are a species of counterclaims. For example, see Minn. Code 1858, sec. 72; Lowry v. Hurd, 7 Minn. 356, 363. In some other states a similar provision is made applicable only to one class of counterclaims.

ing in the new parties requisite for a full and final determination of the defendant's equitable claim; but the necessity of such a proceeding is certainly confined to those states. The rule as thus suggested is expressly repudiated by some of the decisions which hold that the necessity of bringing in other parties, in order to a complete determination of the entire controversy, makes no difference in the operation of the general doctrine resulting from the provisions of the new procedure.[1] In several of the states, the codes of procedure expressly provide for this contingency, by enacting that when the decision upon equitable defenses or counterclaims requires the presence of new parties, such parties may be brought in.[2] The cross-complaint or cross-petition as authorized by the codes in certain states seems also to preclude the necessity of a separate suit and injunction in most instances, even for the purpose of preventing a multiplicity of actions.[3]

§ 1373. **The Same. Third Class — No Affirmative Relief.**— 3. There is another case which would seem to require a resort to an equitable suit and the injunction restraining a prior action at law in a portion of the states. Wherever the doctrine is settled that an "equitable defense," within the meaning of the codes, must consist of facts entitling the defendant to some equitable affirmative specific relief, and must be pleaded with a demand for such relief, and must result in the granting thereof, it would seem that facts constituting a defense in equity, though not at law, but which operate solely by way of defense, *defeating the plaintiff's recovery,* and do not entitle the defendant to any affirmative relief, could only be taken advantage of by a separate equitable suit and an injunction perpetually

[1] See the California cases cited in the last note.

[2] See, among others, the codes of Ohio, sec. 96; Kansas, sec. 97; Nebraska, sec. 103; Indiana, sec. 63; Iowa, sec. 2662. This provision clearly obviates the necessity of a resort to a separate suit, even if it does not prevent such resort under all circumstances.

[3] For example, see Cal. Code Civ. Proc., sec. 442.

restraining the action at law. Such facts do not, by its very definition, constitute a counterclaim, nor do they furnish an occasion for a "cross-complaint," which always involves affirmative relief. That there may be such defenses, constituting simply an *equitable* though not a legal *bar*, is undeniable; they were recognized by the former chancery jurisdiction; and their only mode of enforcement, prior to all legislation, was by suit in equity seeking as its only relief a perpetual injunction against the action at law.[1] It would seem to follow, as a necessary result, that if these defenses, operating only as an *equitable bar*, cannot be set up by answer as a defense under the codes, they must be enforced by a separate equitable suit to perpetually enjoin the action at law. Such a result furnishes a cogent reason for holding that the term "equitable defense" as used in the codes of procedure embraces all possible defenses which are valid upon equitable doctrines, and is not confined to those which entitle the defendant to affirmative relief.

[1] I have already shown that under the statute of 1854 the English law courts confined the "equitable pleas" allowed by the statute to this very species of equitable defense, which simply *barred* the action, and was equivalent, as the courts said, to the remedy of perpetual injunction: *Ante*, § 1367. One or two examples of such defenses will be sufficient to show their possible existence and to illustrate their nature. In an action at law for money had and received, the defendant might allege that he held and was entitled to the money by an equitable assignment; for example, that he held it under an order given by the person then entitled on the depositary of a future fund, non-existing at the time the order was given. These facts would show that the defendant was owner of the money in equity, though not at law; they would bar the plaintiff's right to recover; no affirmative relief would be necessary for the defendant; in fact, no affirmative relief would be possible. Again, in an action of trover to recover damages for the alleged conversion of chattels, the defendant might state that he was entitled to the chattels by virtue of an equitable assignment from the original owner, such as an order on his depositary, or a sale or mortgage of the chattels which were to be acquired in the future. This would be a perfect equitable defense, but would require no affirmative relief. Under the former system these defenses could not be set up in the action at law; the defendant would be driven to a separate suit in equity, in which the only relief asked or obtained would be a perpetual injunction against the action at law or against the judgment. For an illustration of such suits, see Burn v. Carvalho, 7 Sim. 109; 4 Mylne & C. 690; Carvalho v. Burn, 4 Barn. & Adol. 382; 1 Ad. & E. 883.

§ 1374. **Some Illustrations of Equitable Defenses.**—While it does not come within the purposes of this book to discuss the scope and effect of "equitable defenses," I have placed in the foot-note a number of well-considered and important cases which illustrate their operation.[1] They have been used most frequently in actions to recover possession of land, analogous to ejectment, and in actions by vendors in contracts for the sale of land, against their vendees. They have also been resorted to in actions upon mercantile contracts, in actions upon covenants, and in many other miscellaneous suits. These cases further show that the jurisdiction to restrain actions at law by injunction has become of very little importance, and almost obsolete, in the states where the reformed procedure prevails.

[1] In actions to recover possession of land: Heermans v. Robertson, 64 N. Y. 332; Hoppough v. Struble, 60 N. Y. 430; Crary v. Goodman, 12 N. Y. 266; 64 Am. Dec. 506; Bartlett v. Judd, 21 N. Y. 200; 78 Am. Dec. 131; Chase v. Peck, 21 N. Y. 581; Harrington v. Fortner, 58 Mo. 468; Hubble v. Vaughan, 42 Mo. 138; Collins v. Rogers, 63 Mo. 515; Maxwell v. Campbell, 45 Ind. 360; McMannus v. Smith, 53 Ind. 211; Hampson v. Fall, 64 Ind. 382; Hammond v. Perry, 38 Iowa, 217; Richardson v. Bates, 8 Ohio St. 257; McClane v. White, 5 Minn. 178; Guedici v. Boots, 42 Cal. 452; Ten Broeck v. Orchard, 74 N. C. 409. In actions by vendors against vendees: Cavalli v. Allen, 57 N. Y. 508; Duffy v. O'Donovan, 46 N. Y. 223, 227; Leaird v. Smith, 44 N. Y. 618; Hubbell v. Von Schoening, 49 N. Y. 326, 330; Giles v. Austin, 62 N. Y. 486; Cythe v. La Fontain, 51 Barb. 186; Ingles v. Patterson, 36 Wis. 373; Onson v. Cown, 22 Wis. 329; Harris v. Vinyard, 42 Mo. 568; Petty v. Malier, 15 B. Mon. 591, 604; Creager v. Walker, 7 Bush, 1; Talbert v. Singleton, 42 Cal. 390; Bruck v. Tucker, 42 Cal. 346; Hughes v. Davis, 40 Cal. 117. In actions on mercantile contracts: Seeley v. Engell, 13 N. Y. 542; New York Cent. Ins. Co. v. Nat. Protec. Ins. Co., 14 N. Y. 85; Despard v. Walbridge, 15 N. Y. 374; Holland v. Johnson, 51 Ind. 346; Hinkle v. Margerum, 50 Ind. 240; Struman v. Robb, 37 Iowa, 311; Hablitzel v. Latham, 35 Iowa, 550; Becker v. Sandusky City Bank, 1 Minn. 311. In miscellaneous actions for damages: Haire v. Baker, 5 N. Y. 357; Pitcher v. Hennessey, 48 N. Y. 415; Dobson v. Pearce, 12 N. Y. 156; 62 Am. Dec. 152; Pennoyer v. Allen, 51 Wis. 360; 50 Wis. 308. As to affirmative relief, see Massie v. Stradford, 17 Ohio St. 596; Klonne v. Bradstreet, 7 Ohio St. 322; Quebec Bank v. Weyand, 30 Ohio St. 126; Reed v. Newton, 22 Minn. 541; Kellogg v. Aherin, 48 Iowa, 299; Hatcher v. Briggs, 6 Or. 31; Tucker v. McCoy, 3 Col. 284; Mills v. Buttrick, 4 Col. 53, 123; Douglas v. Haberstro, 25 Hun, 262.

THIRD GROUP.

REMEDIES WHICH INDIRECTLY ESTABLISH OR PROTECT INTERESTS AND PRIMARY RIGHTS, EITHER LEGAL OR EQUITABLE.

CHAPTER FIRST.

REFORMATION AND CANCELLATION.

ANALYSIS.

§ 1375. General nature and object.
§ 1376. Reformation and re-execution of instruments.
§ 1377. Cancellation, surrender up, or discharge of instruments.

§ 1375. **General Nature and Object.**—The ultimate object of the remedies belonging to this group is the establishment or protection of interests, estates, and primary rights; but this object is accomplished *indirectly*. While these remedies are not so completely ancillary as interpleader and receivership, yet they are to a certain extent auxiliary. They do not, like a specific performance, or the execution of a trust, or an assignment of dower, or partition of land, operate directly and immediately to establish the plaintiff's title, and to confer upon him the complete dominion over his estate,— the ultimate relief which he seeks. Their effect in establishing his ultimate dominion is indirect. They are often used as the preparatory step which enables him to obtain, sometimes in the same action, and sometimes in a subsequent suit, the ultimate remedy which finally establishes his rights or obligations, or restores him to the full enjoyment of his estate. The reformation of a policy of insurance is not a final remedy; but it establishes the real

contract, and thus enables the assured to recover the amount actually due according to the terms of that contract. The reformation of a deed does not directly restore the grantee to the dominion and possession of the land which had been omitted; but it places him in a position which enables him, if necessary, to assert his dominion and recover the possession. The cancellation of a deed does not of itself *directly* establish the plaintiff's title and put him in possession of the land, but it enables him, if necessary, to assert his title and obtain the possession. These remedies may be obtained on behalf of either a legal or an equitable interest, by either a legal or an equitable owner. The remedies constituting this group are the two following: reformation or re-execution of instruments, and rescission, cancellation, surrender up, or discharge of instruments.[1] Since they are chiefly occasioned by fraud or mistake, the general doctrines and rules determining the jurisdiction to grant them, and regulating their use, have already been fully examined in the preceding volume.[2] In the present chapter I merely collect and arrange the classes of cases in which the jurisdiction will be or will not be exercised.

§ 1376. **Reformation and Re-execution of Instruments.**— This subject has already been treated under the head of

[1] Reformation and re-execution are in fact one and the same remedy, depending upon the same rules; and the same is true of rescission, cancellation, surrender up, and discharge. The decree for cancellation generally includes a direction for a surrender up, and, if necessary, for a discharge of record.

[2] See vol. 2, §§ 838–871 (on mistake); §§ 872–921 (on actual fraud); and §§ 922–974 (on constructive fraud). A large number of cases cited in these chapters illustrate the remedies of "reformation" and "cancellation." In particular, see, as to jurisdiction to grant the relief of reformation or of cancellation on account of mistake, and the conditions of fact which must exist, §§ 870, 871, and cases in notes. As to cancellation on account of fraud, see §§ 910–921; English doctrine: § 912. The American doctrine: § 914. Incidents of the relief, what is required of the plaintiff as a condition to granting the relief: §§ 915–917. Persons against whom granted: § 918. Illustrations: §§ 919–921.

Mistake, and little more need here be said.[1] Equity has jurisdiction to reform written instruments in but two well-defined cases: 1. Where there is a mutual mistake,— that is, where there has been a meeting of minds,— an agreement actually entered into, but the contract, deed, settlement, or other instrument, in its written form, does not express what was really intended by the parties thereto; and 2. Where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties.[2] In such cases the instrument may be made to conform to the agreement or transaction entered into according to the intention of the parties. The conditions of fact giving rise to the exercise of the jurisdiction to grant reformation are numerous. Almost all written instruments may be reformed when a proper occasion is furnished. The following are among the most important:

[1] Vol. 2, §§ 838–871. The remedy of reformation virtually includes that of re-execution, since, in many cases, the latter follows as an incident to the former. In some instances the mistake occurs only in the execution: See Miller v. Davis, 10 Kan. 541; Heaton v. Fryberger, 38 Iowa, 185; Parlin v. Stone, 1 McCrary, 443. Equity has, however, a special jurisdiction to decree the re-execution of such instruments as deeds which have become accidentally lost or destroyed, on the ground that otherwise the plaintiff's title would be defective or embarrassed: Bennett v. Ingoldsby, Finch, 262; Cummings v. Coe, 10 Cal. 529; Hoddy v. Hoard, 2 Ind. 474; 54 Am. Dec. 456; and see Clarke v. Featherston, 32 Ind. 142.

[2] Vol. 2, §§ 845–850, 852–856, 870, and cases cited. See also the following additional cases: Kilmer v. Smith, 77 N. Y. 226; 33 Am. Rep. 613; Albany Sav. Inst. v. Burdick, 87 N. Y. 40; Paine v. Upton, 87 N. Y. 327; 41 Am. Rep. 371; Arthur v. Homestead F. Ins. Co., 78 N. Y. 462; 34 Am. Rep. 550; Ford v. Joyce, 78 N. Y. 618; Steinbach v. Relief F. Ins. Co., 77 N. Y. 498; 33 Am. Rep. 655; Whittemore v. Farrington, 76 N. Y. 452; Moran v. McLarty, 75 N. Y. 25; Paine v. Jones, 75 N. Y. 593; Ramsey v. Smith, 32 N. J. Eq. 28; Real Estate Trust Co. v. Balch, 13 Jones & S. 528; Robertson v. Walker, 51 Ala. 484; Sutherland v. Sutherland, 69 Ill. 481; Evarts v. Steger, 5 Or. 147; Bradford v. Bradford. 54 N. H. 463; Botsford v. McLean, 42 Barb. 445; 45 Barb. 478; Snell v. Insurance Co., 98 U. S. 85. As to laches, carelessness, and the like, cutting off rights of remedy, see Sable v. Maloney, 48 Wis. 331; McFadden v. Rogers, 70 Mo. 421; Snyder v. Ives, 42 Iowa, 157; Nicoll v. Mason, 49 Ill. 358; Hutson v. Fumas, 31 Iowa, 154; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; McIntosh v. Saunders, 68 Ill. 128; Toops v. Snyder, 70 Ind. 554; Witthaus v. Schack, 57 How. Pr. 310.

Deeds of conveyance,[3] mortgages,[4] leases,[5] policies of insurance,[6] bonds of various kinds,[7] negotiable instruments,[8]

[3] The cases of reformation of deeds are many. As illustrations of the various questions which may arise, see Harris v. Pepperell, L. R. 5 Eq. 1; Bloomer v. Spittle, L. R. 13 Eq. 427; White v. White, L. R. 15 Eq. 247; Gillespie v. Moon, 2 Johns. Ch. 585; 7 Am. Dec. 559; Clayton v. Freet, 10 Ohio St. 544; Deford v. Mercer, 24 Iowa, 118; 92 Am. Dec. 460 (quitclaim); Mattingly v. Speak, 4 Bush, 316; Lestrade v. Barth, 19 Cal. 660; Brown v. Balen, 33 N. J. Eq. 469; Weston v. Wilson, 31 N. J. Eq. 51; Day v. Day, 84 N. C. 408; Sawyer v. Hanson, 48 Wis. 611; Kilmer v. Smith, 77 N. Y. 226; 33 Am. Rep. 613; Jackson v. Andrews, 59 N. Y. 244; Bush v. Hicks, 60 N. Y. 298; Albany Sav. Inst. v. Burdick, 87 N. Y. 40; Crippen v. Baums, 15 Hun, 136; Johnson v. Johnson, 8 Baxt. 261; Blackburn v. Randolph, 33 Ark. 119; Michel v. Tinsley, 69 Mo. 442; Baker v. Massey, 50 Iowa, 399; Ballentine v. Clark, 38 Mich. 395; Pasman v. Montague, 30 N. J. Eq. 385; Fly v. Brooks, 64 Ind. 50; Nicholson v. Caress, 59 Ind. 39; Gerald v. Elley, 45 Iowa, 322; Parish v. Scott, 10 Heisk. 438; Dart v. Barbour, 32 Mich. 267; Cummings v. Freer, 26 Mich. 128; Burr v. Hutchinson, 61 Me. 514; Huss v. Morris, 63 Pa. St. 367; Blakeman v. Blakeman, 39 Conn. 320. *Voluntary deeds:* Froman v. Froman, 13 Ind. 317; Randall v. Ghent, 19 Ind. 271; Hunt v. Frazier, 6 Jones Eq. 90. *Deeds of married women:* Heaton v. Fryberger, 38 Iowa, 185; Leonis v. Lazzarovich, 55 Cal. 52; Styers v. Robbins, 76 Ind. 547; Purcell v. Goshorn, 17 Ohio, 105; 49 Am. Dec. 448.

[4] Parlin v. Stone, 1 McCrary, 443; Miller v. Davis, 10 Kan. 541; Albany Sav. Inst. v. Burdick, 87 N. Y. 40; Coe v. N. J. Midland R'y, 31 N. J. Eq. 105; Wilson v. King, 27 N. J. Eq. 374; Wheeler v. Kirtland, 23 N. J. Eq. 13; Petesch v. Hambach, 48 Wis. 443; First Nat. Bank v. Gough. 61 Ind. 147; Wilson v. Stewart, 63 Ind. 294; Exchange Bank v. Russell, 50 Mo. 531; Schwickerath v. Cooksey, 53 Mo. 75; Baskins v. Calhoun, 45 Ala. 582; Alexander v. Rea, 50 Ala. 450; Goodman v. Randall, 44 Conn. 321; Milmine v. Burnham, 76 Ill. 362; Quivey v. Baker, 37 Cal. 465; Ruhling v. Hackett, 1 Nev. 360. *Deeds of trust:* Allen v. McGaughey, 31 Ark. 252; Young v. Coleman, 43 Mo. 179; Haynes v. Seachrest, 13 Iowa, 455.

[5] Henry v. Smith, 76 N. C. 311; Mays v. Dwight, 82 Pa. St. 462; Murray v. Dake, 46 Cal. 644; Campbell v. Hatchett, 55 Ala. 548.

[6] Knox v. Lycoming F. Ins. Co., 50 Wis. 671; Hearn v. Equitable etc. Ins. Co., 4 Cliff. 192; Dean v. Equitable F. Ins. Co., 4 Cliff. 575; Brugger v. State Invest. Ins. Co., 5 Saw. 304; Hay v. Star F. Ins. Co., 77 N. Y. 235; 33 Am. Rep. 607; Mercantile Ins. Co. v. Jaynes, 87 Ill. 199; Mead v. Westchester etc. Ins. Co., 64 N. Y. 453; National Traders' Bank v. Ocean Ins. Co., 62 Me. 519; Keith v. Globe Ins. Co., 52 Ill. 518; 4 Am. Rep. 634; Miaghan v. Hartford F. Ins. Co., 12 Hun, 321; Mackenzie v. Coulson, L. R. 8 Eq. 368.

[7] Emery v. Mohler, 69 Ill. 221; Evarts v. Steger, 5 Or. 147; Craft v. Dickens, 78 Ill. 131; State v. Frank's Adm'r, 51 Mo. 98; Schwear v. Haupt, 49 Mo. 225; Pickersgill v. Lahens, 15 Wall. 140; Garnar v. Bird, 57 Barb. 277.

[8] Botsford v. McLean, 42 Barb. 445; 45 Barb. 478; Talley v. Courtney, 1 Heisk. 715; Gammage v. Moore, 42 Tex. 170; Ottenheimer v. Cook, 10 Heisk.

marriage and family settlements,[9] and compromises.[10] Judgments and other records may also be corrected.[11] Other instances are given in the foot-note.[12]

§ 1377. **Cancellation and Surrender up or Discharge of Instruments.**—The jurisdiction of equity to grant the remedy of cancellation exists and will always be exercised when it is necessary to protect or maintain equitable primary estates, interests, or rights; where, however, the estate, interest, or right is legal, the jurisdiction always *exists,* but its *exercise* depends upon the adequacy of the legal remedies,—a party being left to his affirmative or defensive remedy at law, where full and complete justice can thereby be done.[1] The occasions giving rise to the exercise of this

309; Loomis v. Freer, 4 Ill. App. 547; Potter v. Potter, 27 Ohio St. 84; Druiff v. Lord Parker, L. R. 5 Eq. 131.

[9] See vol. 2, §§ 850, 855, 871. See also the following additional cases: Clark v. Girdwood, L. R. 7 Ch. Div. 9; Lovesy v. Smith, L. R. 15 Ch. Div. 655; Welman v. Welman, L. R. 15 Ch. Div. 570; Hanley v. Pearson, L. R. 13 Ch. Div. 545; Lister v. Hodgson, L. R. 4 Eq. 30.

[10] See vol. 2, §§ 850, 855, 871, and cases cited.

[11] Vol. 2, § 871; Partridge v. Harrow, 27 Iowa, 96; 99 Am. Dec. 643; Snyder v. Ives, 42 Iowa, 157; Cohen v. Dubose, Harp. Eq. 102; 14 Am. Dec. 709 (verdict).

[12] Moran v. McLarty, 75 N. Y. 25 (assignment of mortgage); Kelley v. McKinney, 5 Lea, 164 (contract for sale of land); Stafford v. Fetters, 55 Iowa, 484 (indorsement of note); Hervey v. Savery, 48 Iowa, 313 (release of mortgage); Mastelar v. Edgarton, 44 Iowa, 495 (agreement establishing highway); Thomas v. Raymond, 4 S. C. 347 (military order; not corrected). As to reforming and correcting mistakes in wills, see vol. 2, § 871.

[1] Vol. 1, §§ 219–221; vol. 2, §§ 911, 914; Globe Mut. L. Ins. Co. v. Reals, 79 N. Y. 202; Ryerson v. Willis, 81 N. Y. 277 (when mortgage will not be canceled for failure of consideration); Kelly v. Christal, 81 N. Y. 619 (when a judgment will not be set aside); United States v. Throckmorton, 98 U. S. 61 (the same). In the exercise of the remedy of cancellation instruments are almost necessarily directed to be "delivered up." "Delivery up," under these circumstances, can hardly be called a distinct remedy. In England, courts of equity have entertained jurisdiction from the earliest times to decree instruments of a peculiar and exceptional character—as muniments of title—to be delivered up to persons entitled to their custody and possession. The reasons for the exercise of this jurisdiction do not apply in this country: Armitage v. Wadsworth, 1 Madd. 189, 192; Jackson v. Butler, 2 Atk. 306; 9 Mod. 297; Grey v. Cockeril, 2 Atk. 114; Harrison v. Southcote, 1 Atk. 528, 540; Banbury v. Briscoe, 2 Cas. Ch. 42; Ford v. Peering, 1 Ves. 72; Duncombe v. Mayer, 8 Ves. 320; Francis v. Francis, 2 De Gex, M. & G.

jurisdiction are mistake, fraud, and other instances where enforcing instruments or agreements would be inequitable or unjust.[2] A doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments absolutely void at law, and not merely voidable, to be delivered up and canceled, since the legal remedy of a party was adequate and complete, and no case was presented for equitable interference;[3] but it is now well settled that jurisdiction will be exercised in such cases,[4] except where the invalidity of the instrument is apparent on its face.[5] The particular instances in which this remedy is most often given are instruments concerning land,[6] and

73; Dunn v. Dunn, 7 De Gex, M. & G. 25; Turner v. Letts, 7 De Gex, M. & G. 243; Newton v. Newton, L. R. 6 Eq. 135; Thorpe v. Holdsworth, L. R. 7 Eq. 139; Wilson's Case, L. R. 12 Eq. 516, 521; Waldy v. Gray, L. R. 20 Eq. 238; Jenner v. Morris, L. R. 1 Ch. 603; Heath v. Crealock, L. R. 10 Ch. 22; Leathes v. Leathes, L. R. 5 Ch. Div. 221; James v. Rumsey, L. R. 11 Ch. Div. 398; In re Morgan, L. R. 18 Ch. Div. 93; In re Cooper, L. R. 20 Ch. Div. 611.

[2] The various rules as to when jurisdiction will be exercised, and the evidence necessary, in cases of fraud and mistake, have already been discussed, and the reader is referred to the sections on those subjects.

[3] Ryan v. Mackmath, 3 Brown Ch. 15; Hilton v. Barrow, 1 Ves. 284; Bromley v. Holland, 5 Ves. 610, 618; Franco v. Bollon, 3 Ves. 368.

[4] Forged deeds: In re Cooper, L. R. 20 Ch. Div. 611; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474. For illustrations of the general rule, see Hamilton v. Cummings, 1 Johns. Ch. 517, 520, and cases cited; Lord St. John v. Lady St. John, 11 Ves. 526; Jervis v. White, 7 Ves. 413; Simpson v. Lord Howden, 3 Mylne & C. 97, 102; Mayor of Colchester v. Lowten, 1 Ves. & B. 226, 244; Bromley v. Holland, 7 Ves. 3, 16; Hayward v. Dimsdale, 17 Ves. 111; Chennel v. Churchman, 3 Brown Ch. 16, note; Minshaw v. Jordan, 3 Brown Ch. 16, note; Pierce v. Webb, 3 Belt's Brown Ch. 16, note 2; Lisle v. Liddle, 3 Anstr. 649; Ryan v. Mackmath, cited 13 Ves. 584; Jackman v. Mitchell, 13 Ves. 581; Peirsoll v. Elliott, 6 Pet. 95, 98; and see cases cited in subsequent notes under this section.

[5] Gray v. Mathias, 5 Ves. 286; Simpson v. Lord Howden, 3 Mylne & C. 97; Smyth v. Griffin, 13 Sim. 245; Bromley v. Holland, 7 Ves. 3, 21; Peirsoll v. Elliott, 6 Pet. 95, 98; Van Doren v. Mayor etc., 9 Paige, 388. See § 1399, in regard to removing deeds void on their faces, as being clouds on title. As to removing cloud, see also Strusburgh v. Mayor etc., 87 N. Y. 452; Dederer v. Voorhies, 81 N. Y. 153; Wells v. Buffalo, 80 N. Y. 253; Townsend v. Mayor etc., 77 N. Y. 542 (void tax).

[6] *Deeds:* The following of the many cases will serve as illustrations: Blenkinsopp v. Blenkinsopp, 1 De Gex, M. & G. 495; Harrison v. Guest, 6

negotiable paper before maturity,[7] the legal remedies in these cases being, as a general rule, inadequate. The

De Gex, M. & G. 424; Wright v. Vanderplank, 8 De Gex, M. & G. 133; Greeley v. Mousley, 4 De Gex & J. 78; Nortcliffe v. Warburton, 4 De Gex, F. & J. 449; Clark v. Malpas, 4 De Gex, F. & J. 401; Baker v. Monk, 4 De Gex, J. & S. 388; Broun v. Kennedy, 4 De Gex, J. & S. 217; De Hoghton v. Money, L. R. 1 Eq. 154; Lister v. Hodgson, L. R. 4 Eq. 30; Heath v. Crealock, L. R. 10 Ch. 22; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474; Reid v. Burns, 13 Ohio St. 49; Hamilton v. Batlin, 8 Minn. 403; 83 Am. Dec. 787; Woodruff v. Garner, 27 Ind. 4; 89 Am. Dec. 477; Shewmake v. Williams, 54 Ga. 206; Lindsey v. Lindsey, 50 Ill. 79; 99 Am. Dec. 489; Bayliss v. Williams, 6 Cold. 440; Parrott v. Parrott, 1 Heisk. 681; Bogle v. Hammons, 2 Heisk. 136; Hyer v. Little, 20 N. J. Eq. 443; Warnock v. Campbell, 25 N. J. Eq. 485; Mead v. Coombs, 26 N. J. Eq. 173; Lyons v. Van Riper, 26 N. J. Eq. 337; Yard v. Yard, 27 N. J. Eq. 114; Turner v. Turner, 44 Mo. 535; Davis v. Fox, 59 Mo. 125; Hollocher v. Hollocher, 62 Mo. 267; Davis v. Luster, 64 Mo. 43; Dean v. Younell's Adm'r, 8 Wall. 14, note; Murphy v. Paynter, 1 Dill. 333; Allore v. Jewell, 94 U. S. 506; Barfield v. Price, 40 Cal. 535; Hearst v. Pujol, 44 Cal. 230; Hightower v. Nuber, 26 Ark. 604; Freeman v. Reagan, 26 Ark. 373; Seymour v. Belding, 83 Ill. 222; Stone v. Wilbern, 83 Ill. 105; Hough v. Cook etc. Co., 73 Ill. 23; 24 Am. Rep. 230; Wiley v. Ewalt, 66 Ill. 26; Pickerell v. Morss, 97 Ill. 220; Walton v. Tusten, 49 Miss. 569; Case v. Case, 26 Mich. 484; Ritter v. Ritter, 42 Mich. 108; Rath v. Vanderlyn, 44 Mich. 597; Smith v. Rowley, 66 Barb. 502; Larsen v. Burke, 39 Iowa, 703; Montgomery v. Shockey, 37 Iowa, 107; Benson v. Cowell, 52 Iowa, 137; Cook v. Moore, 39 Tex. 255; Mattair v. Payne, 15 Fla. 682; Morrison v. Morrison, 27 Gratt. 190; Stearns v. Beckham, 31 Gratt. 379; Biglow v. Leabo, 8 Or. 147; Bishop v. Aldrich, 48 Wis. 619. *Mortgages:* Spurgin v. Traub, 65 Ill. 170; Burlington Tp. v. Cross, 15 Kan. 74; Dolan v. Kehr, 9 Mo. App. 351; Connelly v. Fisher, 3 Tenn. Ch. 382; Schenck v. O'Neill, 23 Hun. 209; Foote v. Beecher, 78 N. Y. 155; Schaper v. Schaper, 84 Ill. 603; Starr v. Ellis, 6 Johns. Ch. 393. *Leases:* Wood v. Hubbell, 10 N. Y. 479; Field v. Herrick, 5 Ill. App. 54; Arnold v. Bright, 41 Mich. 207; Wilson v. Deen, 74 N. Y. 531; Watson etc. Co. v. Casteel, 68 Ind. 476. *Contracts concerning lands:* Roy v. Haviland, 12 Ind. 364; Matlock v. Todd, 25 Ind. 128; Wambaugh v. Bimer, 25 Ind. 368; Brainard v. Holsaple, 4 G. Greene, 485; McGuire v. Bowman, 6 Bush, 550; Belknap v. Sealey, 14 N. Y. 143; 67 Am. Dec. 120; Young v. Hughes, 32 N. J. Eq. 372.

[7] Minshaw v. Jordan, 3 Brown Ch. 17, note; Jervis v. White, 7 Ves. 413; Bishop of Winchester v. Fournier, 2 Ves. Sr. 445; Wynne v. Callander, 1 Russ. 293; Town of Springport v. Teutonia Sav. Bank, 75 N. Y. 397 (cancellation of bonds illegally issued in name of a town, to avoid a multiplicity of suits; a very important decision); Town of Wellsborough v. N. Y. & C. R. R., 76 N. Y. 182 (the same); Western R. R. v. Bayne, 75 N. Y. 1 (surrender up of securities); Gould v. Cayuga Co. etc. Bank, 86 N. Y. 75; Metler's Adm'rs v. Metler, 18 N. J. Eq. 270; 19 N. Y. 457; Hughes v. United States, 4 Wall. 232; Ferguson v. Fisk, 28 Conn. 501; Lewis v. Tobias, 10 Cal. 574; Smith v. Smith's Adm'r, 30 N. J. Eq. 564; Crowe v. Peters, 63 Mo. 429;

remedy is also frequently given in case of bonds,[8] policies of insurance,[9] settlements and compromises,[10] awards,[11] and judgments.[12]

Hosleton v. Dickinson, 51 Iowa, 244; Fuller v. Percival, 126 Mass. 381; Fowler v. Palmer, 62 N. Y. 533. An injunction against transferring is often given in such cases.

[8] Jackman v. Mitchell, 13 Ves. 581; Hamilton v. Cummings, 1 Johns. Ch. 517; Town of Venice v. Woodruff, 62 N. Y. 462; 20 Am. Rep. 495; Town of Springport v. Teutonia Sav. Bank, 75 N. Y. 397; Town of Wellsborough v. N. Y. & C. R. R., 76 N. Y. 182; Western R. R. v. Bayne, 75 N. Y. 1; Gould v. Cayuga Co. etc. Bank, 86 N. Y. 75. These cases overrule the decision in Town of Venice v. Woodruff.

[9] Whittingham v. Thornburgh, 2 Vern. 506; Traill v. Baring, 4 De Gex, J. & S. 318; Commercial etc. Ins. Co. v. McLoon, 14 Allen, 351; Insurance Co. v. Bailey, 13 Wall. 616; Derrick v. Lamar Ins. Co., 74 Ill. 404; Life Ins. Co. v. Bangs, 103 U. S. 780; Tabor v. Michigan etc. Ins. Co., 44 Mich. 324; Globe etc. Ins. Co. v. Reals, 48 How. Pr. 502; 79 N. Y. 202.

[10] Vol. 2, §§ 850, 855, 875.

[11] Vol. 2, §§ 871, 919.

[12] Vol. 2, §§ 871, 914, 919. Rescission of a fraudulent sale under a decree: Fisher v. Hersey, 78 N. Y. 387. A judgment will not be set aside on the ground of fraud, when the very fraud alleged was tried and passed upon by the issues of the former action: United States v. Throckmorton, 98 U. S. 61; nor when the facts could have been set up as a complete defense in the former action: Kelly v. Christal, 81 N. Y. 619. For further illustrations of cancellation, see vol. 2, pp. 410, 411, in note under § 914. As to canceling conveyances in fraud of creditors, see vol. 2, §§ 966–974.

FOURTH GROUP.

REMEDIES BY WHICH ESTATES, INTERESTS, AND PRIMARY RIGHTS, EITHER LEGAL OR EQUITABLE, ARE DIRECTLY DECLARED, ESTABLISHED, OR RECOVERED, OR THE ENJOYMENT THEREOF FULLY RESTORED.

CHAPTER FIRST.

SUITS BY WHICH PURELY LEGAL ESTATES ARE ESTABLISHED, AND THE ENJOYMENT THEREOF RECOVERED: NAMELY, ASSIGNMENT OF DOWER, ESTABLISHMENT OF DISPUTED BOUNDARIES, PARTITION OF LAND, AND OF PERSONAL PROPERTY.

ANALYSIS.

§ 1378. General nature and object of this group.
§ 1379. Nature and object of the first class.
§§ 1380–1383. Assignment of dower.
§ 1380. Legal remedies.
§ 1381. Origin and grounds of the equitable jurisdiction.
§ 1382. The jurisdiction now concurrent.
§ 1383. Exclusive jurisdiction over dower in equitable estates.
§ 1384. Establishment of disputed boundaries.
§ 1385. The same; equitable incidents and grounds.
§§ 1386–1390. Partition of lands.
§ 1386. Common law remedy.
§ 1387. Equitable jurisdiction and remedies.
§ 1388. The title of the plaintiff.
§ 1389. Mode of partition.
§ 1390. Partition by means of a sale.
§ 1391. Partition of personal property.
§ 1392. The same; issue of title.

§ 1378. General Nature and Object of This Group.— All the remedies belonging to this group have one most important distinctive feature in common, which is apparent

upon even a slight examination. In all of them the estate or interest of the complaining party, whether it be legal or equitable, is *directly* established or recovered, or the enjoyment thereof is *directly* restored. These remedies are not, therefore, provisional or auxiliary, but they are, for the purposes of the complaining party, as truly final or ultimate reliefs as is the judgment in an action of ejectment or of replevin.[1] The estate, interest, or primary right to be established or recovered, or fully enjoyed by their means, may be either legal or equitable; and when it is equitable, the establishment *may* consist in clothing the plaintiff with the legal estate.[2] The remedies composing this group are separated, by a natural line of division, into *three* general classes, namely: 1. Suits by which purely legal estates are established, and the enjoyment thereof recovered; 2. Suits by which some general right, either legal or equitable, is established; and 3. Suits by which some particular estate or interest, either legal or equitable, is established.

§ 1379. **Nature and Object of the First Class.**— Since the particular cases belonging to this class are primarily adapted to purely legal interests, the common law gives similar

[1] This is manifestly so in "assignment of dower," "settlement of disputed boundaries," and "partition of land," since in each of these instances the plaintiff establishes his individual right to and obtains sole possession of a specific tract of land, and in "partition of personal property," he procures the same with respect to specific chattels. The statement is no less true of the other suits included within this group. In a suit to construe a will, estates in specific property are directly established; in suits to quiet title, the very object of the judgment is to declare and establish the plaintiff's legal or equitable estate in some specific property, and perhaps to convert his equitable estate into a legal one. Even in suits to remove a cloud from title, although the relief is often obtained by means of a cancellation, yet from the nature of the whole proceeding, the plaintiff's estate is thereby established, and he is left in its full enjoyment. In strict foreclosures of mortgages or pledges, and in redemptions of mortgages or pledges, the plaintiff plainly establishes his estate in, and secures his possession of, the specific land or chattels, free from any claim of the defendant. However much these remedies may differ in appearance, they all have this same *essential* element which brings them within the same group.

[2] As in some statutory suits to quiet title, and some suits to remove a cloud from title.

relief by means of appropriate legal actions. The jurisdiction of equity was based wholly upon the superiority of the equitable methods and procedure; and while the equitable jurisdiction in cases of dower and partition has become so established that it has almost displaced the legal remedies, that of settling disputed boundaries still requires the presence of some special equitable incident or circumstance.[1] I purpose to state the general doctrines and rules which regulate the jurisdiction to grant these remedies, and determine the circumstances under which and the parties between whom it will be exercised.

§ 1380. **Assignment of Dower — Legal Remedies.**— The right known as the wife's right of dower was purely legal, and was asserted at law through the writ of right of dower, and the writ of dower *unde nihil habet,* both of which were in the nature of real actions. As early as the reign of Queen Elizabeth, courts of equity began to assume jurisdiction over cases of dower, but only tentatively, and as ancillary to proceedings at law.[1] This jurisdiction, originally narrow and auxiliary, has, by the course of decision, and on familiar equitable principles, been expanded to the extent of affording complete relief between the parties.

§ 1381. **Origin and Grounds of the Equitable Jurisdiction.**— Equitable interposition in cases of dower was at first invoked for the removal of impediments in the way of recovery at law. As the title deeds to real estate were held by heirs, devisees, or trustees, it would be important, and even necessary, for the widow, on the event of a contest of her dower, to resort to equity, for the purpose of ascertaining the lands of which her husband had been seised during marriage. To accomplish this purpose, a bill of discovery would be entertained in equity; and where the land of the husband was an undivided interest in a greater portion, equity would decree a partition in aid of the assignment

§ 1379, [1] Under all ordinary circumstances, the action of ejectment is an adequate remedy by which to settle disputed claims to legal titles and estates.

§ 1380, [1] Wild v. Wells, 1 Dick. 3; Toth. 82.

to the widow of her dower.[1] This jurisdiction was, in its earlier stages, strictly auxiliary; and if no obstacle in the way of recognition and assignment of dower at law was disclosed, the equitable proceedings would be arrested.[2] The equitable jurisdiction, having once attached, was not slow in maturing so as to confer full relief. When the widow came into equity for a discovery respecting the title deeds to her husband's estate, which were in the hands of the heir, it was held that she should have complete relief.[3] If her title to dower was denied, it would be incumbent upon her to establish such title at law. Equity would, for that purpose, retain the bill for a reasonable time, and upon the determination of the issue at law in the widow's favor, would proceed to administer final relief.[4]

§ 1382. **The Jurisdiction Now Concurrent.**— Although it was thus, at one time, supposed that the jurisdiction of equity was ancillary, and could not attach in the absence of impediments at law, it is now well settled that courts of equity have concurrent jurisdiction in cases of legal dower, or dower in legal estates.[1] The advantages of the

§ 1381, [1] Moor v. Black, Cas. t. Talb. 126.

§ 1381, [2] Shute v. Shute, Prec. Ch. 111; Wallis v. Everard, 3 Ch. Rep. 161.

§ 1381, [3] Curtis v. Curtis, 2 Brown Ch. 620, 631, 632.

§ 1381, [4] Curtis v. Curtis, *supra;* Mundy v. Mundy, 2 Ves. 122, 128; D'Arcy v. Blake, 2 Schoales & L. 387; Swaine v. Perine, 5 Johns. Ch. 482; 9 Am. Dec. 318; Hartshorne v. Hartshorne, 2 N. J. Eq. 349; Rockwell v. Morgan, 13 N. J. Eq. 384; Wells v. Beall, 2 Gill & J. 458. And assuming the widow's title to be established or conceded, equity will not only assist her by way of discovery and assignment, but will decree her a due share of the mesne profits, and this, not from the time of the demand merely, but from the time when her title accrued: Dormer v. Fortescue, 3 Atk. 124, 130; Chase's Case, 1 Bland, 206; 17 Am. Dec. 277; Wells v. Beall, 2 Gill & J. 458; Keith v. Trapier, Bail. Eq. 63; Hazen v. Thurber, 4 Johns. Ch. 604.

§ 1382, [1] In a leading case the question was presented on the pleadings, which failed to disclose any impediment in the way of a proceeding at law, but the court determined in favor of the jurisdiction: Mundy v. Mundy, 2 Ves. 122. And such is now the established doctrine in England and in the United States: Pulteney v. Warren, 6 Ves. 73, 89; Strickland v. Strickland, 6 Beav. 77; Herbert v. Wren, 7 Cranch, 370; Powell v. Monson etc. Mfg. Co., 3 Mason, 347; Hazen v. Thurber, 4 Johns. Ch. 604; Swaine v. Perine, 5 Johns. Ch. 482; 9 Am. Dec. 318; Badgley v. Bruce, 4 Paige, 98; Hartshorne v. Hartshorne, 2 N. J. Eq. 349.

equitable procedure are obvious. An outstanding term could be removed and satisfied;[2] a partition in the case of undivided interests could be decreed, and an account could be taken;[3] fraudulent conveyances could be canceled;[4] and antagonistic claims to the subject-matter could be determined without multiplicity of suits.[5] Equity will also award damages which could not be recovered at law on an application for dower. At law, if the tenant dies after judgment, and before assessment of damages, the damages are lost to the widow; and if she herself dies before such assessment of damages, her personal representatives are without recourse. In these instances, the widow, or her personal representatives, by a resort to equity, obtain adequate relief.[6]

§ 1383. **Exclusive Jurisdiction over Dower in Equitable Estates.**— In England since the statute of 3 and 4 William IV.,[1] and in the United States from an early day, equity has assumed an exclusive jurisdiction over claims for dower in equitable estates.[2] Where the husband's estate was an equity of redemption, the widow may proceed against the mortgagee by a bill in equity to redeem.[3] Where the husband's estate was a portion of the assets of a partnership, and where the settlement of the partnership affairs has been unconscionably protracted, the widow may appeal to equity for relief.[4] If the husband should die seised of land on which a part of the purchase-money was due, the widow

§ 1382, [2] Dormer v. Fortescue, 3 Atk. 124, 130.

§ 1382, [3] Hill v. Gregory, 56 Miss. 341; Nye v. Patterson, 35 Mich. 413; Herbert v. Wren, 7 Cranch, 370.

§ 1382, [4] Swaine v. Perine, 5 Johns. Ch. 482; 9 Am. Dec. 318.

§ 1382, [5] Goodburn v. Stevens, 1 Md. Ch. 420.

§ 1382, [6] Curtis v. Curtis, 2 Brown Ch. 620, 632; Dormer v. Fortescue, 3 Atk. 124, 130; Mordant v. Thorold, 2 Lev. 275.

§ 1383, [1] Chapter 105.

§ 1383, [2] McMahan v. Kimball, 3 Blackf. 1.

§ 1383, [3] Dawson v. Bank of Whitehaven, L. R. 4 Ch. Div. 639; Anderson v. Pignet, L. R. 11 Eq. 329; Gibson v. Crehore, 3 Pick. 475; Farwell v. Cotting, 3 Allen, 211; Chiswell v. Morris, 14 N. J. Eq. 101; Eldridge v. Eldridge, 14 N. J. Eq. 195.

§ 1383, [4] Goodburn v. Stevens, 1 Md. Ch. 420.

may resort to equity for a sale of the land in satisfaction of the unpaid balance, and for her dower in the surplus.[5] On the conversion of the husband's estate into money, equity will award to the widow her proportionate share.[6] And where the husband has sought, by fraudulent conveyances, to defeat the wife's dower, equity will, on her application, grant appropriate relief.[7] The widow's right of dower, while yet unmeasured and unassigned, may be transferred by her, or reached by her judgment creditors, and her voluntary transferee, or the receiver appointed in aid of the judgment creditor, may maintain a suit in equity to have the dower assigned to him.[8] The assignment of dower is usually effected by a reference to a master and a commission, and the share is set out by metes and bounds. Where an account is needed, it may be taken by means of a similar reference. In many of our states summary proceedings have been provided by statute for the assignment of dower, especially where the widow's right thereto is not contested.

§ 1384. **Establishment of Disputed Boundaries.**— Where the boundaries between two adjacent parcels of land, even when held by their respective owners under purely legal

[5] Danton v. Nanny, 8 Barb. 618; Thompson v. Cochran, 7 Humph. 72; 46 Am. Dec. 68; Daniel v. Leitch, 13 Gratt. 195.

[6] In re Hall's Estate, L. R. 9 Eq. 179; Lawrence v. Miller, 1 Sand. 516; Higbie v. Westlake, 14 N. Y. 281.

[7] Swaine v. Perine, 5 Johns. Ch. 482; 9 Am. Dec. 318; Holmes v. Holmes, 3 Paige, 363; Tate v. Tate, 1 Dev. & B. Eq. 22; Petty v. Petty, 4 B. Mon. 215; 39 Am. Dec. 501; London v. London, 1 Humph. 1; Smart v. Waterhouse, 10 Yerg. 94; Davis v. Davis, 5 Mo. 183. As to the defense of a *bona fide* purchase for value without notice, against the widow suing in equity for her dower, see *ante*, vol. 2, § 765; Joyce v. De Moleyns, 2 Jones & L. 374; Jerrard v. Saunders, 2 Ves. 254; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274; Blain v. Harrison, 11 Ill. 384; Larrowe v. Beam, 10 Ohio, 498; Blake v. Heyward, Bail. Eq. 208; Campbell v. Murphy, 2 Jones Eq. 357; Ridgeway v. Newbold, 1 Harr. (Del.) 385; Jenkins v. Bodley, Smedes & M. Ch. 338; Wailes v. Cooper, 24 Miss. 208; Daniel v. Hollingshead, 16 Ga. 190.

[8] Potter v. Everitt, 7 Ir. R. Eq. 152 (transferee); Payne v. Becker, 87 N. Y. 153 (receiver appointed in aid of an execution); Tompkins v. Fonda, 4 Paige, 448 (receiver); Stewart v. McMartin, 5 Barb. 438 (same); Strong v. Clem, 12 Ind. 37; 74 Am. Dec. 200 (transferee).

titles, have become confused or obscure, equity has, from an early period, exercised a jurisdiction to settle them.[1] Whether this jurisdiction originated in the consent of the parties, and proceeded by analogy to the writs *de rationalibus divisis* and *de perambulatione facienda* used at law,[2] or arose in avoidance of a multiplicity of suits,[3] has been discussed; but the determination of the question remains uncertain and conjectural. The mere fact, however, that certain boundaries are in controversy is not of itself sufficient to authorize the interference of equity; and upon such a showing, the parties would be left to their rights and remedies at law. Courts of equity will not interpose to ascertain boundaries, unless, in addition to a naked confusion of the controverted boundaries, there is suggested some peculiar equity, which has arisen from the conduct, situation, or relations of the parties.[4]

§ 1385. **Equitable Incidents and Grounds.**—The fraud or neglect of duty of the party against whom relief is sought by way of establishment of boundaries will afford a sufficient ground for equitable interference.[1] And where a settlement of the boundaries in dispute cannot be had at law without a multiplicity of suits, relief may be obtained

§ 1384, [1] Wake v. Conyers, 1 Eden, 331; 2 Lead. Cas. Eq., 4th Am. ed., 850, 853, 860; Mullineux v. Mullineux, Toth. 39; Peckering v. Kimpton, Toth. 39; Boteler v. Spelman, Finch, 96; Perry v. Pratt, 31 Conn. 433.

§ 1384, [2] Speer v. Crawter, 2 Mer. 410, 417.

§ 1384, [3] Wake v. Conyers, *supra*.

§ 1384, [4] Wake v. Conyers, *supra;* Miller v. Warmington, 1 Jacob & W. 484; Speer v. Crawter, 2 Mer. 410, 417; Atkins v. Hatton, 2 Anstr. 386; O'Hara v. Strange, 11 Ir. R. Eq. 262; Ireland v. Wilson, 1 Ir. R. Ch. 623; St. Lukes v. St. Leonards, cited 2 Anstr. 395; Perry v. Pratt, 31 Conn. 433; Wolcott v. Robbins, 26 Conn. 236; De Veney v. Gallagher, 20 N. J. Eq. 33; Norris's Appeal, 64 Pa. St. 275; Tillmes v. Marsh, 67 Pa. St. 507; Merriman v. Russell, 2 Jones Eq. 470; Hill v. Proctor, 10 W. Va. 59; Fraley v. Peters, 12 Bush, 469; Doggett v. Hart, 5 Fla. 215; 58 Am. Dec. 464; Wolf v. Scarborough, 2 Ohio St. 361; Hale v. Darter, 5 Humph. 79; Topp v. Williams, 7 Humph. 569; Wetherbee v. Dunn, 36 Cal. 249.

§ 1385, [1] Atkins v. Hatton, 2 Anstr. 386; Rous v. Barker, 4 Brown Parl. C. 600; Speer v. Crawter, 2 Mer. 410, 418; Duke of Leeds v. Earl of Strafford, 4 Ves. 180; Grierson v. Eyre, 9 Ves. 341, 345; Pratt v. Bryant, 20 Vt. 333; Perry v. Pratt, 31 Conn. 433; Fraley v. Peters, 12 Bush, 469.

in equity.[2]. It may happen that such a relation exists between the parties as to make it incumbent upon one of them to preserve the boundaries. Such would be the case where one of the parties was a tenant or a copyholder; and in all such cases, equity will entertain the suit of the aggrieved party — as of a landlord — to compel the defendant — as in the example, a tenant — to preserve the boundaries from confusion.[3] In the case of a rent-charge, where, by reason of a confusion of the boundaries, the remedy of distress is defeated, a court of equity will issue a commission to fix the boundaries.[4] Where several parcels of land allotted to the holders of certain offices were for a number of years in the possession of a single occupant, who held all the offices, it would seem that a confusion of boundaries resulting from such holding would furnish a sufficient ground for the equitable relief.[5] It is necessary for the complainant to show that some portion of the lands, in respect of which the relief of establishing their boundaries is sought, is in the possession of the defendant.[6]

[2] Wake v. Conyers, *supra;* Bouverie v. Prentice, 1 Brown Ch. 200; Marquis of Bute v. Glamorganshire Can. Co., 1 Phill. Ch. 681; Whaley v. Dawson, 2 Schoales & L. 367, 370; Commissioners etc. v. Glasse, 41 L. J. Ch. 409.

[3] Aston v. Lord Exeter, 6 Ves. 288; Miller v. Warmington, 1 Jacob & W. 484; Att'y-Gen. v. Fullerton, 2 Ves. & B. 263; Speer v. Crawter, 17 Ves. 216; Duke of Leeds v. Earl of Strafford, 4 Ves. 180; Godfrey v. Littel, 1 Russ. & M. 59; 2 Russ. & M. 630; Att'y-Gen. v. Stephens, 6 De Gex, M. & G. 111, 133; Clayton v. Cookes, 2 Atk. 449; Spike v. Harding, L. R. 7 Ch. Div. 871.

[4] Bowman v. Yeat, cited 1 Ch. Cas. 145; Duke of Leeds v. Powell, 1 Ves. Sr. 171; North v. Earl of Strafford, 3 P. Wms. 148; Duke of Leeds v. Corp. of New Radnor, 2 Brown Ch. 338; Att'y-Gen. v. Stephens, 6 De Gex, M. & G. 111; Mayor etc. v. Lord Bolton, 1 Drew. 270, 289.

[5] Kennedy v. Trott, 6 Moore P. C. C. 449, 467.

[6] Att'y-Gen. v. Stephens, 6 De Gex, M. & G. 111; Godfrey v. Littel, 1 Russ. & M. 59; 2 Russ. & M. 630. As to the parties in suits to establish boundaries, all persons interested, whether their estates are present or future, remaindermen, and reversioners should be made parties, although, of course, all need not be joined as plaintiffs: 1 Daniell's Chancery Practice, 209; Rayley v. Best, 1 Russ. & M. 659; Miller v. Warmington, 1 Jacob & W. 484; Speer v. Crawter, 2 Mer. 410; Att'y-Gen. v. Stephens, *supra;* Pope v. Melone, 2 A. K. Marsh. 239.

§ 1386. **Partition of Lands — Common-law Remedy.**— At common law, the writ of partition lay only in case of lands held in coparcenary.[1] The remedy was afterwards extended by statute to joint tenancies and tenancies in common.[2] Where the tenure was copyhold, partition might be had in the lord's court by a plaint in the nature of a writ of partition. As the plaint and the writ have both been abolished by statute,[3] this jurisdiction of equity is now, in the absence of statutory provision, exclusive. The operation of the common-law remedy, even after its extension to joint tenancies and tenancies in common, was imperfect and narrow. The writ of partition lay only against the tenant in possession, and was incompetent to reach the remainderman or the reversioner. As the judgment at law proceeded according to the titles proved, it was necessary for the plaintiff to show the title of the defendant as well as his own. And as partition at law was made by the sheriff by actual division, it might happen that, where the undivided interests were incapable of exact apportionment, the judgment of the court would be powerless to compensate the inequalities.

§ 1387. **Equitable Jurisdiction and Remedies.**— These difficulties, illustrating the inadequacy of the legal remedy, gave rise to the equitable interference. As early as the reign of Elizabeth, partition became a matter of equitable cognizance;[1] and now the jurisdiction is established as of right in England and in the United States.[2] The remedy

§ 1386, [1] The reason given was, that as tenancy in coparcenary arose by operation of law, it was only proper that the law should afford the means of severance.

§ 1386, [2] 31 Henry VIII., c. 1; 32 Henry VIII., c. 32.

§ 1386, [3] 3 & 4 Wm. IV., c. 27.

§ 1387, [1] 1 Fonblanque's Equity, b. 1, c. 1, sec. 3, note *f*; Speke v. Walrond, Toth. 155.

§ 1387, [2] Agar v. Fairfax, 17 Ves. 533; 2 Lead. Cas. Eq., 4th Am. ed., 865, 880, 894; Baring v. Nash, 1 Ves. & B. 551; Parker v. Gerard, Amb. 236; Wood v. Little, 35 Me. 107; Bailey v. Sisson, 1 R. I. 233; Donnell v. Mateer, 7 Ired. Eq. 94; Holmes v. Holmes, 2 Jones Eq. 334; Howey v. Goings, 13 Ill. 95; 54 Am. Dec. 427. And see Wotten v. Copeland, 7 Johns. Ch. 140; Sebring v. Mersereau, Hopk. Ch. 501; 9 Cow. 344; Harwood v. Kirby, 1 Paige, 469; Teal v. Woodworth, 3 Paige, 470; Wilkinson v. Parish,

in equity is not confined to the tenants in possession, but extends to all persons interested, whether presently or in expectancy; and remaindermen, reversioners, infants, and persons not *in esse* may be bound by the decree.[3]

§ 1388. **The Title of the Plaintiff.**— The difficulty under which the complainant labored at law in proving the title

3 Paige, 653; Burhans v. Burhans, 2 Barb. Ch. 398; Van Arsdale v. Drake, 2 Barb. 599; Green v. Putnam, 1 Barb. 500; Tanner v. Niles, 1 Barb. 560; Scott v. Guernsey, 60 Barb. 163; 48 N. Y. 106; Mead v. Mitchell, 17 N. Y. 210; 72 Am. Dec. 455; Clemens v. Clemens, 37 N. Y. 59; Gregory v. Gregory, 69 N. C. 522; Tabler v. Wiseman, 2 Ohio St. 207; Williams v. Van Tuyl, 2 Ohio St. 336; Gregory v. High, 29 Ind. 527; Milligan v. Poole, 35 Ind. 64; Larned v. Renshaw, 37 Mo. 458; Waugh v. Blumenthal, 28 Mo. 462; Reinhardt v. Wendeck, 40 Mo. 577; De Uprey v. De Uprey, 27 Cal. 329; 87 Am. Dec. 81; Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139.

[3] Lord Brook v. Lord Hertford, 2 P. Wms. 518; Gaskell v. Gaskell, 6 Sim. 643; Hobson v. Sherwood, 4 Beav. 184; Wills v. Slade, 6 Ves. 498. But while all persons interested in the land, whether in possession or in expectancy, are proper parties to a bill in partition, only those in possession are entitled to file the bill: Evans v. Bagshaw, L. R. 8 Eq. 469; L. R. 5 Ch. 340; Agar v. Fairfax, 2 Lead. Cas. Eq. 880, 894. The mortgagors of undivided interests may have partition of the equity of redemption: Wotten v. Copeland, 7 Johns. Ch. 140. But the mortgagees and judgment creditors of tenants in common are not proper, or at least not necessary, parties to a bill of partition: Sebring v. Mersereau, 9 Cow. 344; Harwood v. Kirby, 1 Paige, 469; Low v. Holmes, 17 N. J. Eq. 148; Speer v. Speer, 14 N. J. Eq. 240; Thruston v. Minke, 32 Md. 571. Where a mortgagee's interests require that he should be joined, he may be made a party: Whitton v. Whitton, 38 N. H. 127, 135; 75 Am. Dec. 163. It has been held that the mortgagee of an undivided share may sue in equity for a foreclosure and partition, and obtain a receiver of the rents and profits issuing out of the share of the mortgagor: Fall v. Elkins, 9 Week. Rep. 861. In general, all the tenants in common or joint tenants should be made parties; but all need not be plaintiffs: Anonymous, 3 Swanst. 139, note; Cornish v. Gest, 2 Cox, 27; Brashear v. Macey, 3 J. J. Marsh. 89; Braker v. Devereaux, 8 Paige, 513; Borah v. Archers, 7 Dana, 176; Rosekrans v. White, 7 Lans. 486 (wife of tenant); Scott v. Guernsey, 60 Barb. 163, 181 (administrator of deceased tenant); Sullivan v. Sullivan, 4 Hun, 198. Suit by a lessee of a share without making his lessor a party: Baring v. Nash, 1 Ves. & B. 551; Heaton v. Dearden, 16 Beav. 147. As to how far a decree between tenants for life will bind future contingent interests, see Wotten v. Copeland, 7 Johns. Ch. 140; Mead v. Mitchell, 17 N. Y. 210, 214; 72 Am. Dec. 455; Clemens v. Clemens, 37 N. Y. 59; Striker v. Mott, 2 Paige, 387, 389; 22 Am. Dec. 646; Woodworth v. Campbell, 5 Paige, 518; Gaskell v. Gaskell, 6 Sim. 643. See Pomeroy on Remedies, sec. 254. With reference to parties defendant, and especially the legislation of various states on that subject, see Pomeroy on Remedies, secs. 373–377.

as well of the defendant as of himself is, in equity, obviated by a discovery, and if need be by a reference to the master. The complainant must show title in himself, and such a title as will establish his right, as against the defendant, to a partition.[1] Where the complainant's legal title is disputed, courts of equity decline the jurisdiction to try this question; but, in analogy to the case of dower, they will retain the bill for a reasonable time, until the issue of title has been determined at law.[2] If the disputed titles are equitable, courts of equity will exercise jurisdiction to settle them, and will then grant final relief by way of partition, under the same bill.[3] Where the subject-matter of the suit is an equitable estate[4] or an incorporeal hereditament,[5] a partition may be had in equity.

§ 1389. **Mode of Partition — Pecuniary Compensation.**— In the original jurisdiction of equity the partition was effected by means of mutual conveyances; and where the land was incapable of exact or fair division, the court had power to compensate for the inequality by awarding what was known as "owelty of partition," being a pecuniary compensation, or a charge upon the land by way of rent, servitude, or easement.[1] And if one of the joint owners or

§ 1388, [1] Agar v. Fairfax, *supra;* Jope v. Morshead, 6 Beav. 213; Parker v. Gerard, Amb. 236.

§ 1388, [2] Slade v. Barlow, L. R. 7 Eq. 296; Giffard v. Williams, L. R. 5 Ch. 546; Bolton v. Bolton, L. R. 7 Eq. 298, note; Potter v. Waller, 2 De Gex & S. 410; Simpson v. Wallace, 83 N. C. 477; Mattair v. Payne, 15 Fla. 682; Hardy v. Mills, 35 Wis. 141; Hoffman v. Beard, 22 Mich. 59; Wilkin v. Wilkin, 1 Johns. Ch. 111, 118; Manners v. Manners, 2 N. J. Eq. 384; 35 Am. Dec. 512; Currin v. Spraull, 10 Gratt. 145.

§ 1388, [3] Crosier v. McLaughlin, 1 Nev. 348; Leverton v. Waters, 7 Cold. 20; Ross v. Cobb, 48 Ill. 111; Foust v. Moorman, 2 Ind. 17; Donnell v. Mateer, 7 Ired. Eq. 94; Carter v. Taylor, 3 Head, 30; Obert v. Obert, 10 N. J. Eq. 98; Longwell v. Bentley, 23 Pa. St. 99.

§ 1388, [4] Hitchcock v. Skinner, Hoff. Ch. 21; Crosier v. McLaughlin, 1 Nev. 348.

§ 1388, [5] Bailey v. Sisson, 1 R. I. 233.

§ 1389, [1] Earl of Clarendon v. Hornby, 1 P. Wms. 446; Turner v. Morgan, 8 Ves. 143; Story v. Johnson, 2 Younge & C. 586; Horncastle v. Charlesworth, 11 Sim. 315; Mole v. Mansfield, 15 Sim. 41; Smith v. Smith, 10 Paige, 470; Larkin v. Mann, 2 Paige, 27; Phelps v. Green, 3 Johns. Ch. 302; Haywood v. Judson, 4 Barb. 228; Norwood v. Norwood, 4 Har. & J. 112; Warfield v.

owners in common has received more than his share of the rents and profits, the court will direct an account for the purpose of decreeing a reimbursement.[2] And if it should appear that one of the parties had made improvements on the land of which partition is sought, he will be awarded suitable compensation.[3] The inconvenience or difficulty attending the partition is no ground for refusing the relief.[4]

§ 1390. **Partition by Means of a Sale.**— On account of the difficulty of making an equable apportionment and division of the land, it might sometimes be expedient for the court to order a sale of the property and a division of the proceeds. By the original equitable jurisdiction, independent of any statute, if all the parties *sui juris* were willing, the court had power to decree a sale; and this, even though infants might be among the parties interested.[1] But where one of the parties *sui juris* refused his consent, the court had no option but to proceed with the ordinary mode of partition.[2] This restriction has in England been removed

Warfield, 5 Har. & J. 459; Cox v. McMullin, 14 Gratt. 82; Wynne v. Tunstall, 1 Dev. Eq. 23; Graydon v. Graydon, McMull. Eq. 63; Oliver v. Jernigan, 46 Ala. 41.

§ 1389, [2] Lorimer v. Lorimer, 5 Madd. 363; Hill v. Fulbrook, Jac. 574; Story v. Johnson, 2 Younge & C. 586; Leach v. Beattie, 33 Vt. 195; Hitchcock v. Skinner, Hoff. Ch. 21; Early v. Friend, 16 Gratt. 21; 78 Am. Dec. 649; Carter's Ex'r v. Carter, 5 Munf. 108; Backler v. Farrow, 2 Hill Ch. 111; Rozier v. Griffith, 31 Mo. 171.

§ 1389, [3] Swan v. Swan, 8 Price, 518; Green v. Putnam, 1 Barb. 500; Conklin v. Conklin, 3 Sand. Ch. 64; St. Felix v. Rankin, 3 Edw. Ch. 323; Brookfield v. Williams, 2 N. J. Eq. 341; Obert v. Obert, 5 N. J. Eq. 397; Sneed's Heirs v. Atherton, 6 Dana, 276; 32 Am. Dec. 70; Borah v. Archers, 7 Dana, 176; Respass v. Breckenridge's Heirs, 2 A. K. Marsh. 581; Dean v. O'Meara, 47 Ill. 120; Martindale v. Alexander, 26 Ind. 104; 87 Am. Dec. 458.

§ 1389, [4] Warner v. Baynes, Amb. 589; Parker v. Gerard, Amb. 236. In one case the doctrine was carried to the extent of making partition of a house by building a wall through the middle of it: Turner v. Morgan, 8 Ves. 143. Where the defendants, however, objected to the division of their own shares, the partition would be confined to the setting out and severing the share of the complainant: Hobson v. Sherwood, 4 Beav. 184.

§ 1390, [1] Davis v. Turvey, 32 Beav. 554; Hubbard v. Hubbard, 2 Hem. & M. 38; Thackeray v. Parker, 1 N. R. 567.

§ 1390, [2] Griffies v. Griffies, 11 Week. Rep. 943; Wood v. Little, 35 Me. 107; Codman v. Tinkham, 15 Pick. 364.

by a modern statute.[3] In the United States an unqualified power of sale has been conferred on the courts in very many of the states, the power to be exercised whenever it shall appear to the court, independently of the consent of the parties, that a sale would be more beneficial, or less injurious, than an actual division.[4] As between a sale and a partition, however, the courts will *favor* a partition, as not disturbing the existing form of the inheritance.[5]

§ 1391. **Partition of Personal Property — Equitable Jurisdiction and Remedy.**— The rules and proceedings which obtained at common law and by statute on the subject of partition related exclusively to real estate.[1] At common law the co-owner of a chattel could maintain an action respecting the common property against his co-tenant only where a loss, destruction, or sale of the property was provable against the defendant.[2] However expedient the partition of chattels might appear, or however desirable it might be to the co-tenants, the common law furnished no instrumentality by which the partition could be judicially effected. There was not merely an inadequacy of legal remedy, there was an utter absence of it. The situation clearly demanded the intervention of equity. And although the inception of the equitable jurisdiction for the partition of chattels is not traceable with certainty, the jurisdiction itself is unquestioned; and where a literal partition is not practicable, the court will order a sale.[3]

§ 1390, [3] 31 & 32 Vict., c. 40.

§ 1390, [4] Thompson v. Hardman, 6 Johns. Ch. 436; McCall's Appeal, 56 Pa. St. 363; Matter of Skinner's Heirs, 2 Dev. & B. Eq. 63; Steedman v. Weeks, 2 Strob. Eq. 145; 49 Am. Dec. 660; Royston v. Royston, 13 Ga. 425; Wilson v. Duncan, 44 Miss. 642; Higginbottom v. Short, 25 Miss. 160; 57 Am. Dec. 198; Graham v. Graham, 8 Bush, 334; Welsh v. Freeman, 21 Ohio St. 402.

§ 1390, [5] Davidson v. Thompson, 22 N. J. Eq. 83; Thruston v. Minke, 32 Md. 571; Graham v. Graham, 8 Bush, 334.

§ 1391, [1] Allnatt on Partition, 48.

§ 1391, [2] Gilbert v. Dickerson, 7 Wend. 449; 22 Am. Dec. 592; Tinney v. Stebbins, 28 Barb. 290; Cowles v. Garrett's Adm'rs, 30 Ala. 341; Hinds v. Terry, Walk. (Miss.) 80.

§ 1391, [3] Tripp v. Riley, 15 Barb. 333; Fobes v. Shattuck, 22 Barb. 568; Tinney v. Stebbins, 28 Barb. 290; Wetmore v. Zabriskie, 29 N. J. Eq. 62;

§ 1392. **The Issue of Title.**— In the partition of real estate, the rule was well settled, that where the title of the complainant was put in issue, a court of equity would suspend its interference until the question of title had been determined at law in an action of ejectment. But no ejectment lay to try the title to personalty. A refusal, then, by a court of equity, in proceedings for the partition of chattels, to pass upon an issue of title would be tantamount to a complete failure of justice. Courts of equity, therefore, when partition of personalty is sought, have of necessity departed from the analogies of the law of real estate, and have assumed jurisdiction to determine as well the issue of title as any other issue pertinent to the case.[1]

Crapster v. Griffith, 2 Bland, 525; Smith v. Smith, 4 Rand. 95, 102; Kerley v. Clay, 4 Bibb, 241; Marshall v. Crow's Adm'r, 29 Ala. 278; Conover v. Earl, 26 Iowa, 167.

[1] Weeks v. Weeks, 5 Ired. Eq. 111; 47 Am. Dec. 358; Edwards v. Bennett, 10 Ired. 363; Smith v. Dunn, 27 Ala. 315.

CHAPTER SECOND.

SUITS BY WHICH SOME GENERAL RIGHT, EITHER LEGAL OR EQUITABLE, IS ESTABLISHED — BILLS OF PEACE AND BILLS QUIA TIMET QUIETING TITLE.

ANALYSIS.

§ 1393. Nature and object.
§ 1394. Bills of peace — Bills *quia timet* — Quieting title.

§ 1393. **Nature and Object.**— In all the remedies belonging to this class, some *general* right, which may be either legal or equitable, is declared and established.[1] The class includes suits to establish a will, suits to construe a will, and the bills of peace and bills *quia timet* for the purpose of quieting title, which belong to the original general jurisdiction of equity.[2]

§ 1394. **Bills of Peace — Quieting Title.**— The origin, grounds, growth, and extent of the jurisdiction of equity to entertain bills of peace have been fully discussed in the section which treats of the jurisdiction to prevent a multiplicity of suits.[1] It was shown that there were two

§ 1393, [1] Some of the remedies of this class undoubtedly depend upon what the early chancellors called the "jurisdiction *quia timet*." Since the conception of a *quia timet* jurisdiction is so broad, and runs through so many different branches of the remedial jurisprudence, I have not adopted it as a basis of classification. The object of suits to establish and to construe wills is plainly the establishment of a general right; and the same is no less true of those suits to quiet title, bills of peace, and the like, which belong to the original jurisdiction of equity.

§ 1393, [2] All of these remedies have been fully considered in the preceding parts of this work, and I shall only add here a few observations concerning bills of peace, etc.

For suits to establish a will, see *ante*, § 1158. For suits to construe a will, see *ante*, §§ 1155–1157; also see Dill v. Wisner, 88 N. Y. 153; Delaney v. McCormack, 88 N. Y. 174; Bliven v. Seymour, 88 N. Y. 469 (will of personal property). For suit quieting title, bills of peace, etc., see *ante*, vol. 1, §§ 243–275.

§ 1394, [1] Vol. 1, p. 254, sec. iv.

distinct kinds of bills of peace,— the one brought for the purpose of establishing a general right between a single party and numerous persons claiming distinct and individual interests, and the other for the purpose of quieting a complainant's title to land against a single adverse claimant.[2] In the first class, the original jurisdiction to maintain "bills of peace" or "bills *quia timet,*" properly so called, will only be exercised where the claims of the numerous individuals have some community of interest in the subject-matter, or arise from a common title; but the jurisdiction has been enlarged so as to entertain analogous suits, where the community of interest is in respect merely to the questions involved or to the kind of relief demanded.[3] In the second class, the suit can be maintained by a party in possession against a single defendant ineffectually seeking to establish a legal title by repeated actions of ejectment. It is here necessary that the title of the complainant should be established by at least one successful trial at law before equity will entertain jurisdiction.[4]

[2] Vol. 1, § 246.

[3] See the cases cited in vol. 1, §§ 273, 274, and the following additional cases on the last branch of the statement: Thorpe v. Brumfitt, L. R. 8 Ch. 650, 655, 656; White v. Jameson, L. R. 18 Eq. 303; Duke of Buccleuch v. Cowan, 5 Macph. (5 Ses. Cas. S., 3d series) 214; Chipman v. Palmer, 77 N. Y. 51, 56; 33 Am. Rep. 566; Chenango Bridge Co. v. Lewis, 63 Barb. 111; Henshaw v. Clark, 14 Cal. 460, 465; Hillman v. Newington, 57 Cal. 56, 64; Blaisdell v. Stephens, 14 Nev. 17, 23; 33 Am. Rep. 523; Gaines v. Chew, 2 How. 619, 642; Oliver v. Piatt, 3 How. 333, 412; Central Pac. R. R. v. Dyer, 1 Saw. 641, 650; Woodruff v. North Bloomfield etc. Co., 8 Saw. 628, 636; Troy & B. R. R. v. Boston etc. R'y, 86 N. Y. 107; Town of Springport v. Teutonia Sav. Bank, 75 N. Y. 397.

[4] Vol. 1, §§ 253, 272; Thompson v. Engle, 4 N. J. Eq. 271; Gunn v. Harrison, 7 Ala. 585. This class is practically obsolete in many states, owing to the effect given to judgments, by statute, in the action of ejectment.

CHAPTER THIRD.

SUITS BY WHICH SOME PARTICULAR ESTATE, INTEREST, OR RIGHT, EITHER LEGAL OR EQUITABLE, IS ESTABLISHED — STATUTORY SUIT TO QUIET TITLE — SUIT TO REMOVE A CLOUD FROM TITLE.

ANALYSIS.

§ 1395. Nature and object.
§ 1396. Statutory suit to quiet title; legislation.
§ 1397. The same; essential features and requisites; possession; title.
§ 1398. Suit to remove a cloud from title; to prevent a cloud.
§ 1399. The same; when the jurisdiction is exercised; general doctrine.

§ 1395. **Nature and Object.**— In all the instances of this class, as distinguished from those of the preceding one, the direct object of the remedy is to declare and establish some particular estate, interest, or right, either legal or equitable, in the property which is the subject-matter.[1] The class as a whole embraces suits for the strict foreclosure of a mortgage or a pledge, suits for the redemption of a mortgage, suits for the redemption of a pledge,[2] statutory suits to quiet title, and suits to remove a cloud from title.

§ 1396. **Statutory Suit to Quiet Title — Legislation.**— The equity jurisdiction to quiet title, independent of statute, was only invoked by a plaintiff in possession, holding the legal title, when successive actions at law, all of which had failed, were brought against him by a single person out

[1] Some of these remedies, also, have been said to depend upon the *quia timet* jurisdiction.

[2] These three remedies have already been considered: Strict foreclosure of a mortgage: *Ante*, § 1227; of a pledge: *ante*, § 1231. Redemption of a mortgage: *Ante*, §§ 1219, 1220; of a pledge: *ante*, § 1231. I shall in this chapter only discuss the statutory suit to quiet title, and the suit to remove a cloud from title. The former of these suits has, in many of the states, become the most important and common of equitable remedies, and has even taken the place, to some extent, of the action of ejectment. The original equitable jurisdiction to quiet title has been greatly enlarged.

of possession, or when many persons asserted equitable titles against a plaintiff in possession holding the legal or an equitable title. The action has been greatly extended by statute, and in many states is the ordinary mode of trying disputed titles.[1] The states adopting such statutes

[1] *Arizona:* Code Civ. Proc., sec. 256; *California:* Code Civ. Proc., sec. 738; Practice Act, sec. 254; *Colorado:* Code Civ. Proc., sec. 237; *Dakota:* Rev. Codes 1877, p. 584, sec. 635; *Idaho:* Rev. Laws 1874–75, p. 146, sec. 275; *Illinois:* Hurd's Rev. Stats. 1880, p. 192, c. 22, sec. 50; *Indiana:* 2 Davis's Stats. 1876, p. 254, sec. 611; *Iowa:* 1 Miller's Rev. Code 1880, p. 802, sec. 3273; *Kansas:* Dassler's Comp. Laws 1881, p. 683, sec. 594; *Kentucky:* 2 Stanton's Rev. Stats. 1867, c. 57, p. 102; *Michigan:* 2 Comp. Laws 1871, p. 1537, sec. 36; *Minnesota:* Young's Stats. 1880, p. 814, c. 15, sec. 2; *Mississippi:* Rev. Code 1880, p. 507, sec. 1833; *Montana:* Rev. Stats. 1879, p. 110, sec. 354; *Nebraska:* Brown's Comp. Stats. 1881, p. 394, c. 73, sec. 57; *Nevada:* 1 Comp. Laws 1873, p. 372, sec. 1317; *New Jersey:* Rev. 1877, p. 1189; *New York:* 2 Bliss's Code Civ. Proc. 1880, p. 88, sec. 1638; *Ohio:* Code Civ. Proc., sec. 557; Rev. Stats. 1880, p. 1396, sec. 5779; *Oregon:* Gen. Laws 1874, p. 212, sec. 500; *Utah:* Comp. Laws 1876, p. 477, sec. 254; *Wisconsin:* Taylor's Rev. Stats. 1872, p. 1671, c. 141, sec. 29. See also *Georgia:* Code 1882, secs. 3232, 3233; and *Louisiana:* Voorhies's Rev. Code of Prac. 1875, p. 46, arts. 46, 49, 50, 52. The statutes of Massachusetts and Missouri contain provisions concerning preliminary actions which may be brought against holders of adverse claims, to show cause why such holders should not institute proceedings to have their claims determined: See Mass. Pub. Stats. 1882, p. 1026, c. 176; Mo. Rev. Stats. 1879, p. 608, sec. 3562. The action, if brought by a plaintiff in possession, or perhaps when both parties are out of possession, is held to be equitable in its nature: Leggett v. Cole, 1 McCrary, 515; Balmear v. Otis, 4 Dill. 558; Brandt v. Wheaton, 52 Cal. 430.

The following are decisions arising under these various acts: —

California: Present code: Leet v. Rider, 48 Cal. 623; Pierce v. Felter, 53 Cal. 18; Stoddart v. Burge, 53 Cal. 394; Brandt v. Wheaton, 52 Cal. 430; San Francisco v. Ellis, 54 Cal. 72; Brewer v. Houston, 58 Cal. 345; Burton v. Le Roy, 5 Saw. 510. Practice Act: Merced Min. Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262; Smith v. Brannan, 13 Cal. 107; Curtis v. Sutter, 15 Cal. 259; Van Winkle v. Hinckle, 21 Cal. 342; Rico v. Spence, 21 Cal. 504; Head v. Fordyce, 17 Cal. 149; Lyle v. Rollins, 25 Cal. 437; Horn v. Jones, 28 Cal. 194; Ferris v. Irving, 28 Cal. 645; Reed v. Calderwood, 32 Cal. 109; Pralus v. Pacific etc. Min. Co., 35 Cal. 30; Pralus v. Jefferson etc. M. Co., 34 Cal. 558; Brooks v. Calderwood, 34 Cal. 563; 45 Cal. 519; Ross v. Heintzen, 36 Cal. 313; Nevada Co. etc. Canal Co. v. Kidd, 37 Cal. 282; Sepulveda v. Sepulveda, 39 Cal. 13; Coleman v. San Rafael etc. Co., 49 Cal. 517.

Illinois: Emery v. Cochran, 82 Ill. 65; Hardin v. Jones, 86 Ill. 313; Gage v. Abbott, 99 Ill. 366; Whitney v. Stevens, 97 Ill. 482; Oakley v. Hurlbut, 100 Ill. 204; Barnard v. Hoyt, 63 Ill. 341; Wing v. Sherrer, 77 Ill. 200.

Indiana: Cooper v. Jackson, 71 Ind. 244; Green v. Glynn, 71 Ind. 336; Rose v. Nees, 61 Ind. 484.

may be separated into two classes, the first and most numerous class requiring the plaintiff to be in possession, and the second allowing the action to be brought by a

Iowa: Fejervary v. Langer, 9 Iowa, 159; Laverty v. Sexton, 41 Iowa, 435; Miller v. Davison, 31 Iowa, 435; Lewis v. Soule, 52 Iowa, 11; Paton v. Lancaster, 38 Iowa, 494; Balmear v. Otis, 4 Dill. 558.

Kansas: Eaton v. Giles, 5 Kan. 24; Brenner v. Bigelow, 8 Kan. 496; O'Brien v. Creitz, 10 Kan. 202; Wood v. Missouri etc. R'y, 11 Kan. 323; Giles v. Ortman, 11 Kan. 59; Douglass v. Nuzum, 16 Kan. 515; Entreken v. Howard, 16 Kan. 551; Cartwright v. McFadden, 24 Kan. 662; Douglass v. Bishop, 24 Kan. 749; Giltenan v. Lemert, 13 Kan. 476; Pierce v. Thompson, 26 Kan. 714.

Kentucky: Dudley v. Trustees of Frankfort, 12 B. Mon. 610; Armitage v. Wickliffe, 12 B. Mon. 488, 494; Taylor v. Embry, 16 B. Mon. 340; Cates v. Loftus's Heirs, 4 T. B. Mon. 439; Beard v. Smith, 6 T. B. Mon. 430, 505; Underwood v. Crutcher, 7 J. J. Marsh. 529; Hiatt's Heirs v. Calloway's Heirs, 7 B. Mon. 178; Harris v. Smith, 2 Dana, 10; Landrum v. Farmer, 7 Bush, 46; Fraley v. Peters, 12 Bush, 469.

Michigan: Stockton v. Williams, 1 Doug. (Mich.) 546; Hall v. Kellogg, 16 Mich. 135; Rowland v. Doty, Harr. (Mich.) 3; Blanchard v. Tyler, 12 Mich. 339; 86 Am. Dec. 57; Stetson v. Cook, 39 Mich. 750; Haddon v. Hemingway, 39 Mich. 615; Hammontree v. Lott, 40 Mich. 190; Barron v. Robbins, 22 Mich. 35; King v. Carpenter, 37 Mich. 363; Moran v. Palmer, 13 Mich. 367; Ormsby v. Barr, 22 Mich. 80; Jenkins v. Bacon, 30 Mich. 154; Meth. Church of Newark v. Clark, 41 Mich. 730.

Minnesota: Steele v. Fish, 2 Minn. 153; Meighen v. Strong, 6 Minn. 177; 80 Am. Dec. 441; Bidwell v. Webb, 10 Minn. 59; 88 Am. Dec. 56; Wilder v. City of St. Paul, 12 Minn. 192; Murphy v. Hinds, 15 Minn. 182; Byrne v. Hinds, 16 Minn. 521; Conklin v. Hinds, 16 Minn. 457; Leggett v. Cole, 1 McCrary, 515.

Mississippi: Boyd v. Thornton, 13 Smedes & M. 338; Toulmin v. Heidelberg, 32 Miss. 268; Kerr v. Freeman, 33 Miss. 292; Ezelle v. Parker, 41 Miss. 520; Huntington v. Allen, 44 Miss. 654; Glazier v. Bailey, 47 Miss. 395; Carlisle v. Tindall, 49 Miss. 229; Handy v. Noonan, 51 Miss. 166; Griffin v. Harrison, 52 Miss. 824; Shivers v. Simmons, 54 Miss. 520; 28 Am. Rep. 372; Wofford v. Bailey, 57 Miss. 239.

Nebraska: State v. Sioux City etc. R. R., 7 Neb. 357; Harral v. Gray, 10 Neb. 186.

Nevada: Low v. Staples, 2 Nev. 209; Scorpion S. M. Co. v. Marsano, 10 Nev. 370; Lake Bigler Road Co. v. Bedford, 3 Nev. 399; Central Pac. R. R. v. Dyer, 1 Saw. 641.

New Jersey: Powell v. Mayo, 24 N. J. Eq. 178; Holmes v. Chester, 26 N. J. Eq. 79; Bogert v. City of Elizabeth, 27 N. J. Eq. 568; Jersey City v. Lembeck, 31 N. J. Eq. 255; Ludington v. City of Elizabeth, 32 N. J. Eq. 159; 34 N. J. Eq. 357; Lembeck v. Jersey City, 30 N. J. Eq. 554; Raymond v. Post, 25 N. J. Eq. 447.

New York: Onderdonk v. Mott, 34 Barb. 106; Haynes v. Onderdonk, 5

plaintiff either in or out of possession.[2] In almost every instance the statutes, either by express terms or through broad and general language, allow the action to be main-

Thomp. & C. 176; Burnham v. Onderdonk, 41 N. Y. 425; Fisher v. Hepburn, 48 N. Y. 41; Austin v. Goodrich, 49 N. Y. 266; Barnard v. Simms, 42 Barb. 304; Donahue v. O'Conor, 13 Jones & S. 278; Schroeder v. Gurney, 10 Hun, 413; Ford v. Belmont, 69 N. Y. 567.

Ohio: Harvey v. Jones, 1 Disn. 65; Douglass v. Scott, 5 Ohio, 194; Clark v. Hubbard, 8 Ohio, 382; Thomas v. White, 2 Ohio St. 540; Ellithorpe v. Buck, 17 Ohio St. 72; Collins v. Collins, 19 Ohio St. 468; Rhea v. Dick, 34 Ohio St. 420; Bailey v. Hughes, 35 Ohio St. 597.

Oregon: Tichenor v. Knapp, 6 Or. 205; Thompson v. Woolf, 8 Or. 454; King v. French, 2 Saw. 441; Stark v. Starrs, 6 Wall. 402.

Utah: Goldberg v. Taylor, 2 Utah, 486.

Wisconsin: Pier v. Fond du Lac, 38 Wis. 470; Maxon v. Ayers, 28 Wis. 612; Shaffer v. Whelpley, 37 Wis. 334; Page v. Kennan, 38 Wis. 320; Wals v. Grosvenor, 31 Wis. 681; Jones v. Collins, 16 Wis. 594; Gamble v. Loop, 14 Wis. 465; Dean v. Madison, 9 Wis. 402.

Georgia: South Carolina R. R. v. Steiner, 44 Ga. 546; Jones v. Georgia R. R., 62 Ga. 718; Dart v. Orme, 41 Ga. 376; Wynne v. Lumpkin, 35 Ga. 208.

Louisiana: Dooley v. Gibson, 32 La. Ann. 192; Lange v. Baranco, 32 La. Ann. 697; White v. Sheriff, 32 La. Ann. 130; Dahlgreen v. Duncan, 26 La. Ann. 363; Deuchatell v. Robinson, 24 La. Ann. 176; Dickson v. Marks, 10 La. Ann. 518; Searles v. Costillo, 12 La. Ann. 203; Millard v. Richard, 13 La. Ann. 572.

Massachusetts: Hill v. Andrews, 12 Cush. 185; Dewey v. Bulkley, 1 Gray, 416; Macomber v. Jaffray, 4 Gray, 82; Munroe v. Ward, 4 Allen, 150; Tompkins v. Wyman, 116 Mass. 558; India Wharf v. Central Wharf, 117 Mass. 504; Tisdale v. Brabrook, 102 Mass. 374; Boston Mfg. Co. v. Burgin, 114 Mass. 340; Bowditch v. Gardner, 113 Mass. 315.

Missouri: Von Phul v. Penn, 31 Mo. 333; Rutherford v. Ullman, 42 Mo. 216; Deware v. Wyatt, 50 Mo. 236; Jordon v. Stevens, 55 Mo. 361; Webb v. Donaldson, 60 Mo. 394; Babe v. Phelps, 65 Mo. 27; Grant v. King, 31 Mo. 312; Campbell v. Allen, 61 Mo. 581; Bredell v. Alexander, 8 Mo. App. 110.

[2] The states and territories comprising the first class are Arizona, California (under the former Practice Act), Colorado, Kansas, Kentucky, Illinois (except where the land is unimproved and unoccupied), Michigan, Minnesota (except in the case of vacant and unoccupied land), Montana, Nevada, New Jersey, New York, Ohio, Oregon, Utah, and Wisconsin. The complaint must allege possession, the allegation is material, and if traversed, must be proved, or the plaintiff's case will fail: Ferris v. Irving, 28 Cal. 645, 647; Pralus v. Jefferson etc. Min. Co., 34 Cal. 558; Sepulveda v. Sepulveda, 39 Cal. 13, 18; Meighen v. Strong, 6 Minn. 177; 80 Am. Dec. 441; Douglass v. Nuzum, 16 Kan. 515; Shaffer v. Whelpley, 37 Wis. 334. In regard to the nature of the possession requisite to maintain the action, there is some conflict. It has been held on the one side that possession must be lawful, — must be accompanied by a claim of right, legal or equitable: Stark v. Starrs, 6 Wall. 402; King v. French, 2 Saw. 441; Tichenor v. Knapp, 6 Or. 205; and on the

tained by persons having equitable titles; in other words, a plaintiff need not have a legal title.[3]

§ 1397. **Essential Features and Requisites.**— The essential features of the action brought in states of the first class, wherein it differs from the ordinary equitable suit to quiet title, are that the plaintiff may in all cases take the initiative, and need not wait for proceedings to be instituted against him; the statute is an enabling act; and the action may be brought against one or more claimants without regard to the interest or title — legal or equitable — which he or the plaintiff may hold.[1] In addition to the fore-

other, that it is immaterial how possession was obtained, — by collusion, fraud, or otherwise: Scorpion S. M. Co. v. Marsano, 10 Nev. 370; Calderwood v. Brooks, 45 Cal. 519. The states and territories included in the second class are California, Dakota, Idaho, Indiana, Iowa, Mississippi, and Nebraska.

[3] The excepted instances are Kentucky, Wisconsin, and formerly Ohio: See Chase's Ohio Stats. 687, 1278, 1697. In these states a plaintiff is required to have a legal title.

[1] See the various statutes; Curtis v. Sutter, 15 Cal. 259, 263; Head v. Fordyce, 17 Cal. 149; Central Pac. R. R. v. Dyer, 1 Saw. 641, 648; Stark v. Starrs, 6 Wall. 402, 410; Smith v. Brannan, 13 Cal. 107, 114; Merced Min. Co. v. Fremont, 7 Cal. 317, 319; 68 Am. Dec. 262; Giltenan v. Lemert, 13 Kan. 476; Meighen v. Strong, 6 Minn. 177, 179. See also Pierce v. Felter, 53 Cal. 18; Stoddart v. Burge, 53 Cal. 394, — under a statute of the second class. In New York, however, a plaintiff must have been in possession for three years, claiming an estate in fee, for life, or for a term of years not less than ten. In general, *some* interest is necessary: See note preceding last. A possessory title is held sufficient to maintain the action to quiet title to a mining claim located on public lands of the United States: Pralus v. Pacific etc. Min. Co., 35 Cal. 30; Merced Min. Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262. A mere trespasser on government land cannot maintain the action: Wood v. Missouri etc. R'y, 11 Kan. 323. A question has arisen in states of this class, which cannot very well arise in those of the second class, as to the effect of the statutes on the remedies of a plaintiff out of possession. It has been contended that the statutes have deprived such a plaintiff of any equitable remedy which he might otherwise have, leaving as his only resort ejectment, or a legal action to recover possession. The answer, on principle, is plain: equity is not deprived of its jurisdiction except by express language or necessary implication; none of these statutes contain such prohibitory language, nor can they be so construed as to deprive equity of jurisdiction to grant its ordinary remedies. Again, in those states which have adopted the reformed procedure, all remedies, legal and equitable, are unaffected: Pomeroy on Remedies, sec. 69. While it is evident that a party out of possession holding a legal title must resort to ejectment, as before, to

going differences, possession is not required in states of the second class; the action may therefore be brought here in cases where a party at common law would be left to his remedy by ejectment.[2] Several of the statutes in express terms allow the action to be brought to remove clouds from title;[3] others are sufficiently general to include this as well as other adverse claims.[4]

§ 1398. **Suit to Remove a Cloud from Title.**—The jurisdiction of courts of equity to remove clouds from title is well settled,[1] the relief being granted on the principle *quia*

recover possession: Curtis v. Sutter, 15 Cal. 259, 264; Van Winkle v. Hinckle, 21 Cal. 342; King v. Carpenter, 37 Mich. 363; Moran v. Palmer, 13 Mich. 367; Methodist Church of Newark v. Clark, 41 Mich. 730; it is equally evident that the statutes do not prevent a party out of possession from applying for equitable relief, — as, for example, to have a cloud removed or prevent a cloud from being cast on his title: King v. Carpenter, 37 Mich. 363; Ormsby v. Barr, 22 Mich. 80; Low v. Staples, 2 Nev. 209; Pier v. Fond du Lac, 38 Wis. 470; Jones v. Smith, 22 Mich. 360; see also Harral v. Gray, 10 Neb. 186, 188.

[2] See Lewis v. Soule, 52 Iowa, 11, 13.

[3] See the statutes of Illinois, Mississippi, and New Jersey; also that of Georgia.

[4] Head v. Fordyce, 17 Cal. 149; Maxon v. Ayers, 28 Wis. 612; Dean v. Madison, 9 Wis. 402; Lewis v. Soule, 52 Iowa, 11, 13.

As to the effect of the judgment in this statutory action, see Green v. Glynn, 71 Ind. 336; Reed v. Calderwood, 32 Cal. 109. As to the proper or necessary parties in all such suits to quiet title, see Pomeroy on Remedies, secs. 369–372; Flanders v. McClanahan, 24 Iowa, 486; Thomas v. Kennedy, 24 Iowa, 397; 95 Am. Dec. 740; Beckwith v. Dargets, 18 Iowa, 303; Pierce v. Faunce, 47 Me. 507; Newman v. Home Ins. Co., 20 Minn. 422; Johnson v. Robinson, 20 Minn. 170; Durham v. Bischof, 47 Ind. 211; Haley v. Bagley, 37 Mo. 363; Mills v. Buttrick, 4 Col. 123; Bush v. Hicks, 60 N. Y. 298; Fisher v. Hepburn, 48 N. Y. 41, 55.

[1] Hayward v. Dimsdale, 17 Ves. 111; Mayor of Colchester v. Lowten, 1 Ves. & B. 226, 244; Pettit v. Shepherd, 5 Paige, 493, 501; Apthorp v. Comstock, 2 Paige, 482; Peirsoll v. Elliott, 6 Pet. 95, 98. Formerly there seems to have been some doubt as to the jurisdiction. Cancellation is the ordinary remedy in removing clouds. It is equally well established that equity has jurisdiction to prevent, by means of injunctions, clouds from being cast on titles: Pettit v. Shepherd, 5 Paige, 493; 28 Am. Dec. 437; Oakley v. Trustees etc., 6 Paige, 262; Shattuck v. Carson, 2 Cal. 588; Norton v. Beaver, 5 Ohio, 178; Bank of U. S. v. Schultz, 2 Ohio, 471; Groves v. Webber, 72 Ill. 606; O'Hare v. Downing, 130 Mass. 16; Mann v. City of Utica, 44 How. Pr. 334; Sanders v. Village of Yonkers, 63 N. Y. 489; Merriman v. Polk, 5 Heisk. 717. See, in this connection, Drake v. Jones, 27 Mo. 428. The danger,

timet,— that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title.[2]

§ 1399. **When the Jurisdiction is Exercised — General Doctrine.**— Whether or not the jurisdiction will be exercised depends upon the fact that the estate or interest to be protected is equitable in its nature, or that the remedies at law are inadequate where the estate or interest is legal,— a party being left to his legal remedy where his estate or interest is legal in its nature, and full and complete justice can thereby be done.[1] While a court of equity will set

however, in such cases must be imminent, and not merely speculative or potential: Sanders v. Village of Yonkers, *supra*. Cases for preventing and removing clouds from title depend generally upon the same principles, and will be discussed together. For statutory proceedings to remove clouds from title, see § 1397.

[2] 1 Fonblanque's Equity, b. 1, c. 1, sec. 8, note *y*. See also Shell v. Martin, 19 Ark. 139, 141; Hager v. Shindler, 29 Cal. 47, 55; Eckman v. Eckman, 55 Pa. St. 269, 273.

[1] De Witt v. Hays, 2 Cal. 463; 56 Am. Dec. 352; Hager v. Shindler, 29 Cal. 47; Gage v. Rohrbach, 56 Ill. 262, 266; Gage v. Billings, 56 Ill. 268; Budd v. Long, 13 Fla. 288; Lockwood v. City of St. Louis, 24 Mo. 20; Hall v. Whiston, 5 Allen, 126; Hinckley v. Greany, 118 Mass. 595; Daniel v. Stewart, 55 Ala. 278; Redmond v. Packenham, 66 Ill. 434; Martin v. Graves, 5 Allen, 601; Sullivan v. Finnegan, 101 Mass. 447; Plant v. Barclay, 56 Ala. 561; Jones v. De Graffenreid, 60 Ala. 145; Grigg v. Swindal, 67 Ala. 187; Miller v. Neiman, 27 Ark. 233; Crane v. Randolph, 30 Ark. 579; Munson v. Munson, 28 Conn. 582; 73 Am. Dec. 693; Commonwealth v. Smith, 10 Allen, 448; 87 Am. Dec. 672; Kennedy v. Northup, 15 Ill. 148; Moran v. Palmer, 13 Mich. 367; King v. Carpenter, 37 Mich. 363; Branch v. Mitchell, 24 Ark. 431.

As to whether possession by a plaintiff is necessary before he can resort to equity to remove a cloud, there appears to be some conflict of opinion, arising from loose and careless statements of judges, and an overlooking of the principles of equity in regard to the exercise of its jurisdiction. When the estate or interest to be protected is equitable, the jurisdiction should be exercised whether the plaintiff is in or out of possession, for under these circumstances legal remedies are not possible; but when the estate or interest is legal in its nature, the exercise of the jurisdiction depends upon the adequacy of legal remedies. Thus, for example, a plaintiff out of possession, holding the legal title, will be left to his remedy by ejectment, under ordinary circumstances: Burton v. Gleason, 56 Ill. 25; Polk v. Pendleton, 31 Md. 118; Branch v. Mitchell, 24 Ark. 431, 439; Moran v. Palmer, 13 Mich. 367, 370; Crane v. Randolph, 30 Ark. 579; Munson v. Munson, 28 Conn. 582; King v. Carpenter, 37 Mich. 363; Lawrence v. Zimpleman, 37

aside a deed, agreement, or proceeding affecting real estate, where extrinsic evidence is necessary to show its invalidity, because such instrument or proceeding may be used for annoying and injurious purposes at a time when the evidence to contest or resist it may not be as effectual as if used at once,[2] still, if the defect appears upon its face,

Ark. 643; Odle v. Odle, 73 Mo. 289. But where he is *in possession*, and thus unable to obtain any adequate legal relief, he may resort to equity: Gage v. Rohrbach, 56 Ill. 262, 266; Gage v. Billings, 56 Ill. 268; Jones v. De Graffenreid, 60 Ala. 145, 151; Hinckley v. Greany, 118 Mass. 595; Sullivan v. Finnegan, 101 Mass. 447; Clouston v. Shearer, 99 Mass. 209; Branch v. Mitchell, 24 Ark. 431, 439. Where, on the other hand, a party out of possession has an equitable title, or where he holds the legal title under circumstances that the law cannot furnish him full and complete relief, his resort to equity to have a cloud removed ought not to be questioned: Redmond v. Packenham, 66 Ill. 434; Plant v. Barclay, 56 Ala. 561; Thompson v. Lynch, 29 Cal. 189; Hager v. Shindler, 29 Cal. 47; Kennedy v. Northup, 15 Ill. 148, 152; Branch v. Mitchell, 24 Ark. 431, 439; King v. Carpenter, 37 Mich. 363; Ormsby v. Barr, 22 Mich. 80, 84; Low v. Staples, 2 Nev. 209, 212; Pier v. Fond du Lac, 38 Wis. 470; Lawrence v. Zimpleman, 37 Ark. 643, 645; Booth v. Wiley, 102 Ill. 84, 114. While it cannot be said that the cases are uniform on the above propositions, still it is believed that the rule stated in the text and the above explanations are founded on principle and are sufficient to reconcile a vast majority of the conflicting, or apparently conflicting, judicial opinions and *dicta* on this question. In some of the cases the rule is so broadly stated as to require a plaintiff, seeking to have a cloud removed, under all circumstances to be in possession: Orton v. Smith, 18 How. 263; Daniel v. Stewart, 55 Ala. 278; Arnett v. Bailey, 60 Ala. 435; Tyson v. Brown, 64 Ala. 244; Baines v. Barnes, 64 Ala. 375; Smith's Ex'r v. Cockrell, 66 Ala. 64; Miller v. Neiman, 27 Ark. 233; Keane v. Kyne, 66 Mo. 216; Haythorn v. Margerem, 7 N. J. Eq. 324; Busbee v. Lewis, 85 N. C. 332; Herrington v. Williams, 31 Tex. 448; Clark v. Covenant etc. Ins. Co., 52 Mo. 272; while, on the other hand, it is as generally stated that possession is never essential: Almony v. Hicks, 3 Head, 39; Hager v. Shindler, 29 Cal. 47; Thompson v. Lynch, 29 Cal. 189; Bunch v. Gallagher, 5 Blatchf. 481; Jones v. Smith, 22 Mich. 360. Both of these extreme views are open to criticism, and the cases should always be considered with reference to the facts actually before the court.

[2] Crooke v. Andrews, 40 N. Y. 547; Newell v. Wheeler, 48 N. Y. 486; Ward v. Dewey, 16 N. Y. 519; Radcliff v. Rowley, 2 Barb. Ch. 23; Longley v. City of Hudson, 4 Thomp. & C. 353; Congregation Shaarai Tephila v. Mayor etc., 53 How. Pr. 213; Daniel v. Stewart, 55 Ala. 278; Lockett v. Hurt, 57 Ala. 198; Lick v. Ray, 43 Cal. 83; Alden v. Trubee, 44 Conn. 455; Brooks v. Kearns, 86 Ill. 547; Clark v. Covenant etc. Ins. Co., 52 Mo. 272; Johnson v. Cooper, 2 Yerg. 524; 24 Am. Dec. 502; Almony v. Hicks, 3 Head, 39; Bunce v. Gallagher, 5 Blatchf. 481; Smith v. Fellows, 9

and a resort to extrinsic evidence is unnecessary, the reason for equitable interference does not exist, for it cannot be said that any cloud whatever is cast upon the title.[8] Cases showing various conditions of facts in instruments creating clouds, and when jurisdiction will be exercised, are given in the foot-note. In the absence of statutes giving a *prima facie* validity to deeds or other proceedings, the following doctrine seems to be sustained by the great majority of the American decisions: Where the instrument or proceeding constituting the alleged cloud is absolutely void on its face, so that no extrinsic evidence is necessary to show its invalidity, and where the instrument or proceeding is not thus void on its face, but the party claiming under it, in order to enforce it, *must necessarily* offer evidence which will *inevitably* show its invalidity and destroy its efficacy,— in each of these cases the court will not exercise its jurisdiction either to restrain or to remove

Jones & S. 36; Barton v. Drake, 21 Minn. 299. A case for the interposition of equity is made the stronger by the fact that parol testimony is essential to show the invalidity: See the preceding cases. In Waterbury Sav. Bank v. Lawler, 46 Conn. 243, 246, it was held that relief would not be given where the rebutting evidence was a matter of record, and easily obtained. See also Haines's Appeal, 73 Pa. St. 169.

[8] Simpson v. Lord Howden, 3 Mylne & C. 97, 102, 103, 108, and cases cited; Cox v. Clift, 2 N. Y. 118; Van Doren v. Mayor etc., 9 Paige, 388; Heywood v. City of Buffalo, 14 N. Y. 534; Overing v. Foote, 43 N. Y. 290; Marsh v. City of Brooklyn, 59 N. Y. 280; Levy v. Hart, 54 Barb. 248; Tilden v. Mayor etc., 56 Barb. 340; Mulligan v. Baring, 3 Daly, 75; Howell v. City of Buffalo, 2 Abb. App. 412; Farnham v. Campbell, 34 N. Y. 480; Dederer v. Voorhies, 81 N. Y. 153; Stuart v. Palmer, 74 N. Y. 183; 30 Am. Rep. 289; Townsend v. Mayor etc., 77 N. Y. 542; Wells v. City of Buffalo, 80 N. Y. 253; Peirsoll v. Elliott, 6 Pet. 95; Posey v. Conaway, 10 Ala. 811; Cohen v. Sharp, 44 Cal. 29; Head v. James, 13 Wis. 641; Shepardson v. Supervisors, 28 Wis. 593; Briggs v. Johnson, 71 Me. 235; Busbee v. Macy, 85 N. C. 329; Minturn v. Smith, 3 Saw. 142; Curtis v. City of East Saginaw, 35 Mich. 508. See the rule as stated in Merchants' Bank v. Evans, 51 Mo. 335, 345.

In many states, deeds, certificates, and other instruments given on sales for taxes are made *prima facie* evidence by statute of the regularity of proceedings connected with the assessments and sales, and it is well settled that courts of equity will set aside such instruments for defects, although such defects are apparent on the faces of the instruments: Scott v. Onderdonk, 14 N. Y. 9; 67 Am. Dec. 106; Huntington v. Cent. Pac. R. R., 2

a cloud, for the assumed reason that there *is* no cloud.[4] While this doctrine may be settled by the weight of authority, I must express the opinion that it often operates to produce a denial of justice. It leads to the strange scene, almost daily in the courts, of defendants urging that the

Saw. 503; Palmer v. Rich, 12 Mich. 414; Marquette etc. R. R. v. City of Marquette, 35 Mich. 504; Weller v. City of St. Paul, 5 Minn. 95; Allen v. City of Buffalo, 39 N. Y. 386; Hatch v. City of Buffalo, 38 N. Y. 276; Crooke v. Andrews, 40 N. Y. 547; Lewis v. City of Buffalo, 29 How. Pr. 335; Johnson v. Stevens, 13 How. Pr. 132; Mann v. City of Utica, 44 How. Pr. 334; Astor v. Mayor etc., 5 Jones & S. 539; Lennon v. Mayor etc., 5 Daly, 347; Nichols v. Voorhis, 9 Hun, 171; Masterson v. Hoyt, 55 Barb. 520.

[4] *Deeds:* Lyon v. Hunt, 11 Ala. 295; 46 Am. Dec. 216; Hunt v. Acre, 28 Ala. 580; Barclay v. Henderson, 44 Ala. 269; Daniel v. Stewart, 55 Ala. 278; Lockett v. Hurt, 57 Ala. 198; Posey v. Conaway, 10 Ala. 811; Florence v. Paschal, 50 Ala. 28; Plant v. Barclay, 56 Ala. 561; Jones v. De Graffenreid, 60 Ala. 145; Arnett v. Bailey, 60 Ala. 435; Tyson v. Brown, 64 Ala. 244; Baines v. Barnes, 64 Ala. 375; Smith's Ex'r v. Cockrell, 66 Ala. 64; Grigg v. Swindal, 67 Ala. 187; Shell v. Martin, 19 Ark. 139; Walker v. Peay, 22 Ark. 103; Miller v. Neiman, 27 Ark. 233; Crane v. Randolph, 30 Ark. 579; Riley v. Pehl, 23 Cal. 70; Hager v. Shindler, 29 Cal. 47; Thompson v. Lynch, 29 Cal. 189; Lick v. Ray, 43 Cal. 83; Cohen v. Sharp, 44 Cal. 29; Alden v. Trubee, 44 Conn. 455; Munson v. Munson, 28 Conn. 582; 73 Am. Dec. 693; Stout v. Cook, 37 Ill. 283; Reed v. Tyler, 56 Ill. 288; Gage v. Billings, 56 Ill. 268; Reed v. Reber, 62 Ill. 240; Lee v. Ruggles, 62 Ill. 427; Kennedy v. Northup, 15 Ill. 149; Redmond v. Packenham, 66 Ill. 434; Brooks v. Kearns, 86 Ill. 547; Burton v. Gleason, 56 Ill. 25; Peck v. Sexton, 41 Iowa, 566; Gerry v. Stimson, 60 Me. 186; Polk v. Rose, 25 Md. 153; 89 Am. Dec. 773; Polk v. Reynolds, 31 Md. 106; Polk v. Pendleton, 31 Md. 118; Briggs v. Johnson, 71 Me. 235; Martin v. Graves, 5 Allen, 601; Burns v. Lynde, 6 Allen, 305; Sullivan v. Finnegan, 101 Mass. 447; Russell v. Deshon, 124 Mass. 342; Davis v. City of Boston, 129 Mass. 377; Merchants' Bank v. Evans, 51 Mo. 335; Clark v. Covenant etc. Ins. Co., 52 Mo. 272; Harrington v. Utterback, 57 Mo. 519; Keane v. Kyne, 66 Mo. 216; Haythorn v. Margerem, 7 N. J. Eq. 324; Downing v. Wherrin, 19 N. H. 9, 91; 49 Am. Dec. 139; Hall v. Fisher, 9 Barb. 17; Buffalo etc. R. R. v. Lampson, 47 Barb. 533; Remington Paper Co. v. O'Dougherty, 81 N. Y. 484; Cox v. Clift, 2 N. Y. 118; Bockes v. Lansing, 74 N. Y. 437; Hotchkiss v. Elting, 36 Barb. 38; Levy v. Hart, 54 Barb. 248; Busbee v. Macy, 85 N. C. 329; Busbee v. Lewis, 85 N. C. 332; Jones's Heirs v. Perry, 10 Yerg. 59; 30 Am. Dec. 430; Johnson v. Cooper, 2 Yerg. 524; 24 Am. Dec. 502; Almony v. Hicks, 3 Head, 39; Carter v. Taylor, 3 Head, 30; Butler v. Rutledge, 2 Cold. 4; Whillock v. Grisham, 3 Sneed, 237; Williams v. Williams, 7 Baxt. 116; Huffman v. Huffman, 1 Lea, 491; Jones v. Neale, 2 Pat. & H. 339; Carroll v. Brown, 28 Gratt. 791; Willis v. Sweet, 49 Wis. 505; Bunce v. Gallagher, 5 Blatchf. 481; Peirsoll v. Elliott, 6 Pet. 95.

instruments under which they claim *are void, and therefore that they ought to be permitted to stand unmolested,* and of judges deciding that the court cannot interfere, *because the deed or other instrument is void,* while from a business point of view every intelligent person knows that the in-

Mortgages: Ramsdell v. Fuller, 28 Cal. 37; 87 Am. Dec. 103; City of Hartford v. Chipman, 21 Conn. 488; Sherman v. Fitch, 98 Mass. 59 (personal property); Clouston v. Shearer, 99 Mass. 209; Comm. v. Smith, 10 Allen, 448; 87 Am. Dec. 672; Vogler v. Montgomery, 54 Mo. 577; Ward v. Dewey, 16 N. Y. 519; Smith v. Fellows, 9 Jones & S. 36; Eldridge v. Smith, 34 Vt. 484.

Assessments for taxes: See last preceding note; De Witt v. Hays, 2 Cal. 463; 56 Am. Dec. 352; Minturn v. Smith, 3 Saw. 142; Waterbury Sav. Bank v. Lawler, 46 Conn. 243; Gage v. Rohrbach, 56 Ill. 262; Gage v. Chapman, 56 Ill. 311; Barnett v. Cline, 60 Ill. 205; Holland v. Mayor etc., 11 Md. 186; 69 Am. Dec. 195; Scofield v. City of Lansing, 17 Mich. 437; Henry v. Gregory, 29 Mich. 68; Curtis v. City of East Saginaw, 35 Mich. 508; Lockwood v. City of St. Louis, 24 Mo. 20; Fowler v. City of St. Joseph, 37 Mo. 228; McPike v. Pen, 51 Mo. 63; Johnson v. Hahn, 4 Neb. 139; Morris Canal etc. Co. v. Jersey City, 12 N. J. Eq. 227; Longley v. City of Hudson, 4 Thomp. & C. 353; Newell v. Wheeler, 48 N. Y. 486; Cong. Shaarai Tephila v. Mayor etc., 53 How. Pr. 213; Hebrew etc. Ass'n v. Mayor etc., 4 Hun, 446; Dederer v. Voorhies, 81 N. Y. 153; Van Doren v. Mayor etc., 9 Paige, 388; Heywood v. City of Buffalo, 14 N. Y. 534; Howell v. City of Buffalo, 2 Abb. App. 412; Overing v. Foote, 43 N. Y. 290; Tilden v. Mayor etc., 56 Barb. 340; Sanders v. Village of Yonkers, 63 N. Y. 489; Marsh v. City of Brooklyn, 59 N. Y. 280; Guest v. City of Brooklyn, 69 N. Y. 506; Stuart v. Palmer, 74 N. Y. 183; 30 Am. Rep. 289; Townsend v. Mayor etc., 77 N. Y. 542; Wells v. City of Buffalo, 80 N. Y. 253; Burnet v. Corp. of Cincinnati, 3 Ohio, 73; 17 Am. Dec. 582; Culbertson v. City of Cincinnati, 16 Ohio 574; Shepardson v. Supervisors, 28 Wis. 593; Milwaukee Iron Co. v. Town of Hubbard, 29 Wis. 51; Hamilton v. City of Fond du Lac, 25 Wis. 490; Head v. James, 13 Wis. 641.

Judgments and executions: Burt v. Cassety, 12 Ala. 734; Ala. etc. Co. v. Pettway, 24 Ala. 544; Rea v. Longstreet, 54 Ala. 291; Pixley v. Huggins, 15 Cal. 127; Englund v. Lewis, 25 Cal. 337; Shattuck v. Carson, 2 Cal. 588; Hall v. Theisen, 9 Pac. C. L. J. 479; Budd v. Long, 13 Fla. 288; Davidson v. Seegar, 15 Fla. 671; Campbell v. McCahan, 41 Ill. 45; Tucker v. Conwell, 67 Ill. 552; Henderson v. Palmer, 71 Ill. 579; 22 Am. Rep. 117; Groves v. Webber, 72 Ill. 606; Key City etc. Co. v. Munsell, 19 Iowa, 305; Hall v. Whiston, 5 Allen, 126; Hinckley v. Greany, 118 Mass. 595; O'Hare v. Downing, 130 Mass. 16; Barton v. Drake, 21 Minn. 299; Hanson v. Johnson, 20 Minn. 194; Drake v. Jones, 27 Mo. 428; Uhl v. May, 5 Neb. 157; Tucker v. Kenniston, 47 N. H. 267; 93 Am. Dec. 425; Radcliff v. Rowley, 2 Barb. Ch. 23; Lounsbury v. Purdy, 18 N. Y. 515; Tisdale v. Jones, 38 Barb. 523; Brown v. Goodwin, 75 N. Y. 409; Fonda v. Sage, 48 N. Y. 173; Farnham v. Campbell, 34 N. Y. 480; Schroeder v. Gurney, 73 N. Y. 430; Mulligan v. Bar-

strument is a serious injury to the plaintiff's title, greatly depreciating its market value, and the judge himself who repeats the rule would neither buy the property while thus affected nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice and expediency.

ing, 3 Daly, 75; Tear v. Mathews, Wright, 371; Bank of U. S. v. Schultz, 2 Ohio, 471; Norton v. Beaver, 5 Ohio, 178; Merriman v. Polk, 5 Heisk. 717; Rooney v. Soule, 45 Vt. 303; Goodell v. Blumer, 41 Wis. 436; Gamble v. Loop, 14 Wis. 465; Moore v. Cord, 14 Wis. 213; Standish v. Dow, 21 Iowa, 363.

Miscellaneous cases: Mayor etc. v. North Shore etc. Co., 9 Hun, 620 (lease); Spofford v. Bangor etc. R. R., 66 Me. 51 (ditto); Larmon v. Jordan, 56 Ill. 204 (land contract placed on record); Sea v. Morehouse, 79 Ill. 216 (ditto); Boyd v. Schlesinger, 59 N. Y. 301 (ditto); Washburn v. Burnham, 63 N. Y. 132 (ditto); Nickerson v. Loud, 115 Mass. 94 (papers recorded giving notice of claim to land); Sanxay v. Hunger, 42 Ind. 44 (papers recorded giving notice of dispute as to right of way); Yauger v. Skinner, 14 N. J. Eq. 389 (findings of commission of lunacy).

FIFTH GROUP.

REMEDIES BY WHICH EQUITABLE OBLIGATIONS ARE SPECIFICALLY AND DIRECTLY ENFORCED.

CHAPTER FIRST.

SPECIFIC PERFORMANCE OF CONTRACTS.

ANALYSIS.

§ 1400. Nature and object.
§ 1401. Specific performance of contracts; grounds of the jurisdiction.
§ 1402. Extent of the jurisdiction; inadequacy of damages; various kinds of contracts.
§ 1403. The same: Impracticability of the legal remedy.
§ 1404. The jurisdiction discretionary.
§ 1405. Essential elements and incidents.
§ 1406. Rights under the contract; effect of events without the agency of the parties.
§ 1407. Performance by plaintiff a condition precedent.
§ 1408. Time as affecting the right to a performance.
§ 1409. Enforcement of verbal contracts part performed.
§ 1410. Damages in place of a specific performance.

§ 1400. Nature and Object.— The remedies embraced in this group are all purely equitable, and the rights of the complainant and obligations of the defendant which are enforced by their means are also equitable.[1] They belong, therefore, to the exclusive jurisdiction of equity. Their distinctive object is to specifically enforce the complainant's equitable right, and to compel the defendant to specifically perform the actual equitable obligation which rests upon him. This group, as a whole, contains the specific performance of contracts, including the performance of

[1] Although contracts may also give rise to a legal right, yet when equity compels their specific performance, it enforces the equitable obligation arising from them, and not the legal duty. In most cases, it turns the vendee's equitable *estate* into a legal one.

verbal contracts for the sale of land which have been part performed, and the delivery up of specific chattels; the specific enforcement of trusts, express and implied; and the specific enforcement of obligations arising from fiduciary relations analogous to trusts.[2]

§ 1401. **Specific Performance of Contracts — Ground of the Jurisdiction.**— The remedy of the specific performance of contracts is purely equitable, given as a substitute for the legal remedy of compensation, whenever the legal remedy is inadequate or impracticable. In the language of Lord Selborne: "The principle which is material to be considered is, that the court gives specific performance instead of damages only when it can by that means *do more perfect and complete justice.*"[1] The jurisdiction depending upon this broad principle is exercised in two classes of cases: 1. Where the subject-matter of the contract is of such a special nature, or of such a peculiar value, that the damages, when ascertained according to legal rules, would not be a just and reasonable substitute for or representative of that subject-matter in the hands of the party who is entitled to its benefit; or in other words, where the damages are *inadequate;* 2. Where, from some special and practical features or incidents of the contract inhering

[2] The indirect specific enforcement of certain contracts by means of an injunction has already been considered in a preceding chapter (§§ 1341–1344), and will not be here discussed.

[1] Wilson v. Northampton etc. R'y, L. R. 9 Ch. 279, 284. The foundation and measure of the jurisdiction is the desire to do justice, which the legal remedy would fail to give. This justice is primarily due to the plaintiff, but not exclusively, for the equities of the defendant are also protected. Specific performance is, therefore, a conscious attempt on the part of the court to do complete justice to both the parties with respect to all the judicial relations growing out of the contract between them: See Buxton v. Lister, 3 Atk. 383; Wright v. Bell, 5 Price, 325, 328, 329; Adderley v. Dixon, 1 Sim. & St. 607, 610; Ord v. Johnston, 1 Jur., N. S., 1063, 1064. It follows, therefore, that the remedial right, if it exists at all, must be mutual; each party must be able to enforce the remedy against the other: Adderley v. Dixon, *supra;* Old Colony R. R. v. Evans, 6 Gray, 25; 66 Am. Dec. 394; Brown v. Haff, 5 Paige, 235; 28 Am. Dec. 425; Schroeppel v. Hopper, 40 Barb. 425; Hopper v. Hopper, 16 N. J. Eq. 147; but see Jones v. Newhall, 115 Mass. 244; 15 Am. Rep. 97.

either in its subject-matter, in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that *no* real compensation can be obtained by means of an action at law; or in other words, where damages are *impracticable*.[2]

§ 1402. **Extent of the Jurisdiction — Inadequacy of Damages.** — The object of the present discussion is to determine the general classes of contracts which come within the jurisdiction, and which may be specifically enforced. Whether any particular contract belonging to one of these classes will actually be thus enforced depends upon other equitable elements, to be described hereafter. *Lands:* Where land, or any estate therein, is the subject-matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established.[1] When-

[2] The ground of the jurisdiction may be practically stated thus: that an award of damages will not put the party in a situation as beneficial to him as if the agreement were specifically performed: Harnett v. Yielding, 2 Schoales & L. 549, 553; Phyfe v. Wardell, 2 Edw. Ch. 47; Stuyvesant v. The Mayor etc., 11 Paige, 414; Richmond v. Dubuque etc. R. R., 33 Iowa, 422; Blanchard v. Detroit etc. R. R., 31 Mich. 43; 18 Am. Rep. 142; Bogan v. Daughdrill, 51 Ala. 312; Willard v. Tayloe, 8 Wall. 557; Somerby v. Buntin, 118 Mass. 279; 19 Am. Rep. 459; McGarvey v. Hall, 23 Cal. 140.

[1] Harnett v. Yielding, 2 Schoales & L. 549, 553, 554; Adderley v. Dixon, 1 Sim. & St. 607; Cud v. Rutter, 1 P. Wms. 570, 571; Hollis v. Edwards, 1 Vern. 159; Duff v. Fisher, 15 Cal. 375; McGarvey v. Hall, 23 Cal. 140; Kirksey v. Fike, 27 Ala. 383; 62 Am. Dec. 768; Bogan v. Daughdrill, 51 Ala. 312; Barnes v. Barnes, 65 N. C. 261; Richmond v. Dubuque etc. R. R., 33 Iowa, 422; Blanchard v. Detroit etc. R. R., 31 Mich. 43; 18 Am. Rep. 142; Willard v. Tayloe, 8 Wall. 557; Somerby v. Buntin, 118 Mass. 279; 19 Am. Rep. 459. *Contracts to give or renew a lease:* Furnival v. Crew, 3 Atk. 83, 87; Tritton v. Foote, 2 Brown Ch. 636; Burke v. Smyth, 3 Jones & L. 193; Moss v. Barton, L. R. 1 Eq. 474; Buckland v. Papillon, L. R. 2 Ch. 67; Clark v. Clark, 49 Cal. 586; Switzer v. Gardner, 41 Mich. 164. *Contracts for mortgages:* Ashton v. Corrigan, L. R. 13 Eq. 76; Hermann v. Hodges, L. R. 16 Eq. 18; De Pierres v. Thorn, 4 Bosw. 266; City etc. Ins. Co. v. Olmsted, 33 Conn. 476; St. Paul Division etc. v. Brown, 11 Minn. 356; McClintock v. Laing, 22 Mich. 212; Dean v. Anderson, 34 N. J. Eq. 496. *Family settlements:* Wistar's Appeal, 80 Pa. St. 484; Henry v. Henry, 27 Ohio St. 121. *Bond to convey land:* Ewins v. Gordon, 49 N. H. 444. *Contracts concerning land in another country or state:* Penn v. Lord Baltimore, 1 Ves. Sr. 444; Lord Portarlington v. Soulby, 3 Mylne & K. 104; Sutphen v. Fowler, 9 Paige, 280; Brown v. Desmond, 100 Mass. 267; Davis v. Parker, 14 Allen, 94. For

ever a contract concerning real property is in its nature and incidents entirely unobjectionable,— when it possesses none of those features which, in ordinary language, influence the discretion of the court,— it is as much a matter of course for a court of equity to decree its specific performance as it is for a court of law to give damages for its breach. *Chattels:* On the contrary, the doctrine is equally well settled that equity will not, in general, decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality.[2] *Exceptions:* Where, however, particular chattels have some special value to the owner over and above any pecuniary estimate,— the *pretium affectionis,*— and where they are unique, rare, and incapable of being reproduced by money damages, equity will decree a specific delivery of them to their owner, and the specific performance of contracts concerning them.[3] *Things in*

other contracts concerning land, see Johnson v. Johnson, 40 Md. 189; McNamee v. Withers, 37 Md. 171; Bleakley's Appeal, 66 Pa. St. 187; Seichrist's Appeal, 66 Pa. St. 237; Rogers v. Williams, 8 Phila. 123; Green v. Richards, 23 N. J. Eq. 32, 536; Colgate's Ex'r v. Colgate, 23 N. J. Eq. 372; Reynolds v. O'Neil, 26 N. J. Eq. 223; Wynn v. Smith, 40 Ga. 457; Porter v. Allen, 54 Ga. 623; Riddle v. Cameron, 50 Ala. 263; Warren v. Daniels, 72 Ill. 272; Yoakum v. Yoakum, 77 Ill. 85; Page Co. v. American etc. Co., 41 Iowa, 115; Warren v. Ewing, 34 Iowa, 168; Law v. Henry, 39 Ind. 414; Au Gres Boom Co. v. Whitney, 26 Mich. 42; Williams v. McGuire, 60 Mo. 254; Kuhn v. Freeman, 15 Kan. 423; Reese v. Board of Police etc., 49 Miss. 639; Grier v. Rhyne, 69 N. C. 346; Wright v. Pucket, 22 Gratt. 370; Ambrouse's Heirs v. Keller, 22 Gratt. 769; Chartier v. Marshall, 51 N. H. 400; Hayes v. Harmony Grove Cemetery, 108 Mass. 400; McClaskey v. Mayor etc., 64 Barb. 310; Olney v. Eaton, 66 Mo. 563; Gartrell v. Stafford, 12 Neb. 545; 41 Am. Rep. 767; Wormley v. Wormley, 98 Ill. 544; Bonner v. Little, 38 Ark. 397; Coffman v. Robbins, 8 Or. 278.

[2] Cud v. Rutter, 1 P. Wms. 570; Nutbrown v. Thornton, 10 Ves. 159: Adderley v. Dixon, 1 Sim. & St. 607, 608; Buxton v. Lister, 3 Atk. 383; Pierce v. Plumb, 74 Ill. 326; Collins v. Karatopsky, 36 Ark. 316; Bubier v. Bubier, 24 Me. 42; Cowles v. Whitman, 10 Conn. 121, 124; 25 Am. Dec. 60; Gram v. Stebbins, 6 Paige, 124; Phillips v. Berger, 2 Barb. 608; 8 Barb. 527; Scott v. Billgerry, 40 Miss. 119; McLaughlin v. Piatti, 27 Cal. 451; Ashe v. Johnson's Adm'r, 2 Jones Eq. 149.

[3] This class includes,— 1. Articles of special value to their owner, but of no general pecuniary value; and 2. Articles of such great rarity and value

action: Contracts for the sale or assignment of things in action may be enforced by the purchaser, by compelling a transfer and delivery, where the legal damages might be too uncertain and conjectural to constitute an adequate compensation. And since the remedy must be mutual, the vendor may also maintain the action in such cases.[4] *Awards:* An award is treated as the continu-

that they cannot be replaced by money,— paintings, statues, etc. The jurisdiction will be exercised to compel their delivery by one who wrongfully detains them, or to compel the specific execution of a contract for their sale or delivery. As illustrations, see Pusey v. Pusey, 1 Vern. 273 (an ancient horn); Duke of Somerset v. Cookson, 3 P. Wms. 389 (an antique silver patera); Fells v. Read, 3 Ves. 70; Lloyd v. Loaring, 6 Ves. 773; Nutbrown v. Thornton, 10 Ves. 159, 161, 163; Wallwyn v. Lee, 9 Ves. 24, 33; Saville v. Tankred, 1 Ves. Sr. 101; 3 Swanst. 141, note; Wood v. Rowcliffe, 3 Hare, 304; 2 Phill. Ch. 382; Lady Arundell v. Phipps, 10 Ves. 139; Lowther v. Lord Lowther, 13 Ves. 95; Pearne v. Lisle, Amb. 75, 77; Falcke v. Gray, 4 Drew, 651 (rare works of art); Clark v. Flint, 22 Pick. 231; 33 Am. Dec. 733; McGowin v. Remington, 12 Pa. St. 56; 51 Am. Dec. 584 (valuable private maps and charts). Analogous to this jurisdiction and for the same reasons, equity will decree the delivery up to the lawful owner of deeds and other written muniments of title: Brown v. Brown, 1 Dick. 62; Tanner v. Wise, 3 P. Wms. 294, 296; Duncombe v. Mayer, 8 Ves. 320; Freeman v. Fairlie, 3 Mer. 29, 30; Reece v. Trye, 1 De Gex & S. 273; Lady Beresford v. Driver, 14 Beav. 387; 16 Beav. 134; Turner v. Letts, 20 Beav. 185, 191; Gibson v. Ingo, 6 Hare, 112; Cowles v. Whitman, 10 Conn. 121; 25 Am. Dec. 60; Hill v. Rockingham Bank, 44 N. H. 567. If a trust or fiduciary relation exists in reference to the chattels, if an express trust has been created by the contract or an implied trust has arisen from the acts or omissions of the parties, then equity will exercise its jurisdiction to compel the specific performance of such contract, whether the chattels are common or special, since the court will always enforce a trust: Wood v. Rowcliffe, 3 Hare, 304; 2 Phill. Ch. 382; Pooley v. Budd, 14 Beav. 34; Stanton v. Percival, 5 H. L. Cas. 257, 288; Clark v. Flint, 22 Pick. 231; Cowles v. Whitman, 10 Conn. 121; 25 Am. Dec. 60; Hill v. Rockingham Bank, 44 N. H. 567; McGowin v. Remington, 12 Pa. St. 56; 51 Am. Dec. 584; Abbott's Ex'r v. Reeves, 49 Pa. St. 494; 88 Am. Dec. 510; Peer v. Kean, 14 Mich. 354.

[4] Assignment of debts: Adderley v. Dixon, 1 Sim. & St. 607; Cutting v. Dana, 25 N. J. Eq. 265; purchase of an annuity: Withy v. Cottle, 1 Sim. & St. 174; Clifford v. Turrell, 1 Younge & C. Ch. 138; Kenney v. Wexham, 6 Madd. 355; assignment of patent rights: Cogent v. Gibson, 33 Beav. 557; Corbin v. Tracy, 34 Conn. 325; Somerby v. Buntin, 118 Mass. 279; 19 Am. Rep. 459; Binney v. Annan, 107 Mass. 94; 9 Am. Rep. 10. See also, as illustrations, Wright v. Bell, 5 Price. 325; Hughes v. Piedmont etc. Ins. Co., 55 Ga. 111; Tuttle v. Moore, 16 Minn. 123; Woodward v. Harris, 3 Sand. 272. *Stocks:* It is the settled rule in England and in the United States that contracts for public securities, government stocks, bonds, etc., will not be en-

ance of the agreement to submit. If it directs acts to be done which, if stipulated for in a contract, would render such contract capable of enforcement, then the award itself may be specifically enforced.[5] *Special contracts:* The jurisdiction does not depend upon the nature of the contract nor of the subject-matter, but it will be exercised wherever the legal remedy is inadequate. It has been applied to a great number of special agreements.[6] The cases of con-

forced, since they can always be bought in the market: Doloret v. Rothschild, 1 Sim. & St. 590; Shaw v. Fisher, 5 De Gex, M. & G. 596. But contracts for the sale of railway and other business corporation shares and bonds will be enforced in England: Duncuft v. Albrecht, 12 Sim. 189; Shaw v. Fisher, *supra;* Cheale v. Kenward, 3 De Gex & J. 27; Hawkins v. Maltby, L. R. 3 Ch. 188; 4 Ch. 200. The recent English reports abound in such cases. In the United States all such securities are ordinarily purchasable in the market, and the rule is settled by the weight of authority that contracts concerning stocks and bonds of corporations, like those concerning government securities, will not be specifically enforced: Fallon v. Railroad Co., 1 Dill. 121; Ross v. Union Pac. R'y, 1 Woolw. 26, 36; Bissell v. Farmers' and Mechanics' Bank, 5 McLean, 495; Cowles v. Whitman, 10 Conn. 121, 124, 25 Am. Dec. 60; Gram v. Stebbins, 6 Paige, 124; Carpenter v. Mutual etc. Ins. Co., 4 Sand. Ch. 408; Lowry v. Muldrow, 8 Rich. Eq. 241; Strasburg R. R. v. Echternacht, 21 Pa. St. 220; 60 Am. Dec. 49; Sullivan v. Tuck, 1 Md. Ch. 59; Ferguson v. Paschall, 11 Mo. 267. A few cases more incline towards the English rule: See Ashe v. Johnson's Adm'r, 2 Jones Eq. 149; Baldwin v. Commonwealth, 11 Bush, 417; Treasurer v. Commercial etc. Co., 23 Cal. 390; Todd v. Taft, 7 Allen, 371.

[5] For example, awards directing the conveyance of land, etc.: Blackett v. Bates, L. R. 1 Ch. 117; Norton v. Mascall, 2 Vern. 24; Hall v. Hardy, 3 P. Wms. 187; Memphis etc. R. R. v. Scruggs, 50 Miss. 284; Overby v. Thrasher, 47 Ga. 10; Story v. Norwich etc. R. R., 24 Conn. 94; Kirksey v. Fike, 27 Ala. 383; 62 Am. Dec. 768; McNeil v. Magee, 5 Mason, 244; Jones v. Boston Mill Corp., 4 Pick. 507; 16 Am. Dec. 358; Davis v. Havard, 15 Serg. & R. 165, 171; 16 Am. Dec. 537; Somerville v. Trueman's Devisees, 4 Har. & McH. 43; 1 Am. Dec. 389; Cook v. Vick. 2 How. (Miss.) 882; but not an award directing merely a payment of money: Hall v. Hardy, *supra;* Story v. Norwich etc. R. R., *supra;* Bubier v. Bubier, 24 Me. 42.

[6] These agreements are so various that it is difficult to classify them. The following cases are cited as illustrations: *Special contracts concerning chattels:* Buxton v. Lister, 3 Atk. 383; Taylor v. Neville, cited 3 Atk. 384; Duke of Buckingham v. Ward, cited 3 Atk. 385. *Agreement to pay off or discharge a mortgage:* Barkley v. Barkley, 14 Rich. Eq. 12; Bennett v. Abrams, 41 Barb. 619; Weir v. Mundell, 3 Brewst. 594; Howe v. Nickerson, 14 Allen, 400; Stark v. Wilder, 36 Vt. 752. *Contract to insure:* Tayloe v. Merchants' etc. Ins. Co., 9 How. 390; Carpenter v. Mut. etc. Ins. Co., 4 Sand. Ch. 408; Neville v. Merchants' etc. Ins. Co., 19 Ohio, 452; Wooddy v. Old

tracts for personal acts, and for building and construction, are considered in the foot-note.

Dominion Ins. Co., 31 Gratt. 362; 31 Am. Rep. 732. *Agreement to compromise and discharge a judgment:* Phillips v. Berger, 2 Barb. 608; 8 Barb. 527. *Agreement to indemnify:* Chamberlain v. Blue, 6 Blackf. 491; but *per contra*, Hoy v. Hansborough, Freem. (Miss.) 533. *Antenuptial contract concerning personal property:* Tarbell v. Tarbell, 10 Allen, 278; Sullings v. Sullings, 9 Allen, 234; Gough v. Crane, 3 Md. Ch. 119; 4 Md. 316. *Miscellaneous cases:* Thorn v. Comm'rs etc., 32 Beav. 490; Schotsmans v. Lancashire etc. R'y, L. R. 2 Ch. 332; Very v. Levy, 13 How. 345; Kirksey v. Fike, 27 Ala. 383, 62 Am. Dec. 768; McKnight v. Robbins, 5 N. J. Eq. 229, 642; Ashe v. Johnson's Adm'r, 2 Jones Eq. 149; Sullivan v. Tuck, 1 Md. Ch. 59; Hall v. Joiner, 1 S. C. 186; Starnes v. Newsom, 1 Tenn. Ch. 239; Furman v. Clark, 11 N. J. Eq. 306; Steward v. Winters, 4 Sand. Ch. 587; Stuyvesant v. Mayor etc., 11 Paige, 414; Hall v. Hiles, 2 Bush, 532; McMullen v. Vanzant, 73 Ill. 190; Watson v. Smith, 7 Or. 448 (contract of support); Shields v. Whitaker, 82 N. C. 516 (to apply land in payment of debts); Reilley v. Roberts, 34 N. J. Eq. 299 (to cancel judgment); Apperson v. Gogin, 3 Ill. App. 48 (to credit value of property on judgment); Reybold v. Herdman, 2 Del. Ch. 34 (indemnity); Williams v. Vreeland, 32 N. J. Eq. 135 (agreement to hold a legacy for benefit of a third person); Coffman v. Robbins, 8 Or. 278 (by riparian owners to divide water); Boardman v. Lake Shore etc. R'y, 84 N. Y. 157 (concerning preferred and guaranteed stock). *Contracts for personal acts:* As an almost universal rule, these contracts will not be directly enforced. (They may sometimes be indirectly enforced by injunction: §§ 1343, 1344.) There are a few special exceptions. As an illustration, agreements for separation between husband and wife will be specifically enforced, if valid: Wilson v. Wilson, 1 H. L. Cas. 538; 5 H. L. Cas. 40; 14 Sim. 405; Gibbs v. Harding, L. R. 5 Ch. 336; 8 Eq. 490; McCrocklin v. McCrocklin, 2 B. Mon. 370. *Contracts for building and construction:* In general, the specific performance of these contracts will not be decreed, because the court cannot, by its ordinary means and instrumentalities, enforce its decree: Errington v. Aynesly, 2 Brown Ch. 341; Lucas v. Commerford, 3 Brown Ch. 166; Paxton v. Newton, 2 Smale & G. 437; Mosely v. Virgin, 3 Ves. 184; e. g., to work a gravel pit: Flint v. Brandon, 8 Ves. 159; construction of a railway: South Wales R'y v. Wythes, 1 Kay & J. 186; 5 De Gex, M. & G. 880; Port Clinton R. R. v. Cleveland etc. R. R., 13 Ohio St. 544; Fallon v. R. R. Co., 1 Dill. 121; Ross v. Union Pac. R'y, 1 Woolw. 26; to work quarries: Booth v. Pollard, 4 Younge & C. 61; Marble Co. v. Ripley, 10 Wall. 339; or mines: Pollard v. Clayton, 1 Kay & J. 462. The English courts have established exceptions to this rule, and enforce such contracts in four classes of cases, viz.: 1. Where the agreement to erect a building is defined and certain: Mosely v. Virgin, 3 Ves. 184, 185; Flint v. Brandon, 8 Ves. 159, 164; Cubitt v. Smith, 10 Jur., N. S., 1123; Phillips v. Soule, 9 Gray, 233; and see Brace v. Wehnert, 25 Beav. 348. 2. Where the defendant has contracted to construct some defined work *on his own* land, and the plaintiff has a material interest therein not susceptible of adequate compensation in damages:

§ 1403. **The Same. Impracticability of a Legal Remedy.**— This ground of the jurisdiction includes two classes of cases: 1. Where, from the lack of some legal formality or condition in the contract, no action at law can be maintained; 2. Where, from some peculiar feature of the contract, either in its subject-matter or in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty.[1] The most important instances in which the jurisdiction is referable to this ground are,— 1. Contracts which the plaintiff has not fully performed, or even cannot fully perform, on his part, but which equity enforces with compensation for his partial failure; 2. Contracts invalid at law, especially verbal contracts concerning land; 3. Contracts which are incomplete in their terms.

Storer v. Great W. R'y, 2 Younge & C. Ch. 48; Sanderson v. Cockermouth etc. R'y, 11 Beav. 497; Franklyn v. Tuton, 5 Madd. 469; Middleton v. Greenwood, 2 De Gex, J. & S. 142; Wilson v. West Hartlepool R'y, 2 De Gex, J. & S. 475; Wilson v. Northampton etc. R'y, L. R. 9 Ch. 279; Att'y-Gen. v. Mid-Kent R'y, L. R. 3 Ch. 100. 3. Where defendant has contracted to construct works on land acquired by conveyance from the plaintiff, etc.: So. Wales R'y v. Wythes, 1 Kay & J. 186, 200; Price v. Corpor. of Penzance, 4 Hare, 506; Wilson v. Furness R'y, L. R. 9 Eq. 28; Hood v. North East R'y, L. R. 5 Ch. 525; 8 Eq. 666; Firth v. Midland R'y, L. R. 20 Eq. 100. 4. Where there has been a part performance, so that the defendant is enjoying the benefits *in specie:* Price v. Corpor. of Penzance, 4 Hare, 506, 509. See also Stuyvesant v. Mayor etc., 11 Paige, 414 (constructing a drain); Birchett v. Bolling, 5 Munf. 442 (erecting a building); Whitney v. New Haven, 23 Conn. 624; Gregory v. Ingwersen, 32 N. J. Eq. 199 (to erect a structure).

[1] Under this head are included,— 1. Contracts in which the plaintiff has not performed, or even cannot perform, all the conditions on his part, so as to maintain an action at law, but which equity still may treat as binding and enforce. In such cases, if the contract is otherwise a proper one, equity will decree a specific performance with such allowances or compensations as are just: Mortlock v. Buller, 10 Ves. 292, 305, 306; Stewart v. Alliston, 1 Mer. 26, 32. Even where the partial failure or inability results from the plaintiff's own fault: Davis v. Hone, 2 Schoales & L. 341, 347; Voorhees v. De Meyer, 2 Barb. 37; Coale v. Barney, 1 Gill & J. 324; McCorkle v. Brown, 9 Smedes & M. 167. 2. Contracts not valid at all at law, but which equity treats as binding on the conscience. By far the most important are verbal contracts concerning land which are invalid by the statute of frauds, but which, if part performed, equity will enforce: Kirk v.

§ 1404. **The Jurisdiction Discretionary.**—The object of the foregoing paragraphs is to formulate the general rules which determine the classes of contracts in which the equitable jurisdiction *may* be exercised. But even when a particular contract belongs to such a class, the right to its specific performance is not absolute, like the right to recover a legal judgment. The granting the equitable remedy is, in the language ordinarily used, a matter of discretion, not of an arbitrary, capricious discretion, but of a sound judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case. Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach. This is the ordinary language of judges and text-writers.[1]

Bromley Union, 2 Phill. Ch. 640; Gough v. Crane, 3 Md. Ch. 119; 4 Md. 316; see *post*, § 1409, where this subject is treated. Under this head are also included certain agreements void at the old common law, but which equity enforces; e. g., assignments of expectancies; agreements to assign things in action; contracts between a man and woman, who afterwards marry: Cannel v. Buckle, 2 P. Wms. 243; Gould v. Womack, 2 Ala. 83. 3. Contracts incomplete in their terms: Buxton v. Lister, 3 Atk. 383; Doloret v. Rothschild, 1 Sim. & St. 590; Phillips v. Thompson, 1 Johns. Ch. 131.

[1] The following are a few illustrations: Radcliffe v. Warrington, 12 Ves. 326, 332; Joynes v. Statham, 3 Atk. 388; Underwood v. Hitchcox, 1 Ves. Sr. 279; Willard v. Tayloe, 8 Wall. 557, 565; Marble Co. v. Ripley, 10 Wall. 339, 356; Lowry v. Buffington, 6 W. Va. 249, 255; Fish v. Lightner, 44 Mo. 268, 272; Fish v. Leser, 69 Ill. 394, 395; Stone v. Pratt, 25 Ill. 25, 34; Quinn v. Roath, 37 Conn. 16, 24; McComas v. Easley, 21 Gratt. 23, 29; Hale v. Wilkinson, 21 Gratt. 75, 80; Cooper v. Pena, 21 Cal. 403, 411; Bruck v. Tucker, 42 Cal. 346, 353; Bogan v. Daughdrill, 51 Ala. 312, 314; Aston v. Robinson, 49 Miss. 348, 351; Daniel v. Frazer, 40 Miss. 507; Weise's Appeal, 72 Pa. St. 351, 354; Snell v. Mitchell, 65 Me. 48, 50; Blackwilder v. Loveless, 21 Ala. 371, 374; Port Clinton R. R. v. Cleveland etc. R. R., 13 Ohio St. 544, 549; Rogers v. Saunders, 16 Me. 92, 97; 33 Am. Dec. 635; Seymour v. Delancey, 6 Johns. Ch. 222, 224; 3 Cow. 445; 15 Am. Dec. 270; Lamare v. Dixon, L. R. 6 H. L. 414, 423; Tilley v. Thomas, L. R. 3 Ch. 61, 72; Mississippi etc. R. R. v. Cromwell, 91 U. S. 643; Eastman v. Plumer,

The term "discretionary" as thus used is, in my opinion, misleading and inaccurate. The remedy of specific performance is governed by the same general rules which control the administration of all other equitable remedies. The right to it depends upon elements, conditions, and incidents, which equity regards as essential to the administration of all its peculiar modes of relief. When all these elements, conditions, and incidents exist, the remedial right is perfect in equity.[2] So far as these essential elements and conditions do not relate to the existence of contracts binding in equity, they are nothing but expressions and applications of the fundamental principles, he who seeks equity must do equity, and he who comes into equity must come with clean hands.

§ 1405. **Essential Elements and Incidents.**—Assuming that a contract has been completely concluded, and that it belongs to a class capable of being enforced, it must still possess certain essential elements and incidents, in order that a court of equity may exercise the jurisdiction to compel its performance. Some of these elements affect its validity; others its equitable character. It must be upon a valuable consideration.[1] It must be reasonably certain

46 N. H. 464; Sharps Rifle M. Co. v. Rowan, 35 Conn. 127; Sherman v. Wright, 49 N. Y. 227; Cuff v. Dorland, 55 Barb. 481; Seaman v. Van Rensselaer, 10 Barb. 81; Plummer v. Keppler, 26 N. J. Eq. 481; Crane v. Decamp, 21 N. J. Eq. 414; Merritt v. Brown, 21 N. J. Eq. 401; Smoot v. Rea, 19 Md. 398; Godwin v. Collins, 4 Houst. 28; Humbard's Heirs v. Humbard's Heirs, 3 Head, 100; Phillips v. Stauch, 20 Mich. 369; Bowman v. Cunningham, 78 Ill. 48; Auter v. Miller, 18 Iowa, 405; St. Paul Division etc. v. Brown, 9 Minn. 157; Burke v. Seely, 46 Mo. 334; Taylor v. Williams, 45 Mo. 80.

2 These elements, conditions, and incidents, as collected from the cases, are the following: The contract must be concluded, certain, unambiguous, mutual, and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; not an unconscionable or hard bargain; and its performance not oppressive upon the defendant; and finally, it must be capable of specific execution through a decree of the court.

1 A seal does not, for this purpose, import a valuable consideration: Jefferys v. Jefferys, Craig & P. 138; Ord v. Johnston, 1 Jur., N. S., 1063, 1065; Houghton v. Lees, 1 Jur., N. S., 862, 863; Minturn v. Seymour, 4 Johns. Ch. 497; Burling v. King, 66 Barb. 633; Butman v. Porter, 100 Mass. 337;

as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made.[2] It must be, in general, mutual in its obligation and in its remedy.[3] The contract must be free from any fraud, misrepresentation even though not fraudulent, mistake, or illegality.[4] The elements which peculiarly affect the *equitable* character of the agreement and of the remedy are the following: The contract must be perfectly fair, equal,

Vasser v. Vasser, 23 Miss. 378; Estate of Webb, 49 Cal. 541, 545; Murphy v. Rooney, 45 Cal. 78.

[2] Marsh v. Milligan, 3 Jur., N. S., 979; Morrison v. Barrow, 1 De Gex, F. & J. 633; Taylor v. Portington, 7 De Gex, M. & G. 328; Pearce v. Watts, L. R. 20 Eq. 492; Tallman v. Franklin, 14 N. Y. 584; Stanton v. Miller, 58 N. Y. 192; Nichols v. Williams, 22 N. J. Eq. 63; Carr v. Passaic etc. Co., 22 N. J. Eq. 85; 19 N. J. Eq. 424; Potts v. Whitehead, 20 N. J. Eq. 55; Reese v. Reese, 41 Md. 554; Hardesty v. Richardson, 44 Md. 617; 22 Am. Rep. 57; Pierce's Heirs v. Catron's Heirs, 23 Gratt. 588; Allen v. Webb, 64 Ill. 342; Bowman v. Cunningham, 78 Ill. 48; Miller v. Campbell, 52 Ind. 125; Munsell v. Loree, 21 Mich. 491; McClintock v. Laing, 22 Mich. 212; Wright v. Wright, 31 Mich. 380; Tiernan v. Gibney, 24 Wis. 190; Mastin v. Halley, 61 Mo. 196; Long v. Duncan, 10 Kan. 294; Agard v. Valencia, 39 Cal. 292; Odell v. Morin, 5 Or. 96; Lynes v. Hayden, 119 Mass. 482; Hyde v. Cooper, 13 Rich. Eq. 250; McGuire v. Stevens, 42 Miss. 724; 2 Am. Rep. 649; Bell v. Bruen, 1 How. 169; Hopkins v. Roberts, 54 Md. 312; McCornack v. Sage, 87 Ill. 484.

[3] Bromley v. Jefferies, 2 Vern. 415; Rogers v. Saunders, 16 Me. 92; 33 Am. Dec. 635; Duvall v. Myers, 2 Md. Ch. 401; Beard v. Linthicum, 1 Md. Ch. 345; Reese v. Reese, 41 Md. 554; Benedict v. Lynch, 1 Johns. Ch. 370; 7 Am. Dec. 484; German v. Machin, 6 Paige, 288; Meason v. Kaine, 63 Pa. St. 335; Moore's Adm'rs v. Fitz Randolph, 6 Leigh, 175; Flight v. Bolland, 4 Russ. 298; Blanchard v. Detroit etc. R. R., 31 Mich. 43; 18 Am. Rep. 142; Maynard v. Brown, 41 Mich. 298; Hopkins v. Roberts, 54 Md. 312. This doctrine is constantly stated by the courts, but there are so many exceptions, especially with respect to the obligation, that the rule is far from universal: See Green v. Richards, 23 N. J. Eq. 32, 35. It may be said, however, as a general proposition, that where a contract was intended to bind *both* the parties, and for any reason one of them is not bound, he cannot compel performance by the other: Butman v. Porter, 100 Mass. 337; Sullings v. Sullings, 9 Allen, 234. Unilateral contracts, in the form of bonds and the like, are constantly enforced: Ewins v. Gordon, 49 N. H. 444; Jones v. Robbins, 29 Me. 351; 50 Am. Dec. 593; Barnard v. Lee, 97 Mass. 92; Palmer v. Scott, 1 Russ. & M. 391.

[4] The effect of these incidents upon contracts in equity, and upon the remedy of specific performance, has been discussed in the preceding volume. As to parol evidence of mistake, fraud, or surprise, see vol. 2, §§ 857–859; defense of mistake in suits for specific performance: § 860; proof of mistake on plaintiff's part in same suits: §§ 861–863; effect of statute of frauds on the proof of mistake, fraud, or surprise: §§ 864–867.

and just in its terms and in its circumstances.[5] The contract and the situation of the parties must be such that the remedy of specific performance will not be harsh or oppressive.[6] The vendor's title must be free from reasonable

As to misrepresentations as a defense, even when not intentional or with knowledge, see vol. 2, § 889; also § 899. Non-disclosure of facts a defense: § 905; inadequacy of consideration as a defense: §§ 925–928; Ready v. Noakes, 29 N. J. Eq. 497; illegal contracts, in general: §§ 929–936; 937–942.

[5] See *ante*, § 1404. If, then, the contract itself is unfair, onesided, unjust, unconscionable, or affected by any other inequitable feature; or if its enforcement would be oppressive or hard on the defendant, or would prevent his enjoyment of his own rights, or would work any injustice; or if the plaintiff has obtained it by sharp and unscrupulous practices, by overreaching, by trickery, by taking undue advantage of his position, by non-disclosure of material facts, or by any other unconscientious means,—then a specific performance will be refused. It necessarily follows that a *less strong case* is sufficient to *defeat* a suit for a specific performance than is requisite to obtain the remedy: See Vigers v. Pike, 8 Clark & F. 562, 645, per Lord Cottenham. See cases in note under § 1404; Willan v. Willan, 16 Ves. 72, 83; Savage v. Brocksopp, 18 Ves. 335; Twining v. Morrice, 2 Brown Ch. 326; Revell v. Hussey, 2 Ball & B. 280, 288; Willard v. Tayloe, 8 Wall. 557; Marble Co. v. Ripley, 10 Wall. 339; Jackson v. Ashton, 11 Pet. 229; McNeil v. Magee, 5 Mason, 244; Margraf v. Muir, 57 N. Y. 155; Osgood v. Franklin, 2 Johns. Ch. 1, 23; 7 Am. Dec. 513; Minturn v. Seymour, 4 Johns. Ch. 497; St. John v. Benedict, 6 Johns. Ch. 111; Acker v. Phœnix, 4 Paige, 305; Howard v. Moore, 4 Sneed, 317; Bowman v. Cunningham, 78 Ill. 48; Fish v. Leser, 69 Ill. 394. The remedy will therefore be refused when the performance of the contract would work a breach of trust: Harnett v. Yielding, 2 Schoales & L. 548, 553; White v. Cuddon, 8 Clark & F. 766; or work injury to third persons: Thomas v. Dering, 1 Keen, 729; Curran v. Holyoke W. Co., 116 Mass. 90; further examples of the general rule: Shriver v. Seiss, 49 Md. 384; Abbott v. L'Hommedieu, 10 W. Va. 677; White v. McGannon, 29 Gratt. 511; Shaddle v. Disborough, 30 N. J. Eq. 370; Coe v. N. J. Midland R'y, 31 N. J. Eq. 105; Tillotson v. Gesner, 33 N. J. Eq. 313; Chicago etc. R. R. v. Schoeneman, 90 Ill. 258; Tamm v. Lavalle, 92 Ill. 263; Foll's Appeal, 91 Pa. St. 434; 36 Am. Rep. 671; Brake v. Ballou, 19 Kan. 397; Nims v. Vaughn, 40 Mich. 356; Fitzpatrick v. Dorland, 27 Hun, 291; Schuessler v. Hatchett, 58 Ala. 181; Race v. Weston, 86 Ill. 91.

[6] This rule generally operates in favor of defendants; but may be invoked by a plaintiff when a defendant demands the remedy by counterclaim or cross-complaint. The oppression or hardship may result from unconscionable provisions of the contract itself; or it may result from the situation of the parties, unconnected with the terms of the contract or with the circumstances of its negotiation and execution; that is, from external facts or events or circumstances which control or affect the situation of the defendant: See cases cited *ante*, under § 1404; Gould v. Kemp, 2 Mylne & K. 304, 308; Kimberley v. Jennings, 6 Sim. 340; Willard v. Tayloe, 8 Wall. 557;

doubt. In suits by a vendor, the purchaser will not be compelled to complete the contract, unless the title is free from any reasonable doubt.[7] The remaining essential elements and incidents relate more directly to the remedy itself, to the actual performance directed by the decree, and may be briefly stated as follows: The contract must be such that its specific enforcement would not be nugatory.[8] Although

Marble Co. v. Ripley, 10 Wall. 339; Catheart v. Robinson, 5 Pet. 263; Tobey v. County of Bristol, 3 Story, 800; Margraf v. Muir, 57 N. Y. 155; Clarke v. Rochester etc. R. R., 18 Barb. 350; Weise's Appeal, 72 Pa. St. 351; Cannaday v. Shepard, 2 Jones Eq. 224; Barnett v. Spratt's Adm'r, 4 Ired. Eq. 171; Stone v. Pratt, 25 Ill. 25; Chicago etc. R. R. v. Schoeneman, 90 Ill. 258; Coe v. N. J. Midland R'y, 31 N. J. Eq. 105.

[7] This rule should not be misunderstood. It is wholly distinct from the objection that the vendor has no title at all, or has only a partial or defective one,—an objection which may be raised *by either* of the parties, and which, if *proved*, would either totally defeat a specific performance or render it partial. The rule of the text assumes that the question whether the vendor's title is valid or imperfect is not definitely decided by the court. But if there arises, on the pleadings or from the proofs, a reasonable doubt as to the vendor's title, the court, without deciding the question between the parties then before it, regards the doubt as a sufficient reason for not compelling the purchaser to carry out the contract and accept a conveyance. Where the purchaser is plaintiff, he *may* elect to take a defective and partial title: Pyrke v. Waddingham, 10 Hare, 1; Radford v. Willis, L. R. 7 Ch. 7; Alexander v. Mills, L. R. 6 Ch. 124; Beioley v. Carter, L. R. 4 Ch. 230; Collier v. McBean, L. R. 1 Ch. 81; Rede v. Oakes, 4 De Gex, J. & S. 505; Bensel v. Gray, 80 N. Y. 517; Bates v. Delavan, 5 Paige, 299; Seymour v. De Lancey, Hopk. Ch. 436; 14 Am. Dec. 552; Jeffries v. Jeffries, 117 Mass. 184; Sturtevant v. Jaques, 14 Allen, 523; Vreeland v. Blauvelt, 23 N. J. Eq. 483; Dobbs v. Norcross, 24 N. J. Eq. 327; Kostenbader v. Spotts, 80 Pa. St. 430; Pratt v. Eby, 67 Pa. St. 396; Walsh v. Hall, 66 N. C. 233; Allen v. Atkinson, 21 Mich. 351; Powell v. Conant, 33 Mich. 396; Morgan's Heirs v. Morgan, 2 Wheat. 290; Longworth v. Taylor, 1 McLean, 395; Watts v. Waddle, 1 McLean, 200; Jenkins v. Fahey, 73 N. Y. 355; Cornell v. Andrews, 35 N. J. Eq. 7; Mitchell v. Steinmetz, 97 Pa. St. 251; Rader v. Neal, 13 W. Va. 373; Swepson v. Johnston, 84 N. C. 449; Hancock v. Bramlett, 85 N. C. 393; Lyles v. Kirkpatrick, 9 S. C. 265; Chrisman v. Partee, 38 Ark. 31; Hymers v. Branch, 6 Mo. App. 511; Luse v. Deitz, 46 Iowa, 205.

[8] The court will not grant the remedy when by the terms of the contract itself the defendant would be entitled at any time to terminate the agreement and thus evade the decree. Illustrations: Partnership agreements will not, unless in some exceptional cases, be thus enforced: Scott v. Rayment, L. R. 7 Eq. 112; Hercy v. Birch, 9 Ves. 357; Sheffield etc. Co. v. Harrison, 17 Beav. 294; England v. Curling, 8 Beav. 129; Tobey v. Co. of

the contract by its terms can be specifically enforced, the defendant must also have the capacity and ability to perform it by obeying the decree of the court.[9] Finally, the contract must be such that the court is able to make an efficient decree for its specific performance, and is able to enforce its own decree when made.[10]

Bristol, 3 Story, 800; Buck v. Smith, 29 Mich. 166; 18 Am. Rep. 84; Meason v. Kaine, 63 Pa. St. 335; Manning v. Wadsworth, 4 Md. 59; Reed v. Vidal, 5 Rich. Eq. 289; and see Rust v. Conrad, 47 Mich. 449; 41 Am. Rep. 720. Nor agreements to submit to arbitration: Price v. Williams, cited 6 Ves. 818; Street v. Rigby, 6 Ves. 815; Tobey v. Co. of Bristol, 3 Story, 800, 820, 823; Noyes v. Marsh, 123 Mass. 286; Conner v. Drake, 1 Ohio St. 166; King v. Howard, 27 Mo. 21.

[9] *Total inability.* — If at the time of the inability the defendant is totally unable to perform because he has no title at all, or a title completely defective, the remedy will not be granted. Mere pecuniary inability to pay the price is not, however, such an incapacity as the rule assumes. This incapacity must exist at the time of the hearing. The mere fact that the defendant did not own or possess the subject-matter at the time of making the contract does not of itself constitute the legal impossibility, if he acquired it subsequently, at, or before the hearing: Green v. Smith, 1 Atk. 572; Columbine v. Chichester, 2 Phill. Ch. 27; Hallett v. Middleton, 1 Russ. 243; Greenaway v. Adams, 12 Ves. 395, 401; Phillips v. Stauch, 20 Mich. 369; Burke v. Seely, 46 Mo. 334; Burton v. Shotwell, 13 Bush, 271. The rule applies even when the inability is caused by the defendant's own wrongful act; as where a vendor, after making the contract and before the suit, conveyed the land to a *bona fide* purchaser for value and without notice. A specific performance would be refused, although the court of equity *might* grant a decree for damages: Denton v. Stewart, 1 Cox, 258; Greenaway v. Adams, 12 Ves. 395, 400; Ferguson v. Wilson, L. R. 2 Ch. 77; Smith v. Kelley, 56 Me. 64; Little v. Thurston, 58 Me. 86; Gupton v. Gupton, 47 Mo. 37; Warren v. Richmond, 53 Ill. 52. But if a vendor, after making a contract, should enter into a second agreement to sell the land to B, or should convey it to B, under such circumstances that B is *not* a *bona fide* purchaser, etc., then the prior vendee can compel a specific performance against the vendor and B: Snowman v. Harford, 57 Me. 397; Fullerton v. McCurdy, 4 Lans. 132; Haughwout v. Murphy, 22 N. J. Eq. 531; 21 N. J. Eq. 118; Cole v. Cole, 41 Md. 301; Bryant v. Booze, 55 Ga. 438; Johnson v. Bowden, 37 Tex. 621; Bird v. Hall, 30 Mich. 374; Youell v. Allen, 18 Mich. 107; Gregg v. Hamilton, 12 Kan. 333.

Partial incapacity. — Where the defendant's title fails as to a part of the subject-matter, or is partially defective, the plaintiff *may* elect and be entitled to a specific enforcement of the contract, so far as it can be enforced; and *may* claim and receive compensation for the deficiency: See cases cited *post*, under § 1407.

[10] Although the contract is valid, and the defendant is able to do what he has undertaken to do, if, through the want of appropriate means and instru-

§ 1406. Rights under the Contract — Effect of Events without the Agency of the Parties.— The effect of an executory contract for the sale of land, in working an equitable conversion, and in clothing the purchaser with an equitable estate in the land, and the vendor with an equitable owner-

mentalities, the court is unable, while pursuing its ordinary modes of administering justice, either to render a decree or to enforce the decree when made, then the remedy will be refused. *Cases where the court cannot render a decree:* The following species of contracts will not be thus enforced: Agreements concerning the manufacture and sale of secret medicines and other secret commodities, where the contract recognizes the secret as not to be disclosed: Newbery v. James, 2 Mer. 446; Williams v. Williams, 3 Mer. 157. Contracts for the sale or transfer of a good-will, separate from or unconnected with the business and premises of which it is an incident: Bozon v. Farlow, 1 Mer. 459; Baxter v. Conolly, 1 Jacob & W. 576; Coslake v. Till, 1 Russ. 376. But where the good-will is sold and transferred, *together with* the business and premises, the agreement may be directly enforced, or negatively enforced by an injunction: Darbey v. Whitaker, 4 Drew. 134, 139, 140; Chissum v. Dewes, 5 Russ. 29; Whittaker v. Howe, 3 Beav. 383; and see cases cited in note under § 1344. *Cases where the court cannot enforce its decree:* This class includes the following species of contracts, for which the equitable remedy is refused. *Continuing* covenants: Collins v. Plumb, 16 Ves. 454; City of London v. Nash, 3 Atk. 512, 515; Caswell v. Gibbs, 33 Mich. 331. Contracts for sale at a price to be fixed by valuers: Milnes v. Gery, 14 Ves. 400; Wilks v. Davis, 3 Mer. 507; Collins v. Collins, 26 Beav. 306; Vickers v. Vickers, L. R. 4 Eq. 529; Richardson v. Smith, L. R. 5 Ch. 648; Earl of Darnley v. London etc. R'y, 3 De Gex, J. & S. 24; L. R. 2 H. L. 43; Hopkins v. Gilman, 22 Wis. 476; for limitations of the rule, see Dinham v. Bradford, L. R. 5 Ch. 519; Smith v. Peters, L. R. 20 Eq. 511; Jackson v. Jackson, 1 Smale & G. 184. Contracts for personal services, where the full performance rests upon the personal *will* of the contracting party: Palmer v. Scott, 1 Russ. & M. 391; Mair v. Himalaya Tea Co., L. R. 1 Eq. 411; Marble Co. v. Ripley, 10 Wall. 339; Ford v. Jermon, 6 Phila. 6; Cooper v. Pena, 21 Cal. 403, 411; Randall v. Latham, 36 Conn. 48; Richmond v. Dubuque etc. R. R., 33 Iowa, 422: De Rivafinoli v. Corsetti, 4 Paige, 264; 25 Am. Dec. 532; Hamblin v. Dinneford, 2 Edw. Ch. 529; Haight v. Badgeley, 15 Barb. 499. How far and when such contracts may be negatively enforced by injunction has been considered *ante*, in § 1343. Contracts whose performance would be continuous, and would require protracted supervision and direction; e. g., contracts for building; for construction of works, railroads, and the like; for working mines, quarries, etc.: See *ante*, § 1402, and cases in the note. The English decisions on this subject are very numerous. The following are a few illustrations of American decisions: Beck v. Allison, 56 N. Y. 366; 15 Am. Rep. 430; Mastin v. Halley, 61 Mo. 196; Randall v. Latham, 36 Conn. 48; Starnes v. Newsom, 1 Tenn. Ch. 239; Columbia W. Co. v. Columbia, 5 S. C. 225: Atlanta etc. R. R. v. Speer, 32 Ga. 550; 79 Am. Dec. 305; Cincinnati etc.

ship of the purchase price, has already been described.[1] As soon as the contract is finally *concluded,* although it is wholly executory in form, these rights and estates become fixed and vested. It follows, therefore, that the purchaser, being the equitable owner, is entitled to all the benefits and assumes all the risks of ownership.[2]

§ 1407. **Performance by Plaintiff a Condition Precedent.**—The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms.[1] With respect to the necessity of an actual

R. R. v. Washburn, 25 Ind. 259; Columbus etc. R. R. v. Watson, 26 Ind. 50; Gregory v. Ingwersen, 32 N. J. Eq. 199; Danforth v. Philadelphia etc. R'y, 30 N. J. Eq. 12; Wharton v. Stoutenburgh, 35 N. J. Eq. 266; Roberts v. Kelsey, 38 Mich. 602. The tendency of the recent cases, especially in England, is to narrow and limit the operation of this rule.

§ 1406, [1] See *ante,* §§ 368, 372, 1161; Coman v. Lakey, 80 N. Y. 345, 350; Pelton v. Westchester F. Ins. Co., 77 N. Y. 605, 607.

§ 1406, [2] From that time he takes the benefit of all *subsequent* improvements, increases, gains, rises in value, and other advantages happening to the property. Conversely, the subject-matter is at his risk, and he must bear all total or partial losses, from fire or other accidental cause, or from trespassers, and all depreciations in value, and other disadvantages; *res perit domino.* This *liability* is, however, subject to the important limitation that the loss or depreciation does not arise from the neglect, default, or unwarrantable delay of the vendor in carrying out the contract: Paine v. Meller, 6 Ves. 349; Cass v. Rudele, 2 Vern. 280; Mortimer v. Capper, 1 Brown Ch. 156; Jackson v. Lever, 3 Brown Ch. 605; Richter v. Selin, 8 Serg. & R. 425, 440; Brewer v. Herbert, 30 Md. 301; 96 Am. Dec. 582; Robb v. Mann, 11 Pa. St. 300; 51 Am. Dec. 551; Andrews v. Bell, 56 Pa. St. 343; Lee v. Kirby, 104 Mass. 420, 428; Ewing v. Beauchamp, 6 B. Mon. 422; Cooper v. Pena, 21 Cal. 403; Willard v. Tayloe, 8 Wall. 558, 571; Marble Co. v. Ripley, 10 Wall. 339; Hale v. Wilkinson, 21 Gratt. 75; Ambrouse's Heirs v. Keller, 22 Gratt. 769. Vendor's delay or default: Wyvill v. Bishop of Exeter, 1 Price, 292; Paine v. Meller, 6 Ves. 349; Christian v. Cabell, 22 Gratt. 82; Griffin's Ex'r v. Cunningham, 19 Gratt. 571; Booten v. Scheffer, 21 Gratt. 474; Merritt v. Brown, 19 N. J. Eq. 286; Kirby v. Harrison, 2 Ohio St. 326; 59 Am. Dec. 677.

§ 1407, [1] In the language often used, he must show himself "ready, willing

tender and a demand of performance before suit brought, the American decisions are somewhat conflicting, and differ-

desirous, prompt, and eager." There are two *apparent* exceptions, depending upon strictly equitable considerations: 1. A strict performance at the very stipulated *time* is not always necessary; and 2. Partial and immaterial failures of title or defects of the subject-matter, if admitting of compensation, *may* not prevent the vendor from enforcing the remainder of the agreement: Lloyd v. Collett, 4 Brown Ch. 469; 4 Ves. 690, note; Harrington v. Wheeler, 4 Ves. 686; Guest v. Homfray, 5 Ves. 818; Walker v. Jeffreys, 1 Hare, 341, 352; Southcomb v. Bishop of Exeter, 6 Hare, 213, 218; Dorin v. Harvey, 15 Sim. 49; Sharp v. Wright, 28 Beav. 150; Earl of Darnley v. London etc. R'y, 3 De Gex, J. & S. 24; McMurray v. Spicer, L. R. 5 Eq. 527, 537; Colson v. Thompson, 2 Wheat. 336; Watts v. Waddle, 6 Pet. 389; Boone v. Mo. Iron Co., 17 How. 340; McNeil v. Magee, 5 Mason, 244; Longworth v. Taylor, 1 McLean, 395; Sullings v. Sullings, 9 Allen, 234; Wood v. Perry, 1 Barb. 114; Burling v. King, 66 Barb. 633; Van Campen v. Knight, 63 Barb. 205; Reeves v. Kimball, 40 N. Y. 299; King v. Ruckman, 21 N. J. Eq. 599; Thorp v. Pettit, 16 N. J. Eq. 488; Crane v. Decamp, 21 N. J. Eq. 414; Merritt v. Brown, 21 N. J. Eq. 401; Earl v. Halsey, 14 Pa. St. 332; Buchanan v. Lorman, 3 Gill, 51, 77; McComas v. Easley, 21 Gratt. 23; Vail v. Nelson, 4 Rand. 478; Blackmer v. Phillips, 67 N. C. 340; Secrest v. McKenna, 1 Strob. Eq. 356; Brown v. Hayes, 33 Ga. Supp. 136; Tyler v. McCardle, 9 Smedes & M. 230; Richardson v. Linney, 7 B. Mon. 571; O'Kane v. Kiser, 25 Ind. 168; Allen v. Atkinson, 21 Mich. 351; Rogers v. Taylor, 40 Iowa, 193; Wass v. Mugridge, 128 Mass. 394; Jenkins v. Harrison, 66 Ala. 345; Selleck v. Tallman, 87 N. Y. 106; McHugh v. Wells, 39 Mich. 175; Russell v. Nester, 46 Mich. 290; Ludlum v. Buckingham, 35 N. J. Eq. 71; Kinney v. Redden, 2 Del. Ch. 46.

Vendor's failure of title.— It is therefore a familiar rule that the vendor cannot force performance upon the purchaser, unless he is able to give a good title to the subject-matter: King v. Knapp, 59 N. Y. 462; Hepburn v. Auld, 5 Cranch, 262; Hoover v. Calhoun, 16 Gratt. 109; Jackson v. Ligon, 3 Leigh, 160; Bryan v. Read, 1 Dev. & B. Eq. 78; Cunningham v. Sharp, 11 Humph. 116, 121; Jeffries v. Jeffries, 117 Mass. 184; Dobbs v. Norcross, 24 N. J. Eq. 327; Vreeland v. Blauvelt, 23 N. J. Eq. 483; Cornell v. Andrews, 35 N. J. Eq. 7; Jenkins v. Fahey, 73 N. Y. 355; Bensel v. Gray, 80 N. Y. 517; Swepson v. Johnston, 84 N. C. 449; Hancock v. Bramlett, 85 N. C. 393; Lyles v. Kirkpatrick, 9 S. C. 265; Rader v. Neal, 13 W. Va. 373; Hymers v. Branch, 6 Mo. App. 511; Chrisman v. Partee, 38 Ark. 31; Mitchell v. Steinmetz, 97 Pa. St. 251.

His partial defect or failure.— But where the defect or failure is partial and immaterial, so that he can give substantially what he contracted to give, the court may grant the remedy, with compensation to the purchaser: Halsey v. Grant, 13 Ves. 73, 77; Guest v. Homfray, 5 Ves. 818; Mortlock v. Buller, 10 Ves. 292, 306; McQueen v. Farquhar, 11 Ves. 467; Foley v. Crow, 37 Md. 51; but the defect or failure must be *immaterial:* Peers v. Lambert, 7 Beav. 546; Howard v. Kimball, 65 N. C. 175; 6 Am. Rep. 739; Griffin's Ex'r v. Cunningham, 19 Gratt. 571; Smith v. Turner, 50 Ind. 367; Havens v. Bliss, 26 N. J. Eq. 363; Gregory v. Perkins, 40 Iowa, 82; Walsh v. Barton, 24 Ohio St. 28; Bogan v. Daughdrill, 51 Ala. 312.

ent rules seem to prevail in different states. The most important of these rules are given in the foot-note.

Tender, when necessary.— In general, the rules of equity concerning the necessity of an *actual* tender are not so stringent as those of the law. The following special rules seem to be settled: 1. An actual tender by the plaintiff is unnecessary when, from the acts of the defendant or from the situation of the property it would be wholly nugatory. Thus if defendant has openly refused to perform, the plaintiff need not make a tender or demand; it is enough that he is ready and willing, and offers to perform in his pleading: Hunter v. Daniel, 4 Hare, 420, 433; Mattocks v. Young, 66 Me. 459, 467; Crary v. Smith, 2 N. Y. 60, 65; Kerr v. Purdy, 50 Barb. 24; Maxwell v. Pittenger, 3 N. J. Eq. 156; White v. Dobson, 17 Gratt. 262; Brock v. Hidy, 13 Ohio St. 306, 310; Brown v. Eaton, 21 Minn. 409, 411; Gill v. Newell, 13 Minn. 462, 472; Deichmann v. Deichmann, 49 Mo. 107; Gray v. Dougherty, 25 Cal. 266, 280, 281. Also, if at the time fixed the vendor is unable to convey, by reason of a defect in his title, etc.: Karker v. Haverly, 50 Barb. 79; Delavan v. Duncan, 49 N. Y. 485, 487; Hall v. Whittier, 10 R. I. 530; Young v. Daniels, 2 Iowa, 126; 63 Am. Dec. 477; Gray v. Dougherty, 25 Cal. 266, 280; unless time was made essential: Kimball v. Tooke, 70 Ill. 553. 2. Where the stipulations are mutual and dependent,— that is, where the deed is to be delivered upon payment of the price,— an actual tender and demand by one party is necessary to put the other in default, and to cut off *his* right to treat the contract as still subsisting: Hubbell v. Von Schoening, 49 N. Y. 326, 331; Leaird v. Smith, 44 N. Y. 618; Van Campen v. Knight, 63 Barb. 205; Irvin v. Bleakley, 67 Pa. St. 24, 28; Crabtree v. Levings, 53 Ill. 526. 3. *Time essential:* Where the time of payment by the vendee is made *essential*, and *a fortiori* where, if his payments are not made on the exact day named, the vendor may treat the contract as at an end, the vendee must make an actual tender of the price and a demand of the deed at a specified time. The same is true of the vendor when the time of conveying is made essential. This is the very meaning of time being of the essence of the contract: Duffy v. O'Donovan, 46 N. Y. 223; Gale v. Archer, 42 Barb. 320; Wells v. Smith, 2 Edw. Ch. 78; Kimball v. Tooke, 70 Ill. 553; Phelps v. Illinois Cent. R. R., 63 Ill. 468; Heuer v. Rutkowski, 18 Mo. 216; but the necessity may be waived by conduct of the other party: Duffy v. O'Donovan; Kimball v. Tooke, *supra;* Tobey v. Foreman, 79 Ill. 489. *Time not essential:* Concerning the necessity of actual tender in contracts in which time is not essential, the American decisions are directly conflicting. According to one group of cases, the strict legal rule is enforced. Where the stipulations are mutually dependent, the plaintiff must make an actual tender, and must demand performance before bringing his suit. Some of these cases, however, dispense with the demand, and only require a tender. *Suits by the vendee:* Klyce v. Broyles, 37 Miss. 524; Mhoon v. Wilkerson, 47 Miss. 633; Gray v. Dougherty, 25 Cal. 266, 278, 282; Jones v. Petaluma, 36 Cal. 230, 232; Marshall v. Caldwell, 41 Cal. 611, 615; Duff v. Fisher, 15 Cal. 375, 381; Mather v. Scoles, 35 Ind. 1; Fall v. Hazelrigg, 45 Ind. 576; 15 Am. Rep. 278; Lynch v. Jennings, 43 Ind. 276, 286; Hart v. McClellan, 41 Ala. 251; Bell v. Thompson, 34 Ala. 633; Deichmann v. Deichmann, 49 Mo. 107; Brock v. Hidy, 13 Ohio St. 306, 310; Rogers v. Taylor, 40

§ 1408. Time as Affecting the Right to a Performance.— The stipulations concerning time of performance in a contract are regarded by equity either as immaterial, or as essential, or as material. In all ordinary cases of contract, equity does not regard time as of the essence of the agreement. In all ordinary cases of contract for the sale of land, if there is nothing special in its objects, subject-matter, or terms, although a certain period of time is stipulated for its completion, or for the execution of any of its terms, equity treats the provision as formal rather than essential, and permits a party who has suffered the period to elapse to perform such acts after the prescribed date, and to compel a performance by the other party notwithstanding his own delay.[1] *Time essential:* Time may be essential. It is

Iowa, 193; Bearden v. Wood, 1 A. K. Marsh. 450; Hall v. Whittier, 10 R. I. 530. *Suits by vendor:* Klyce v. Broyles, 37 Miss. 524; Ex parte Hodges, 24 Ark. 197; Corbas v. Teed, 69 Ill. 205; and see Thomson v. Smith, 63 N. Y. 301. Another group of decisions adopts a rule more in accordance with the principles of equity, viz., that in such contracts an actual tender or demand by the plaintiff prior to the suit is not essential. It is enough that he was ready and willing, and offered, at the time specified, and even that he is ready and willing at the time of bringing the suit, unless his rights have been lost by laches, and that he offers to perform in his pleading. The plaintiff's performance will be provided for in the decree, and his previous neglect will only affect his right to costs. *Suits by vendee:* Irvin v. Gregory, 13 Gray, 215, 218; Park v. Johnson, 4 Allen, 259; Stevenson v. Maxwell, 2 N. Y. 408, 415; Bruce v. Tilson, 25 N. Y. 194, 197, 203 (see comments of Allen, J., upon Wells v. Smith, 2 Edw. Ch. 78; 7 Paige, 22; 31 Am. Dec. 274; confining it to contracts in which time is made essential); Freeson v. Bissell, 63 N. Y. 168, 170; Chess's Appeal, 4 Pa. St. 52; 45 Am. Dec. 668; Smoot v. Rea, 19 Md. 398, 410; Maughlin v. Perry, 35 Md. 352; Morris v. Hoyt, 11 Mich. 9, 18; Seeley v. Howard, 13 Wis. 336; St. Paul Division etc. v. Brown, 9 Minn. 157. *Suits by vendor:* Stevenson v. Maxwell, Bruce v. Tilson, Freeson v. Bissell, *supra;* Hawk v. Greensweig, 2 Pa. St. 295; Winton v. Sherman, 20 Iowa, 295; Seeley v. Howard, 13 Wis. 336; Woodson's Adm'rs v. Scott, 1 Dana, 470. This is unquestionably the true *equitable* doctrine. For further illustrations, see Wass v. Mugridge, 128 Mass. 394; Selleck v. Tallman, 87 N. Y. 106; Jenkins v. Harrison, 66 Ala. 345; McHugh v. Wells, 39 Mich. 175.

[1] This general doctrine is established by an unbroken line of decisions; but it is subject to various exceptions and limitations, one of the most important being that the delay must not be willful and intentional, and must not have worked any harm to the other party. My limits do not permit me to enter upon a full discussion of these questions; for their solution the reader must be referred to special works on this subject: Seton v. Slade, 7 Ves. 265, per

so whenever the intention of the parties is clear that the performance of its terms shall be accomplished exactly at the stipulated day. The intention must then govern. A delay cannot be excused. A performance at the time is essential; any default will defeat the right to a specific enforcement.[2] *Time material:* Although time is not ordi-

Lord Eldon; Decamp v. Feay, 5 Serg. & R. 323; 9 Am. Dec. 372; per Gibson, J.; Vyse v. Foster, L. R. 7 H. L. 318; McMurray v. Spicer, L. R. 5 Eq. 527; Tilley v. Thomas, L. R. 3 Ch. 61, 67, 69; Parkin v. Thorold, 2 Sim., N. S., 1; 16 Beav. 59; Hull v. Sturdivant, 46 Me. 34; Dresel v. Jordan, 104 Mass. 407; Quinn v. Roath, 37 Conn. 16; Edgerton v. Peckham, 11 Paige, 352; Hubbell v. Von Schoening, 49 N. Y. 326; Van Campen v. Knight, 63 Barb. 205; Sharp v. Trimmer, 24 N. J. Eq. 422; King v. Ruckman, 20 N. J. Eq. 316; Smoot v. Rea, 19 Md. 399; Scarlett v. Stein, 40 Md. 512; Brock v. Hidy, 13 Ohio St. 305; Keller v. Fisher, 7 Ind. 718; Shafer v. Niver, 9 Mich. 253; Snyder v. Spaulding, 57 Ill. 480; Spalding v. Alexander, 6 Bush, 160; Walton v. Wilson, 30 Miss. 576; Morgan v. Bergen, 3 Neb. 209; Prince v. Griffin, 27 Iowa, 514; Knott v. Stephens, 5 Or. 235; Steele v. Branch, 40 Cal. 3. A delay in payment at the day appointed, unless intentional and willful, or unreasonably long, will not preclude the vendee from enforcing the contract. Of course, the delay must be explained and accounted for, and it must not be prejudicial to the other party beyond the means of reparation: See Longworth v. Taylor, 1 McLean, 395; 14 Pet. 172, per Story, J., and cases cited; Moote v. Scriven, 33 Mich. 500; Brassell v. McLemore, 50 Ala. 476; Sharp v. Trimmer, 24 N. J. Eq. 422; Pritchard v. Todd, 38 Conn. 413; Converse v. Blumrich, 14 Mich. 109, 114; 90 Am. Dec. 230; Shortall v. Mitchell, 57 Ill. 161; Decamp v. Feay, 5 Serg. & R. 323, 327; 9 Am. Dec. 372; Edgerton v. Peckham, 11 Paige, 352, 359; McClartey v. Gokey, 31 Iowa, 505; and see further, in this connection, Grey v Tubbs, 43 Cal. 359; Snider v. Lehnherr, 5 Or. 385; Peck v. Brighton Co., 69 Ill. 200; Beach v. Dyer, 93 Ill. 295; Tilton v. Stein, 87 Ill. 122; Jones v. Jones, 11 Phila. 559; Russell v. Baughman, 94 Pa. St. 400; Parsons v. Gilbert, 45 Iowa, 33; Chadwell v. Winston, 3 Tenn. Ch. 110; Henderson v. Hicks, 58 Cal. 364; Burton v. Adkins, 2 Del. Ch. 125; Davison v. Jersey Co. Ass'n, 71 N. Y. 333; Wonson v. Fenno, 129 Mass. 405.

[2] Hipwell v. Knight, 1 Younge & C. 401; Quinn v. Roath, 37 Conn. 16; Miller's Adm'r v. Miller, 25 N. J. Eq. 354; King v. Ruckman, 20 N. J. Eq. 316; Prince v. Griffin, 27 Iowa, 514; Knott v. Stephens, 5 Or. 235; Grey v. Tubbs, 43 Cal. 359. Time may become essential from the subject-matter, or object of the contract; e. g., where the value of the subject-matter *necessarily* fluctuates and changes with the mere lapse of time: Hipwell v. Knight, 1 Younge & C. 401, 416; Doloret v. Rothschild, 1 Sim. & St. 590 (stocks); see McKay v. Carrington, 1 McLean, 50; Holt v. Rogers, 8 Pet. 420; Brashier v. Gratz, 6 Wheat. 528; Hepburn v. Auld, 5 Cranch, 262; Jennisons v. Leonard, 21 Wall. 302; Jones v. Robbins, 29 Me. 351; 50 Am. Dec. 593; Goldsmith v. Guild, 10 Allen, 239; Hoyt v. Tuxbury, 70 Ill. 331. Also in unilateral contracts: Brooke v. Garrod, 3 Kay & J. 608; 2 De Gex & J. 62; Austin v

narily essential, yet it is, as a general rule, material. In order that a default may not defeat a party's remedy, the delay which occasioned it must be explained and accounted for. The doctrine is fundamental that a party seeking the remedy of specific performance, and also the party who desires to maintain an objection founded upon the other's laches, must show himself to have been "ready, desirous, prompt, and eager."[3]

Tawney, L. R. 2 Ch. 143; Kerr v. Purdy, 51 N. Y. 629; 50 Barb. 24; Karker v. Haverly, 50 Barb. 79; Potts v. Whitehead, 20 N. J. Eq. 55; Fessler's Appeal, 75 Pa. St. 483; Maughlin v. Perry, 35 Md. 352, 360; White v. Dobson, 17 Gratt. 262; Jones v. Noble, 3 Bush, 694; Mason v. Payne, 47 Mo. 517; Estes v. Furlong, 59 Ill. 298, 300. Time may be made essential by express stipulation. No particular form is necessary, but any clause will have the effect which clearly provides that the contract is to be null, if the fulfillment is not within the prescribed time: Hudson v. Bartram, 3 Madd. 440; Benedict v. Lynch, 1 Johns. Ch. 370; 7 Am. Dec. 484; Wells v. Smith, 2 Edw. Ch. 78; 7 Paige, 22; 31 Am. Dec. 274; Barnard v. Lee, 97 Mass. 92; Goldsmith v. Guild, 10 Allen, 239; Quinn v. Roath, 37 Conn. 16; Baldwin v. Van Vorst, 9 N. J. Eq. 577; Bullock v. Adams's Ex'rs, 20 N. J. Eq. 367, 371; Reed v. Breeden, 61 Pa. St. 460; Jackson v. Ligon, 3 Leigh, 160, 187; Kirby v. Harrison, 2 Ohio St. 326, 332; 59 Am. Dec. 677; Scott v. Fields, 7 Ohio, 424; Phelps v. Ill. Cent. R. R., 63 Ill. 468; Peck v. Brighton Co., 69 Ill. 200; Kimball v. Tooke, 70 Ill. 553; Davis v. Stevens, 3 Iowa, 158; O'Fallon v. Kennerly, 45 Mo. 124; Morgan v. Bergen, 3 Neb. 209; Snider v. Lehnherr, 5 Or. 385; Grey v. Tubbs, 43 Cal. 359. Time may also be made essential, where one of the parties delays in fulfilling, and the other party by a notice prescribes a period within which the contract must be completed, or else be abandoned: Reynolds v. Nelson, 6 Madd. 18; Eads v. Williams, 4 De Gex, M. & G. 674; Rogers v. Saunders, 16 Me. 92; 33 Am. Dec. 635; Wiswall v. McGowan, Hoff. Ch. 125; Thompson v. Dulles, 5 Rich. Eq. 370; Smith v. Lawrence, 15 Mich. 499; Reed v. Breeden, 61 Pa. St. 460.

[3] The following are a few out of the great number of cases illustrating this doctrine: Lloyd v. Collett, 4 Brown Ch. 469; Alley v. Deschamps, 13 Ves. 225; McMurray v. Spicer, L. R. 5 Eq. 527, 537; Hubbell v. Von Schoening, 58 Barb. 498; 49 N. Y. 326; Eppinger v McGreal, 31 Tex. 147; Campbell v. Hicks, 19 Ohio St. 433; Mix v. Balduc, 78 Ill. 215; Peck v. Brighton Co., 69 Ill. 200; McDermid v. McGregor, 21 Minn. 111; Ritson v. Dodge, 33 Mich. 463; Delavan v. Duncan, 49 N. Y. 485; Finch v. Parker, 49 N. Y. 1; Hawley v. Jelly, 25 Mich. 94; McLaurie v. Barnes, 72 Ill. 73; Roby v. Cossitt, 78 Ill. 638; Green v. Covillaud, 10 Cal. 317; 70 Am. Dec. 725; Steele v. Branch, 40 Cal. 3; Williams v. Hart, 116 Mass. 513; Boyd v. Schlessinger, 59 N. Y. 301, 305; Davison v. Jersey Co. Ass'n, 6 Hun, 470; 71 N. Y. 333; Ludlum v. Buckingham, 35 N. J. Eq. 71; Kinney v. Redden, 2 Del. Ch. 46; Russell v. Nester, 46 Mich. 290; Beach v. Dyer, 93 Ill. 295; Tilton v. Stein, 87 Ill. 122; Parsons v. Gilbert, 45 Iowa, 33; Chadwell v. Winston, 3 Tenn. Ch. 110; Henderson

§ 1409. Enforcement of Verbal Contracts Part Performed.— The doctrine was settled at an early day in England, and has been fully adopted in nearly all the American states, that a verbal contract for the sale or leasing of land, or for a settlement made upon consideration of marriage, if part performed by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds.[1] The ground upon which the remedy in

v. Hicks, 58 Cal. 364; Burton v. Adkins, 2 Del. Ch. 125; Wonson v. Fenno, 129 Mass. 405; Russell v. Baughman, 94 Pa. St. 400; Jones v. Jones, 11 Phila. 559.

[1] The contract must possess all the elements and features necessary to the specific enforcement of any agreement, except the written memorandum required by the statute. My limits only permit me to state the most general rules on this subject. Out of the vast number of decisions, I shall cite only a comparatively few, by way of illustration: Lester v. Foxcroft, Colles, 108; cited 2 Vern. 456; 1 Lead. Cas. Eq., 4th Am. ed., 1027, 1038, 1042; Clinan v. Cooke, 1 Schoales & L. 22; Newton v. Swazey, 8 N. H. 9; Tilton v. Tilton, 9 N. H. 385; Eaton v. Whitaker, 18 Conn. 222; 44 Am. Dec. 586; Hall v. Whittier, 10 R. I. 530; Freeman v. Freeman, 43 N. Y. 34; 3 Am. Rep. 657; Welsh v. Bayaud, 21 N. J. Eq. 186; Greenlee v. Greenlee, 22 Pa. St. 225; Cole v. Cole, 41 Md. 301; Semmes v. Worthington, 38 Md. 298; Pierce's Heirs v. Catron's Heirs, 23 Gratt. 483; Lowry v. Buffington, 6 W. Va. 249; Church of the Advent v. Farrow, 7 Rich. Eq. 378; Ford v. Finney, 35 Ga. 258; Johnson v. Bowden, 37 Tex. 621; Farrar v. Patton, 20 Mo. 81; Feusier v. Sneath, 3 Nev. 120; Morgan v. Bergen, 3 Neb. 209; Gregg v. Hamilton, 12 Kan. 333; Northrop v. Boone, 66 Ill. 368; Fall v. Hazelrigg, 45 Ind. 576; 15 Am. Rep. 278; Grant v. Ramsey, 7 Ohio St. 157; Armes v. Bigelow, 3 McAr. 442; Hiatt v. Williams, 72 Mo. 214; 37 Am. Rep. 438; Bohanan v. Bohanan, 96 Ill. 591; McDowell v. Lucas, 97 Ill. 489; Jefferson v. Jefferson, 96 Ill. 551; Marshall v. Peck, 91 Ill. 187; Laird v. Allen, 82 Ill. 43; Wallace v. Rappleye, 103 Ill. 229; Littlefield v. Littlefield, 51 Wis. 23; Seaman v. Aschermann, 51 Wis. 678; 37 Am. Rep. 849; Manly v. Howlett, 55 Cal. 94; Hanlon v. Wilson, 10 Neb. 138; Hibbert v. Aylott, 52 Tex. 530; Judy v. Gilbert, 77 Ind. 96; 40 Am. Rep. 289; Lamb v. Hinman, 46 Mich. 112; Jamison v. Dimock, 95 Pa. St. 52; Newkumet v. Kraft, 10 Phila. 127; Wharton v. Stoutenburgh, 35 N. J. Eq. 266; Sherman v. Scott, 27 Hun, 331; Barnes v. Boston etc. R. R., 130 Mass. 388. In a very few states the remedy seems to be either wholly denied, or else admitted only under very special circumstances: North Carolina, Tennessee, Kentucky; while in Massachusetts and Maine, it did not exist until the very recent legislation.

Fundamental ground of the jurisdiction.— The ground is equitable fraud; not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defense. If the defendant knowingly permits the plaintiff to do acts in part performance of the verbal agreement, acts done in reliance on the agreement, which change the rela-

such cases rests is that of equitable fraud. It would be a virtual fraud for the defendant, after permitting the acts of part performance, to interpose the statute as a bar to the plaintiff's remedial right. The acts of part performance, therefore, in order to satisfy this principle, must be done in pursuance of the contract, and must alter the relations of the parties. The most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements, and these two combined.

tions of the parties and prevent a restoration to their former condition, it would be a virtual fraud for the defendant to interpose the statute as a defense, and thus to secure for himself the benefit of the acts of part performance, while the plaintiff would be left not only without adequate remedy at law, but also liable for damages as a trespasser: See vol. 2, §§ 864–867, 921, where this principle is discussed. See also Lester v. Foxcroft, *supra;* McCormick v. Gregan, L. R. 4 H. L. 82, 97; Haigh v. Kaye, L. R. 7 Ch. 469; Caton v. Caton, L. R. 1 Ch. 137, 147; Bond v. Hopkins, 1 Schoales & L. 413, 433; Clinan v. Cooke, 1 Schoales & L. 22, 41; Mundy v. Jolliffe, 5 Mylne & C. 167, 177; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; Wright v. Pucket, 22 Gratt. 370. 374; Pierce's Heirs v. Catron's Heirs, 23 Gratt. 588; Semmes v. Worthington, 38 Md. 298; Horn v. Ludington, 32 Wis. 73; Morgan v. Bergen, 3 Neb. 209; and cases cited above, in this note. It follows from this principle that the acts of part performance must be done by the party seeking to enforce the contract; and must be done in pursuance of the contract, and with the design of carrying the same into execution; and must be done with the consent, express or implied, or knowledge, of the other party: Id.

Acts of part performance.—The following acts do *not* constitute a part performance within the doctrine: Acts done prior to the contract; acts merely preparatory or ancillary to the agreement, such as delivering abstract of title, measuring the land, drawing up deeds, etc.; marriage alone; payment of the price in whole or in part (otherwise in Iowa, by statute). The important acts which *do* constitute a sufficient part performance are actual, open *possession* of the land; or permanent and valuable *improvements* made on the land; or these two combined. In addition to the cases cited at the commencement of this note, see *Possession:* Pain v. Coombs, 1 De Gex & J. 34; Shillibeer v. Jarvis, 8 De Gex, M. & G. 79; Coles v. Pilkington, L. R. 19 Eq. 174; Clinan v. Cooke, 1 Schoales & L. 22; Gregory v. Mighell, 18 Ves. 328; Tilton v. Tilton, 9 N. H. 385, 390; Malins v. Brown, 4 N. Y. 403; Reed v. Reed, 12 Pa. St. 117; Danforth v. Laney, 28 Ala. 274; Catlett v. Bacon, 33 Miss. 269; White v. Watkins, 23 Mo. 423; Anderson v. Simpson, 21 Iowa, 399. *Improvements:* Wills v. Stradling, 3 Ves. 378; Stockley v. Stockley, 1 Ves. & B. 23; Mundy v. Jolliffe. 5 Mylne & C. 167; Surcome v. Penniger, 3 De Gex, M. & G. 571; Crook v. Corpor. of Seaford, L. R. 6 Ch. 551; 10 Eq. 678; Williams v. Evans, L. R. 19 Eq. 547; Miller v. Tobie, 41 N. H. 84; Potter v. Jacobs, 111 Mass. 32; Freeman v. Freeman, 43 N. Y. 34; 3 Am. Rep.

§ 1410. Damages in Place of a Specific Performance.— When the impossibility of a specific performance is disclosed at the hearing, and the suit was brought by the plaintiff in ignorance of such fact, the court will award the remedy of damages.[1]

657; Cagger v. Lansing, 43 N. Y. 550; Adams v. Fullam, 43 Vt. 592; Peckham v. Barker, 8 R. I. 17; Green v. Finin, 35 Conn. 178; Mims v. Lockett, 33 Ga. 9; Wimberly v. Bryan, 55 Ga. 198; Sackett v. Spencer, 65 Pa. St. 89; Moss v. Culver, 64 Pa. St. 414; 3 Am. Rep. 601; Ingles v. Patterson, 36 Wis. 373; Gregg v. Hamilton, 12 Kan. 333; Poland v. O'Conner, 1 Neb. 50; 93 Am. Dec. 327; Hoffman v. Fett, 39 Cal. 109; McCarger v. Rood, 47 Cal. 138; Neale v. Neale, 9 Wall. 1. *Special acts, personal services, etc.:* See Rhodes v. Rhodes, 3 Sand. Ch. 279, 284; Davison v. Davison, 13 N. J. Eq. 246; Vanduyne v. Vreeland, 12 N. J. Eq. 142, 151; Twiss v. George, 33 Mich. 253; Johnson v. Hubbell, 10 N. J. Eq. 332; 66 Am. Dec. 773; Cronk v. Trumble, 66 Ill. 482; Edwards v. Estell, 48 Cal. 194.

[1] If the vendor has disabled himself from performance after making the contract, and if the disability existed at the time of making the contract from a defect in his title, a court of equity will, in either of these cases, award damages to the vendee-plaintiff, provided he commenced his suit in good faith, without any knowledge of the disability: See Milkman v. Ordway, 106 Mass. 232, 253; Chartier v. Marshall, 56 N. H. 478; Wiswall v. McGowan, Hoff. Ch. 125; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; Morss v. Elmendorf, 11 Paige, 277; Berry v. Van Winkle, 2 N. J. Eq. 269; Hopkins v. Gilman, 22 Wis. 476; Tenney v. State Bank, 20 Wis. 152; McQueen v. Chouteau's Heirs, 20 Mo. 222; 64 Am. Dec. 178; Hamilton v. Hamilton, 59 Mo. 232; Gupton v. Gupton, 47 Mo. 37, 47; Harrison v. Deramus, 33 Ala. 463; Carroll v. Wilson, 22 Ark. 32; Foley v. Crow, 37 Md. 51; but will not, in general, grant damages if the plaintiff was aware of the disability at the time of bringing his suit: Ibid.; Hatch v. Cobb, 4 Johns. Ch. 559; Kempshall v. Stone. 5 Johns. Ch. 193; Smith v. Kelley, 56 Me. 64; Sternberger v. McGovern, 56 N. Y. 12, 20. For a full and able discussion of the rules as to damages in equity, see Woodman v. Freeman, 25 Me. 531, 532, 548.

CHAPTER SECOND.

SPECIFIC ENFORCEMENT OF OBLIGATIONS ARISING FROM TRUSTS AND FIDUCIARY RELATIONS.

ANALYSIS.

§ 1411. General nature, kinds, and classes.
§ 1412. Suits against corporations to compel the transfer or issue of stock.

§ 1411. General Nature, Kinds, and Classes.— The nature and objects of the various remedies included in this division are sufficiently indicated by the title, and need no further description. The remedies belonging to the class are suits to enforce express trusts, either private or charitable; suits to enforce resulting or constructive trusts by compelling a conveyance of the legal title; suits against persons in fiduciary relations; suits against administrators or executors; and suits against corporations and their managing officers. The jurisdiction to entertain these suits and to grant these remedies has been described in previous chapters.[1] There remains one particular remedy to be briefly considered,— the suit by a stockholder against a corporation to compel the transfer or issue of stock.

§ 1412. Suits against Corporations to Compel the Transfer or Issue of Stock.— Cases frequently arise where corporations or joint-stock companies refuse to recognize the rights of assignees of stock, and make the transfers on their books and issue new certificates in place of the old ones presented, or where certificates have been presented to the company without the owner's consent and negligence, and new cer-

[1] See *ante*, concerning charitable trusts, §§ 1018–1029; express private trusts: §§ 1059–1087; resulting and constructive trusts: §§ 1030–1058; fiduciary persons, guardians, etc.: §§ 1088, 1097; administration suits: §§ 1152–1154; and see Peyser v. Wendt, 87 N. Y. 322; suits against corporations and their managing officers: §§ 1089–1096; and see Brinckerhoff v. Bostwick, 88 N. Y. 52; Van Dyck v. McQuade, 86 N. Y. 38, 45, 46.

tificates have been issued instead thereof to others purporting to be entitled thereto. In such cases it is well settled that although the law may give some remedy, as that of damages, for the refusal, equity has jurisdiction to compel the corporation to make the transfer and issue new certificates in the one case, to the lawful assignee;[1] and in the other, to decree that the corporation replace the stock upon its books, and issue new certificates to the original owner, or if it is unable to do this by reason of its not having or being able to procure any shares, to pay the value of the stock.[2]

[1] Cushman v. Thayer Mfg. Co., 76 N. Y. 365; 32 Am. Rep. 315; Middlebrook v. Merchants' Bank, 41 Barb. 481; 3 Abb. App. 295; Purchase v. N. Y. Exch. Bank, 3 Rob. (N. Y.) 164. It has been said, in analogy to suits for specific performance of sales of stock, that the action is proper, in this case, where a recovery of damages would furnish inadequate compensation: Cushman v. Thayer Mfg. Co., *supra*. In Burrall v. Bushwick R. R., 75 N. Y. 211, an action was brought to obtain the issue and delivery of a certain number of *shares* of capital stock, in accordance with what purported to be the terms of a certificate. Held, that a subscriber may become the owner of shares, but not in the sense that he can take them away out of the corporate fund. The corporation has no power, and cannot be compelled while continuing its legal existence and carrying on its affairs, to issue and deliver such shares; it can only be compelled to issue their legal evidence, in the shape, generally, of stock certificates.

[2] Hildyard v. South Sea Co., 2 P. Wms. 77; Ashby v. Blackwell, 2 Eden, 299; Sloman v. Bank of England, 14 Sim. 475; Taylor v. Midland R'y Co., 28 Beav. 287; 8 H. L. Cas. 751; Pollock v. National Bank, 7 N. Y. 274; 57 Am. Dec. 520; Chew v. Bank of Baltimore, 14 Md. 299 (sale of stock by lunatic); Sewall v. Boston etc. Co., 4 Allen, 277; 81 Am. Dec. 701; Pratt v. Taunton Copper Co., 123 Mass. 110; 25 Am. Rep. 37; Pratt v. Boston etc. R. R., 126 Mass. 443; Telegraph Co. v. Davenport, 97 U. S. 369.

The cases under this head almost invariably arise where the owner's name has been forged. It is no answer that the officers of the company have been without blame in allowing the unauthorized transfer, or that the certificate was obtained by a purchaser in good faith: See Telegraph Co. v. Davenport, *supra*. Dividends received on the stock after the unauthorized transfer will be ordered by the decree to be paid by the corporation: See the cases above cited.

SIXTH GROUP.

REMEDIES IN WHICH THE FINAL RELIEF IS PECUNIARY, BUT IS OBTAINED BY THE ENFORCEMENT OF A LIEN OR CHARGE UPON SOME SPECIFIC PROPERTY OR FUND.

CHAPTER FIRST.

FORECLOSURE SUITS — MARSHALING SECURITIES — CREDITORS' SUITS.

ANALYSIS.

§ 1413. Nature, kinds, and classes.
§ 1414. Suits for marshaling of securities.
§ 1415. Creditors' suits.

§ 1413. Nature, Kinds, and Classes.— The title of this group plainly indicates the nature and object of the remedies composing it. They are all purely equitable, and therefore belong to the exclusive jurisdiction; because, although the *final* relief is pecuniary, and so resembles the ordinary relief at law, it is obtained through preliminary proceedings, forming a part of the judgment, which belong solely to the procedure and jurisdiction of equity. The group contains the following species of remedies: Suits for the foreclosure by judicial sale of mortgages of real property; suits for the similar foreclosure of mortgages of personal property; suits for the similar foreclosure of pledges; suits to enforce the various equitable liens; suits to enforce the equitable contracts of married women upon their separate property; suits to marshal securities; and creditors' suits. The jurisdiction to entertain most of these suits — when and between what parties most of these remedies will be granted — has already been discussed as fully

as my limits will permit.[1] I shall briefly consider in the present chapter marshaling of securities and creditors' suits.

§ 1414. **Marshaling of Securities.**— The equitable remedy of marshaling securities, with that of marshaling assets, depends upon the principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. The general rule is, that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only,— as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another,— the former must seek satisfaction out of that fund which the latter cannot touch.[1] If, therefore, the prior creditor resorts to the doubly

§ 1413, [1] See *ante*, foreclosure of mortgages of land: § 1228; of mortgages of chattels: § 1230; of pledges: § 1231. The enforcement of equitable liens; arising from express contract: §§ 1235–37; from implied contract: §§ 1239–1243; from charges by will or deed: §§ 1245–1247; grantor's lien: §§ 1249–1258; vendor's lien: § 1262; vendee's lien: § 1263; deposit of title deeds: § 1267; statutory liens: § 1269. Suits to enforce the equitable contracts of married women upon their separate property: §§ 1121–1126. Although the late English cases hold that these contracts of married women do *not* create any lien, yet the whole remedy in form and substance is exactly the same as though there *was* a lien, and as though its object was to enforce that lien. Furthermore, the American courts generally hold that a lien *is* created. "Creditors' suits" belong to this group, because they are based upon the conception that an equitable lien is created upon the judgment debtor's property, by means of the judgment and execution returned unsatisfied; and this lien is in reality enforced, although the enforcement may, perhaps, require the ancillary remedies of cancellation, a receiver, etc.

§ 1414, [1] Lanoy v. Duke of Athol, 2 Atk. 444, 446; Aldrich v. Cooper, 8 Ves. 382, 395; 2 Lead. Cas. Eq., 4th Am. ed., 2280, notes; Ex parte Kendall, 17 Ves. 514, 520; Baldwin v. Belcher, 3 Dru. & War. 173, 176; Hughes v. Williams, 3 Macn. & G. 683; Tidd v. Lister, 10 Hare, 140, 157, 3 De Gex, M. & G. 857; Averall v. Wade, Lloyd & G. 252; Gibson v. Seagrim, 20 Beav. 614; Hales v. Cox, 32 Beav. 118; Ex parte Alston, L. R. 4 Ch. 168; Heyman v. Dubois, L. R. 13 Eq. 158; Cheesebrough v. Millard, 1 Johns. Ch. 409; 7 Am. Dec. 494; Hawley v. Mancius, 7 Johns. Ch. 174, 184; Evertson v. Booth, 19 Johns. 486, 492; Besley v. Lawrence, 11 Paige, 581; York etc. Ferry Co. v. Jersey Co., Hopk. Ch. 460; Ziegler v. Long, 2 Watts, 205; Pallen v. Agricultural Bank, Freem. (Miss.) 419; Glass v. Pullen, 6 Bush, 346; Russell v. Howard, 2 McLean, 489; Ross v. Duggan, 5 Col. 85; Terry v. Rosell, 32 Ark. 478.

charged fund, the subsequent creditor will be substituted, as far as possible, to his rights.[2] These rules must be taken with the modifications and exceptions that in their application the paramount encumbrancer shall not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because some one else has taken imperfect security;[3] that the rights of third parties shall not be prejudiced;[4] and that the parties themselves are creditors of the same debtor.[5] The rules of marshaling securities are applied under a variety of circumstances; but generally, in this country, between mortgagees, mortgagees and judgment creditors, and between judgment creditors.[6]

§ 1415. **Creditors' Suits.**— The jurisdiction of equity to entertain suits in aid of creditors[1] undoubtedly had its origin in the narrowness of the common-law remedies by

[2] Cheesebrough v. Millard, 1 Johns. Ch. 409; Hunt v. Townsend, 4 Sand. Ch. 510; Herriman v. Skillman, 33 Barb. 378; Bank of Kentucky v. Vance's Adm'rs, 4 Litt. 168; Ramsey's Appeal, 2 Watts, 228; 27 Am. Dec. 301.

[3] Evertson v. Booth, 19 Johns. 486, 493; Woolcocks v. Hart, 1 Paige, 185; Jervis v. Smith, 7 Abb. Pr., N. S., 217; Briggs v. Planters' Bank, Freem. (Miss.) 574; Denham v. Williams, 39 Ga. 312; Calloway v. People's Bank, 54 Ga. 572; Walker v. Covar, 2 S. C. 16; Coker v. Shropshire, 59 Ala. 542; Sweet v. Redhead, 76 Ill. 374; Wolf v. Smith, 36 Iowa, 454.

[4] Barnes v. Racster, 1 Younge & C. Ch. 401; Averall v. Wade, Lloyd & G. 252; Cannon v. Kreipe, 14 Kan. 324; Leib v. Stribling, 51 Md. 285; McArthur v. Martin, 23 Minn. 74 (homestead right); Marr v. Lewis, 31 Ark. 203; 25 Am. Rep. 553 (ditto).

[5] Ex parte Kendall, 17 Ves. 514, 520; Dorr v. Shaw, 4 Johns. Ch. 17; Stevens v. Church, 41 Conn. 369. The rule, also, does not apply between a debtor and his creditor, but only between different creditors: Rogers v. Meyers, 68 Ill. 92.

[6] When creditor No. 1 has a lien upon two funds, A and B, and creditor No. 2 has a subsequent lien upon fund B alone, the theory of the remedy is, that the lien of creditor No. 2 is transferred to and enforced against fund A. It is possible that some cases may have carried the principle to the extent of permitting creditor No. 2 to maintain an equitable suit for the purpose of compelling creditor No. 1 to enforce his security, in the first place, out of fund A, so as to leave fund B, if possible, subject to the plaintiff's subsequent lien. This form of the relief is not, in my opinion, warranted by the principle; it was not allowed in the analogous remedy of marshaling assets; and it seems to interfere with the prior vested rights of creditor No. 1.

[1] Creditors' suits may be brought either while the debtor is living, or after

writs of execution. These writs, issued by courts of common law, besides being otherwise limited in their operation, were, of course, confined to those estates and interests recognized by the law, and did not extend to estates and interests equitable in their nature. Creditors' suits were therefore permitted to be brought in those instances where the relief by execution at common law was ineffectual; as for a discovery of assets;[2] to reach equitable and other interests not subject to levy and sale at law;[3] and to set aside fraudulent conveyances and obstructions.[4] Statutes in England and in certain American states have greatly extended the scope of writs of execution, thereby providing for adequate legal relief in cases where formerly resort to equity was necessary, and even extending the relief to instances where, perhaps, a creditor's bill would not lie.[5] In

his death against his estate In the latter case, the suit ends in administration, if the executor or administrator does not admit assets. If assets are admitted, a decree is simply made for payment of the debt. The jurisdiction of equity to entertain suits of this latter class has been considered under the head of Administration: See *ante*, § 1154. The present discussion will be confined to suits of the first class.

[2] Hadden v. Spader, 20 Johns. 554; 5 Johns. Ch. 280; Hendricks v. Robinson, 2 Johns. Ch. 283; Gordon v. Lowell, 21 Me. 251; Bay State Iron Co. v. Goodall, 30 N. H. 223; Miers v. Zanesville etc. Co., 11 Ohio, 273; Cadwallader v. Granville etc. Soc., 11 Ohio, 292; Thomas v. Adams, 30 Ill. 37; Clarke v. Webb, 2 Hen. & M. 8; Le Roy v. Rogers, 3 Paige, 234; Trego v. Skinner, 42 Md. 426.

[3] Halsted v. Davison, 10 N. J. Eq. 290; Montgomery v. McGee, 7 Humph. 234; Wallace v. Smith, 2 Handy, 78; Galveston etc. R'y v. McDonald, 53 Tex. 510; Lackland v. Garesche, 56 Mo. 267; Harris v. Alcock, 10 Gill & J. 226; 32 Am. Dec. 158; Rose v. Bevan, 10 Md. 466; 69 Am. Dec. 170; Hadden v. Spader, 20 Johns. 554; 5 Johns. Ch. 280; Bayard v. Hoffman, 4 Johns. Ch. 450; Tompkins v. Fonda, 4 Paige, 448.

[4] Beck v. Burdett, 1 Paige, 305; 19 Am. Dec. 436; Gates v. Boomer, 17 Wis. 455; Hagan v. Walker, 14 How. 29; Hammond v. Hudson River etc. Co., 20 Barb. 378; McCaffrey v. Hickey, 66 Barb. 489; Tantum v. Green, 21 N. J. Eq. 364; Pulliam v. Taylor, 50 Miss. 551; Trego v. Skinner, 42 Md. 426.

[5] In England, by the statute of frauds, 29 Car. II., c. 3, sec. 10, legal execution was given against the lands, tenements, and hereditaments of a person seised in trust for the debtor at the time of execution sued out. This exception to the property capable of being reached by the ordinary writs was obviously very narrow,—extending only to real estate *seised* in trust at the *time* of execution sued out, and not embracing chattels real, trusts under

other states, statutes have increased the efficiency of creditors' suits by dealing with the subject directly. It is a necessary result from the whole theory of the creditors' suits that jurisdiction in equity will not be entertained where there is a remedy at law.[6] The general rule is, therefore, that a judgment must be obtained, and certain steps taken towards enforcing or perfecting such judgment, before a party is entitled to institute a suit of this character.[7] In this there is a uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he has obtained his judgment.[8] It is, of course, neces-

which the debtor had not the whole interest, equities of redemption, or any equitable interest parted with before execution sued out: See Forth v. Duke of Norfolk, 4 Madd. 503. By statute 1 & 2 Vict., c. 110, the remedies of creditors by ordinary writs of execution are very complete. As an example of the legislation in American states of the first type referred to in the text, see Cal. Code Civ. Proc., sec. 688.

[6] See the cases cited in the next note but one.

[7] It is impossible to state a more definite rule than this, as will subsequently appear.

[8] *When an execution returned unsatisfied is or is not an essential preliminary.*—Much of the conflict doubtless results from the effect judgments and writs of execution have in different states. The rule seems to be sustained by the weight of authority, that before a creditor's suit can be brought to reach choses in action and personal property in such a shape or form or under such conditions that no levy can be made at law, execution must have been issued and a return of *nulla bona* made: Beck v. Burdett, 1 Paige, 305, 309; Willis v. Moore, Clarke Ch. 150; Spader v. Davis, 5 Johns. Ch. 280; 20 Johns. 554; Brinkerhoff v. Brown, 4 Johns. Ch. 671; McElwain v. Willis, 9 Wend. 548, 562, 565, 569; Beardsley Scythe Co. v. Foster, 36 N. Y. 561; Dunlevy v. Tallmadge, 32 N. Y. 457; Crippen v. Hudson, 13 N. Y. 161; Parshall v. Tillon, 13 How. Pr. 7; Scott v. Wallace, 4 J. J. Marsh. 654; Wooley v. Stone, 7 J. J. Marsh. 302; Morgan v. Crabb, 3 Port. 470; Brown v. Bank of Mississippi, 31 Miss. 454; Suydam v. North West Ins. Co., 51 Pa. St. 394. On the other hand, where it is sought to reach equitable interests of a debtor in, or to remove fraudulent obstructions from, real property, judicial opinion inclines in favor of the rule that execution must have been issued, but a return is unnecessary: Neate v. Duke of Marlborough, 3 Mylne & C. 407 · Shirley v. Watts, 3 Atk. 200; North American F. Ins. Co. v. Graham, 5 Sand. 197; McCullough v. Colby, 5 Bosw. 477; Hendricks v. Robinson, 2 Johns. Ch. 283, 296; Beck v. Burdett, 1 Paige, 305. 308; 19 Am. Dec. 436; McElwain v. Willis, 9 Wend. 548, 568; Buswell v. Lincks, 8 Daly, 518; Geery v. Geery, 63 N. Y. 252; Jones v. Green, 1 Wall. 330; Manchester v. McKee, 4 Gilm. 511; Thurmond v. Reese, 3 Ga. 449; 46 Am. Dec. 440; Newman v. Willetts, 52 Ill. 98; Loving v. Pairo, 10 Iowa, 282; 77 Am. Dec. 108; Miller

sary for the creditor to allege and prove that he has taken the necessary proceedings at law before he can show a case requiring the interposition of equity. Whether an equitable suit, analogous to the creditor's suit, will be allowed in aid

v. Dayton, 47 Iowa, 312. The equitable relief in this case rests on the fact that the judgment is or is in the nature of a lien, which should be perfected by an execution taken out, in which stage of the proceedings a creditor will be assisted. As regards choses in action and personal property, however, under the above circumstances, no specific lien is created until proceedings are taken in equity. It therefore follows from the preceding that if the judgment itself constitutes, or is held to constitute, a specific lien, execution is unnecessary: Cornell v. Radway, 22 Wis. 260; Fleming v. Grafton, 54 Miss. 79; McNairy v. Eastland, 10 Yerg. 310; Montgomery v. McGee, 7 Humph. 234; and where the judgment constitutes no lien on real estate, the creditor must make a levy, if the debtor has the legal title, and if he has but an equitable title, execution must be returned, as in the case of personal property, before a suit in equity can be maintained: Webster v. Clark, 25 Me. 313; Dana v. Haskell, 41 Me. 25; Hartshorn v. Eames, 31 Me. 93; Corey v. Greene, 51 Me. 115; Dockray v. Mason, 48 Me. 178; Griffin v. Nitcher, 57 Me. 270, 272.

Special exceptions.— The circumstances constituting exceptions to the general rule as stated in the text are not numerous; and as to what will excuse issuing of an execution, or issuing of an execution and a return unsatisfied, the cases are not unanimous. In Shaw v. Dwight, 27 N. Y. 244, 84 Am. Dec. 275, where it was sought to set aside fraudulent obstructions, issuing of execution in counties where the lands were situated was held unnecessary, an execution having been issued in the county where the debtor resided, and returned unsatisfied. And see Payne v. Sheldon, 63 Barb. 169. Where a judgment was obtained against one of two persons sued as joint debtors, and an execution thereon was returned unsatisfied, a creditor's suit may be begun without proceeding to judgment and execution against the other joint debtor: Hiler v. Hetterick, 5 Daly, 33; see Voorhees v. Howard, 4 Abb. App. 503. Whether the debtor's insolvency will obviate the necessity of proceeding at law in the same manner as if he were solvent is unsettled; it has been held on the one side that insolvency is an excuse: Tabb v. Williams, 4 Jones Eq. 352; Turner v. Adams, 46 Mo. 95; and on the other, that it is not: Mixon v. Dunklin, 48 Ala. 455; Parish v. Lewis, Freem. (Miss.) 299.

There are exceptions to the rule even that a judgment is required. Thus it is held that under certain circumstances equity will lend its aid to set aside fraudulent conveyances of property and apply it to a creditor's demands, by a proceeding that may be called "equitable attachment," without a judgment having been obtained, where the debtor has absconded, or removed from or resides out of the state: Scott v. McMillen, 1 Litt. 302; 13 Am. Dec. 239; Kipper v. Glancey, 2 Blackf. 356; Peay v. Morrison's Ex'rs, 10 Gratt. 149; Pope v. Solomon, 36 Ga. 541; and to reach money of an absconding debtor not subject to garnishment at law: Pendleton v. Perkins, 49 Mo. 565.

In aid of attachments.— An exception has been sought to be made in the

of the lien created by an attachment, before the recovery of judgment, is a question to which the American courts have given directly conflicting answers.

case of attaching creditors, and the question has been presented whether equity will ever assist an attachment at law. It has been held, in accordance with the prevailing theory, that a creditor's suit may be maintained to reach real estate when a specific lien is created, that an attachment constitutes such a lien as to furnish ground for equitable interference to remove fraudulent obstructions or impediments on the property, real or personal, attached, without the requirement of a judgment obtained, or the steps subsequent thereto, necessary in ordinary creditors' suits: Falconer v. Freeman, 4 Sand. Ch. 565; Greenleaf v. Mumford, 19 Abb. Pr. 469; Skinner v. Stuart, 15 Abb. Pr. 391; Bates v. Plonsky, 62 How. Pr. 429; Kelly v. Lane, 42 Barb. 594; Mechanics' etc. Bank v. Dakin, 51 N. Y. 519; Heyneman v. Dannenberg, 6 Cal. 376; 65 Am. Dec. 519; Scales v. Scott, 13 Cal. 76; Robert v. Hodges, 16 N. J. Eq. 299; Curry v. Glass, 25 N. J. Eq. 108; Hunt v. Field, 9 N. J. Eq. 36; 57 Am. Dec. 365; Williams v. Michenor, 11 N. J. Eq. 520; Ward v. McKenzie, 33 Tex. 297; 7 Am. Rep. 261; Tappan v. Evans, 11 N. H. 311; Dodge v. Griswold, 8 N. H. 425; Stone v. Anderson, 26 N. H. 506; Sheafe v. Sheafe, 40 N. H. 516; see Castle v. Bader, 23 Cal. 76. In pursuance of this doctrine, when the attaching creditor or officer is sued for taking the property, it may be shown as a good defense that the plaintiff's title is fraudulent: Hall v. Stryker, 27 N. Y. 596; Rinchey v. Stryker, 28 N. Y. 45; 84 Am. Dec. 324; 31 N. Y. 140. Other decisions hold that such a suit cannot be maintained: Thurber v. Blanck, 50 N. Y. 80; Lawrence v. Bank of Republic, 35 N. Y. 320; Greenleaf v. Mumford, 50 Barb. 543; Griffin v. Nitcher, 57 Me. 270; Tennent v. Battey, 18 Kan. 324; Weil v. Lankins, 3 Neb. 384; Bigelow v. Andress, 31 Ill. 322; Martin v. Michael, 23 Mo. 50; 66 Am. Dec. 656; McMinn v. Whelan, 27 Cal. 300.

SEVENTH GROUP.

REMEDIES IN WHICH THE FINAL RELIEF IS WHOLLY PECUNIARY, AND IS OBTAINED IN THE FORM OF A GENERAL PECUNIARY RECOVERY.

CHAPTER FIRST.

SUITS FOR CONTRIBUTION, EXONERATION, AND SUBROGATION.

ANALYSIS.

§ 1416. General nature, kinds, and classes.
§ 1417. Exoneration; rights of surety against the principal debtor.
§ 1418. Contribution.
§ 1419. Subrogation.

§ 1416. **General Nature, Kinds, and Classes.**— The remedies composing this group belong to the concurrent jurisdiction of equity, since the final reliefs are the same in form and substance as that granted under like circumstances by a judgment at law,— a general pecuniary recovery,— and since the primary rights and interests of the parties are generally recognized and protected by the law. Within the group are included suits by assignees of things in action; suits by equitable assignees of a fund;[1] suits for contribution in general; suits for contribution, exoneration, and subrogation, growing out of suretyship; suits for an accounting in general; and suits under various circumstances, and between particular parties, in which an accounting is a necessary element of the relief,— as, for example, between partners.

[1] As to suits by assignees of things in action, see *ante*, §§ 1277, 1278; by equitable assignees of a fund: §§ 1280–1284.

§ 1417. Exoneration — Rights of Surety against the Principal Debtor.— When a surety has actually paid or satisfied the principal's obligation, or any part thereof, he is entitled to be reimbursed by the principal debtor, and can maintain an equitable action for that purpose.[1] He may also maintain a *quia timet* suit in equity before any payment.

[1] The right of recovery being based upon an implied contract of the principal, a jurisdiction at law to give the same relief has become established, and is ordinarily resorted to in this country. The equitable jurisdiction, however, still exists. The surety is entitled to exoneration, whether his payment was voluntary or compulsory; if compulsory, he can recover back his reasonably necessary costs and expenses. The jurisdiction extends to all those who in reality stand in a position of suretyship towards principal debtors; e. g., to a surety *for a* [illegible] *surety:* Dering v. Earl of Winchelsea, 1 Cox, 318; 1 Lead. Cas. Eq., 4[illegible] ed., 120, 124, 134; Craythorne v. Swinburne, 14 Ves. 160; Hazelton v. [illegible]ntine, 113 Mass. 472, 479; Savage v. Winchester, 15 Gray, 453; Konitzky v. Meyer, 49 N. Y. 571; Townsend v. Whitney, 75 N. Y. 425; Harris v. Warner, 13 Wend. 400; Neimcewicz v. Gahn, 3 Paige, 614; 11 Wend. 312; Wesley Church v. Moore, 10 Pa. St. 273; Baxter v. Moore, 5 Leigh, 219; Butler v. Butler's Adm'r, 8 W. Va. 677; Hare v. Grant, 77 N. C. 203; Moore v. Young, 1 Dana, 516; Hamilton v. Johnston, 82 Ill. 39; Hearne v. Keath, 63 Mo. 84. If the surety satisfies the obligation at less than its full amount, he can only recover from the principal debtor what he has actually paid, or the value of the property given up: Reed v. Norris, 2 Mylne & C. 361, 375; Bonney v. Seely, 2 Wend. 481; Blow v. Maynard, 2 Leigh, 30.

Suit before payment.— After the obligation becomes payable, the surety, before he has paid it, and whether he has been sued by the creditor or not, may maintain a suit in equity against the debtor — in the nature of a bill *quia timet* — to compel *him* to pay the debt or perform the obligation; provided the creditor can himself enforce payment or performance, and neglects or refuses to do so. The creditor is, of course, made a co-defendant: Cal. Civ. Code, sec. 2846; Dering v. Earl of Winchelsea, *supra;* notes in 2 Lead. Cas. Eq., 4th Am. ed., 278, 280, 283, 306, 1896; Nisbet v. Smith, 2 Brown Ch. 579, 582; Comes Ranelaugh v. Hayes, 1 Vern. 189; Antrobus v. Davidson, 3 Mer. 569; Padwick v. Stanley, 9 Hare, 627; Wooldridge v. Norris, L. R. 9 Eq. 410; Beaver v. Beaver, 23 Pa. St. 167; Ardesco Oil Co. v. N. A. Oil etc. Co., 66 Pa. St. 375, 381; Bishop v. Day, 13 Vt. 81; 37 Am. Dec. 582; Hayes v. Ward, 4 Johns. Ch. 123, 131; 8 Am. Dec. 554; King v. Baldwin, 2 Johns. Ch. 554; 17 Johns. 384; Norton v. Reid, 11 S. C. 593; White v. Schurer, 4 Baxt. 23; Gilliam v. Esselman, 5 Sneed, 86; Irick v. Black, 17 N. J. Eq. 189; Stephenson v. Taverners, 9 Gratt. 389; Rice v. Downing, 12 B. Mon. 44; Dempsey v. Bush, 18 Ohio St. 376; Fame Ins. Co.'s Appeal, 83 Pa. St. 396, 405. Conversely, when the surety has been discharged by the acts of the creditor in dealing with the principal debtor, he may maintain a suit in equity for a decree declaring his liability at an end, and restraining the creditor if necessary: See Morley v. Dickinson, 12 Cal. 561.

§ 1418. **Contribution.**— Where there are two or more sureties for the same principal debtor, and for the same debt or obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all of his co-sureties, in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens. The same doctrine applies, and the same remedy is given, between all those who are jointly, or jointly and severally, liable on contract or obligation in the nature of contract.[1] The right,

[1] The doctrine of contribution rests upon the maxim, Equality is equity: See vol. 1, §§ 405–412. Although contribution is based upon general considerations of justice, and not upon any notion of an implied promise, a jurisdiction at law has become well settled which is sufficient in all ordinary cases of suretyship or joint liability. The equitable jurisdiction still remains, and has some most important advantages. All the co-sureties and the principal debtor being parties to the equity suit, the liabilities of each and their exoneration by the principal debtor can be adjusted and established by a single decree. If one or more of the co-sureties are insolvent, the plaintiff can in equity obtain a proportionate increase of contribution from the others who are solvent. It seems, however, that the surety must first resort to the principal debtor; and that he can only compel contribution in equity when he has failed to obtain exoneration from the principal. Of course, there can be no such limitation to a contribution among joint debtors not sureties. There is no contribution among tort-feasors. As to contribution among co-trustees, see *ante*, § 1081; among owners of lands subject to encumbrance: §§ 1221–1226. As illustrations of the general doctrine, see Dering v. Earl of Winchelsea, 1 Cox, 318; 1 Lead. Cas. Eq. 120, 124, 134; Craythorne v. Swinburne, 14 Ves. 160; Primrose v. Bromley, 1 Atk. 89; Stirling v. Forrester, 3 Bligh, 575; Yonge v. Reynell, 9 Hare, 809; Hitchman v. Stewart, 3 Drew. 271; Mayor of Berwick v. Murray, 7 De Gex, M. & G. 497; Whiting v. Burke, L. R. 6 Ch. 342; Hichborn v. Fletcher, 66 Me. 209; 22 Am. Rep. 562; Morgan v. Smith, 70 N. Y. 537; Wells v. Miller, 66 N. Y. 255; Johnson v. Harvey, 84 N. Y. 363; 38 Am. Rep. 515; Smith v. State, 46 Md. 617; Nally v. Long, 56 Md. 567; Bright v. Lennon, 83 N. C. 183; Scofield v. Gaskill, 60 Ga. 277; Owen v. McGehee, 61 Ala. 440; Broughton v. Wimberly, 65 Ala. 549; Jenkins v. Lockard's Adm'r, 66 Ala. 377; Magruder v. Admire, 4 Mo. App. 133; Stephens v. Meek, 6 Lea, 226; Oldham v. Broom, 28 Ohio St. 41; Camp v. Bostwick, 20 Ohio St. 337; 5 Am. Rep. 669; Robertson v. Deatherage, 82 Ill. 511; Conover v. Hill, 76 Ill. 342; Wagenseller v. Prettyman, 7 Ill. App. 192; Curtis v. Parks, 55 Cal. 106; Taylor v. Reynolds, 53 Cal. 686; Powell v. Powell, 48 Cal. 234; Dussol v. Bruguiere, 50 Cal. 456; Black v. Shreeve, 7 N. J. Eq. 440; Bowen v. Hoskins, 45 Miss. 183; 7 Am. Rep. 728; Mills v. Hyde, 19 Vt. 59; 46 Am. Dec. 177; Strong v. Mitchell, 19 Vt. 644; Wayland v. Tucker, 4 Gratt. 267; 50 Am. Dec. 76; Campbell v. Mesier, 4 Johns. Ch. 334; 8 Am. Dec. 570; 6 Johns. Ch. 21. *Where one or more co-sureties are*

however, may be controlled or modified by express agreement among the co-sureties or debtors.

§ 1419. **Subrogation.**— The surety who has paid or satisfied the principal's debt or obligation is entitled to be subrogated to and to have the benefit of all securities which may at any time have been put into the creditor's hands by the principal debtor, or which the creditor may have obtained from the principal debtor. By the fact of payment, the surety becomes an equitable assignee of all such securities, and is entitled to have them assigned and delivered up to him by the creditor, in order that he may enforce them for his own reimbursement and exoneration. If, therefore, the creditor refuses to surrender up such securities, the surety may maintain an equitable suit to compel their assignment and surrender. The doctrine and remedy of subrogation are extended also to the creditor, who is subrogated to and entitled to the benefit of all securities given to a surety for purposes of *his* indemnification by the principal debtor; and also between co-sureties, so that one surety, in enforcing his rights of exoneration and of contribution, is subrogated to securities given to his co-surety.[1] It necessarily follows from the surety's right of

insolvent: Hitchman v. Stewart, 3 Drew. 271; Mayor etc. v. Murray, 7 De Gex, M. & G. 497; Magruder v. Admire, 4 Mo. App. 133; Burrows v. McWhann, 1 Desaus. Eq. 409; Breckinridge v. Taylor, 5 Dana, 110. On death of a co-surety, his estate is liable to contribute: Primrose v. Bromley, 1 Atk. 89; Dussol v. Bruguiere, 50 Cal. 456; Johnson v. Harvey, 84 N. Y. 363; 38 Am. Rep. 515; Stephens v. Meek, 6 Lea, 226.

[1] The doctrine of subrogation is of wide extent and operation in various departments of equity jurisprudence. The grounds and reasons upon which it depends have already been explained. Being a doctrine of purely equitable origin and nature, its operation is always controlled by equitable principles. It is, therefore, never enforced so as to defeat or interfere with the superior or equal equities of third persons, or with the legal right of third persons growing out of express contract. As to subrogation among encumbrancers, see *ante*, §§ 1211–1214. The remedy of subrogation has been granted to sureties much more favorably and extensively by the American equity jurisprudence than by the English. In England, prior to modern legislation, if a surety paid a contract which he executed jointly with his principal debtor, or paid a judgment recovered against him and his principal jointly, the contract or judgment was thereby ended and discharged, and could not itself be enforced by the surety. The courts of all the American states, with very few

subrogation that the creditor cannot, without the surety's assent, surrender, give up, release, or discharge any such securities, or render them in any way unavailable to the surety, either by his own acts or omissions. If he does so, the surety's liability is thereby discharged, wholly or partially, as the case may be.

exceptions, have extended the remedy of subrogation to such cases; they enable the surety to enforce such bond, or contract, or judgment immediately against the principal debtor, although the surety was himself directly liable. In other words, by the English doctrine, the surety became equitable assignee only of collateral securities; by the American doctrine he becomes equitable assignee, not only of collateral securities, but of the principal undertaking. As illustrations of the doctrine, see Dering v. Earl of Winchelsea, *supra;* 2 Lead. Cas. Eq. 277–291; notes to Aldrich v. Cooper, 8 Ves. 282; Mayhew v. Crickett, 2 Swanst. 185; Law v. East I. Co., 4 Ves. 824; Hodgson v. Shaw, 3 Mylne & K. 183, 190; Pearl v. Deacon, 24 Beav. 1[illegible]1; De Gex & J. 461; Lake v. Brutton, 18 Beav. 34; 8 De Gex, M. & G. [illegible]range v. Fooks, 4 Giff. 408; Drew v. Lockett, 32 Beav. 499; Capel v. Butler, 2 Sim. & St. 457; Scribner v. Adams, 73 Me. 541; Kelly v. Herrick, 131 Mass. 373; Thompson v. White, 48 Conn. 509; Townsend v. Whitney, 75 N. Y. 425; 15 Hun, 93; Van Santen v. Standard Oil Co., 81 N. Y. 171; Cole v. Malcolm, 66 N. Y. 363; Lewis v. Palmer, 28 N. Y. 271; Steele's Appeal, 72 Pa. St. 101; Bleakley's Appeal, 66 Pa. St. 187, 191; Price v. Trusdell, 28 N. J. Eq. 200; Receivers of N. J. etc. R'y v. Wortendyke, 27 N. J. Eq. 658; Irick v. Black, 17 N. J. Eq. 189; Dent v. Wait's Adm'r, 9 W. Va. 41; Hevener v. Berry, 17 W. Va. 474; York v. Landis, 65 N. C. 535; Saffold v. Wade's Ex'r, 51 Ala. 214; Knighton v. Curry, 62 Ala. 404; Osborn v. Noble, 46 Miss. 449; Davis v. Walker, 51 Miss. 659; Talbot v. Wilkins, 31 Ark. 411; Fishback v. Weaver, 34 Ark. 569; Farmers' etc. Bank v. Sherley, 12 Bush, 304; Storms v. Storms, 3 Bush, 77; Allen v. Henley, 2 Lea, 141; Harlan v. Sweeny, 1 Lea, 682; Kirkman v. Bank of America, 2 Cold. 397; Smith v. Rumsey, 33 Mich. 183; Keith v. Hudson, 74 Ind. 333; Prout v. Lomer, 79 Ill. 331; Hollingsworth v. Pearson, 53 Iowa, 53; McArthur v. Martin, 23 Minn. 74; Eaton v. Hasty, 6 Neb. 419; 29 Am. Rep. 265; Van Orden v. Durham, 35 Cal. 136; Lidderdale's Ex'rs v. Executor of Robinson, 12 Wheat. 594; Norwood v. Norwood, 2 Har. & J. 238; Wright v. Grover, 82 Pa. St. 80; Marsh v. Pike, 10 Paige, 595; McDougald v. Dougherty, 14 Ga. 674; Neilson v. Fry, 16 Ohio St. 552; 91 Am. Dec. 110; Dearborn v. Taylor, 18 N. H. 153; Pierson v. Catlin, 18 Vt. 77; Hayes v. Ward, 4 Johns. Ch. 123; 8 Am. Rep. 554. *By surety against a co-surety:* Copis v. Middleton, Turn. & R. 224, 231; Fishback v. Weaver, 34 Ark. 569; Brown v. Ray, 18 N. H. 102; 45 Am. Dec. 361; Administrator of Aldrich v. Hapgood, 39 Vt. 617; Elwood v. Deifendorf, 5 Barb. 398; Parham v. Green, 64 N. C. 436; McCune v. Belt, 45 Mo. 174. *By the creditor against a surety:* Moses v. Murgatroyd, 1 Johns. Ch. 119; 7 Am. Dec. 478; Phillips v. Thompson, 2 Johns. Ch. 418, 421; Rice's Appeal, 79 Pa. St. 168; Wallace's Appeal, 5 Pa. St. 103; Burwell's Adm'rs v. Fauber, 21 Gratt. 446; Osborn v. Noble, 46 Miss. 449; Rardin v. Walpole, 38 Ind. 146. As the rules concerning the discharge of the surety's liability by the conduct of the creditor are generally enforced at law as well as in equity, I do not enter upon their discussion.

CHAPTER SECOND.

SUITS FOR AN ACCOUNTING.

§ 1420. Origin of the equitable jurisdiction.
§ 1421. Extent of the equitable jurisdiction; when exercised.

§ 1420. Origin of the Equitable Jurisdiction.— The action of account-render was one of the most ancient actions known to the common law.[1] From the narrow scope and technical rules of this action, the inability of common-law courts to obtain a discovery from the defendant on his oath, the difficulty met with in cases of mutual and complicated accounts, and the impossibility of otherwise doing complete justice, it is easy to understand why the action of account-render fell into disuse, and a jurisdiction in equity to entertain suits for an accounting grew up.[2] The juris-

[1] This action was exceedingly narrow in its operation; for it lay only in cases where there was either a privity in deed, as against a bailiff or receiver appointed by the party, or a privity in law, *ex provisione legis*, as against guardians in socage: Co. Lit. 90 b. By the law merchant, also, the action could be brought by a person, naming himself a merchant, against another, naming him a merchant, and charging him as a receiver: Co. Lit. 172 a. Statutes afterwards extended the action, which was strictly confined to these parties, to their executors and administrators: 3 & 4 Anne, c. 16; 13 Edw. I., c. 23; 31 Edw. III., c. 11. The method of procedure was, first, to obtain a preliminary judgment that the defendant do account, *quod computet*, before auditors, and then a second judgment that he pay the plaintiff the balance found to be due him: 3 Black. Com. 163. But if the balance was in favor of the defendant, the plaintiff could not be compelled to pay it: 1 Spence's Eq. Jur. 650. Besides this defect in the common-law procedure, the auditors had no power, prior to statute, of examining the parties on oath; and any disputes which arose before them on the items of account could only be settled by as many issues in court: Jeremy's Eq. Jur. 504. This action of account-render was the only means which the common law furnished of obtaining a settlement of an account, except that assumpsit might be brought for a determinate balance: 3 Black. Com. 162. But if the balance was disputed, it was necessary for the jury to investigate the items one by one, a task which was practically impossible.

[2] 1 Spence's Eq. Jur. 649; Mitford's Eq. Pl. 120, 123; Bacon Abr., tit. Accompt. The action of account-render is perfected in several states by statute.

diction exists, therefore, and is well established; but the question arises, since there is a similar jurisdiction at law, When may a suit in equity for an accounting be brought? This question, of course, does not arise in those cases where an accounting is decreed as an incident to other equitable relief; nor should it arise where the subject-matter is an equitable interest or estate, for here the jurisdiction should be exercised as a necessary consequence, without regard to legal remedies.[3] It is not in every matter of account cognizable at law that the equitable jurisdiction will be exercised, the general rule being that a proper case is presented when the remedies at law are inadequate.[4]

§ 1421. **Extent of the Equitable Jurisdiction — When Exercised.**— The instances in which the legal remedies are held to be inadequate, and therefore a suit in equity for an accounting proper, are: 1. Where there are mutual accounts between the plaintiff and the defendant,— that is, where each of the two parties has received and paid on account of the other;[1] 2. Where the accounts are all on one side, but there are circumstances of great complication, or difficulties in the way of adequate relief at law;[2] 3. Where a fidu-

[3] Vol. 1, §§ 218, 219.

[4] Vol. 1, §§ 176, 178.

[1] The accounts must be mutual, as distinguished from matters of set-off, and accounts on one side only: Dinwiddie v. Bailey, 6 Ves. 136; Wells v. Cooper, cited 6 Ves. 139; Allison v. Herring, 9 Sim. 583; Phillips v. Phillips, 9 Hare, 471; Padwick v. Hurst, 18 Beav. 575; Fluker v. Taylor, 3 Drew. 183; North-eastern R'y v. Martin, 2 Phill. Ch. 758; Kennington v. Houghton, 2 Younge & C. Ch. 620, 627; Porter v. Spencer, 2 Johns. Ch. 169; Smith v. Marks, 2 Rand. 449; Hickman v. Stout, 2 Leigh, 6; McLin v. McNamara, 2 Dev. & B. Eq. 82; Hay v. Marshall, 3 Humph. 623; Wilson v. Mallett, 4 Sand. 112; Durant v. Einstein, 5 Rob. (N. Y.) 423; Salter v. Ham, 31 N. Y. 321; Walker v. Cheever, 35 N. H. 339; Gloninger v. Hazard, 42 Pa. St. 389; Passyunk Building Ass'n's Appeal, 83 Pa. St. 441; Carter v. Bailey, 64 Me. 458; 18 Am. Rep. 273; Dickinson v. Lewis, 34 Ala. 638; Avery v. Ware, 58 Ala. 475; Garner v. Reis, 25 Minn. 475; Haywood v. Hutchins, 65 N. C. 574 (accounts on both sides, but having no connection with each other). For a definition of a mutual account, see Phillips v. Phillips, 9 Hare, 471.

[2] O'Connor v. Spaight, 1 Schoales & L. 305; O'Mahony v. Dickson, 2 Schoales & L. 400; Bliss v. Smith, 34 Beav. 508; South Eastern R'y v. Brog-

ciary relation exists between the parties, and a duty rests upon the defendant to render an account.[3] A plea of stated

den, 3 Macn. & G. 8; Kennington v. Houghton, 2 Younge & C. Ch. 620, 627; Frietas v. Dos Santos, 1 Younge & J. 574; Taff Vale R'y v. Nixon, 1 H. L. Cas. 110; Mitchell v. Great Works etc. Co., 2 Story, 648; Governor v. McEwen, 5 Humph. 241; Watt v. Conger, 13 Smedes & M. 412; Kirkman v. Vanlier, 7 Ala. 217; Printup v. Mitchell, 17 Ga. 558; 63 Am. Dec. 258; Wilson v. Riddle, 48 Ga. 609; Lafever v. Billmyer, 5 W. Va. 33; Blood v. Blood, 110 Mass. 545; Frue v. Loring, 120 Mass. 507; Ward v. Peck, 114 Mass. 121; Farmers' etc. Bank v. Polk, 1 Del. Ch. 167; Trapnall v. Hill, 31 Ark. 345; Nesbit v. St. Patrick's Church, 9 N. J. Eq. 76; Seymour v. Long Dock Co., 29 N. J. Eq. 396; *contra*, Norwich etc. R. R. v. Storey, 17 Conn. 364. For cases furnishing peculiar illustrations of the latter branch of the rule, see Dabbs v. Nugent, 11 Jur., N. S., 943; Coffman v. Sangston, 21 Gratt. 263. To determine what degree of complication is required before a court of equity will entertain jurisdiction for that reason, independent of other circumstances, the rule was established in England that the account should be so complicated that a court of law would be incompetent to examine it at *nisi prius* with the necessary accuracy: O'Connor v. Spaight, 1 Schoales & L. 305, per Lord Redesdale; South Eastern R'y v. Brogden, 3 Macn. & G. 8; Kennington v. Houghton, 2 Younge & C. Ch. 620, 627; Taff Vale R'y v. Nixon, 1 H. L. Cas. 110; Foley v. Hill, 2 H. L. Cas. 28, 46. But under the present practice in England, matters of account may now be referred to officers or referees, so that the rule as above stated can now hardly be followed. The facts of each particular case should govern, and if it is doubtful whether adequate relief could be obtained at law, equity should entertain jurisdiction.

[3] This will embrace suits against trustees — including directors of corporations — which, as before stated, are particularly of equitable cognizance. Also suits for an accounting between partners; this relation necessarily giving rise to the right of an accounting in equity: Parsons on Partnership, 508. The jurisdiction of equity to compel guardians and executors and administrators to account is governed to a great extent in the United States by the powers given to courts of probate: Vol. 1, §§ 77, 78, 347–350; vol. 3, § 1154. See further, Davis v. Davis, 1 Del. Ch. 256, and State v. Quinn, 74 N. C. 359, on the accounting of guardians in equity. The principal difficulty is as to when equity will take jurisdiction of an accounting between principal and agent. The mere relation of principal and agent, without more,— the relation not being really fiduciary in its nature, and no obstacle intervening to a recovery at law,— is insufficient to enable a principal to maintain the action against his agent: King v. Rossett, 2 Young & J. 33; Navulshaw v. Brownrigg, 1 Sim., N. S., 573; 2 De Gex, M. & G. 441; Hemings v. Pugh, 4 Giff. 456; Moxon v. Bright, L. R. 4 Ch. 292; Crothers v. Lee, 29 Ala. 337 (attorney and client); Knotts v. Tarver, 8 Ala. 743 (agency for a single transaction); Coquillard v. Suydam, 8 Blackf. 24 (ditto); Blakeley v. Biscoe, 1 Hemp. 114: Powers v. Cray, 7 Ga. 206 (attorney and client); Long v. Cochran, 9 Phila. 267; County of Clinton v. Schuster, 82 Ill. 137 (not maintainable against a treasurer and assessor, as everything was a matter of record). But where the relation is such that a confidence is reposed by the principal

account obviously constitutes a bar to a suit in equity for an accounting, since in that case the remedy at law is entirely

in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction: Makepiece v. Rogers, 11 Jur., N. S., 215; Hemings v. Pugh, 4 Giff. 456; Mackenzie v. Johnston, 4 Madd. 373; Moxon v. Bright, L. R. 4 Ch. 292; Southampton Dock Co. v. Southampton etc. Board, L. R. 11 Eq. 254; Thornton v. Thornton, 31 Gratt. 212; Taylor v. Tompkins, 2 Heisk. 89; Kerr v. Camden Steamboat Co., Cheves Eq. 189; Halsted v. Rabb, 8 Port. 63; Hale v. Hale, 4 Humph. 183. Other circumstances, as complication and mutuality of accounts, make a stronger case: Walker v. Spencer, 13 Jones & S. 71; Halsted v. Rabb, 8 Port. 63; Taylor v. Tompkins, 2 Heisk. 89. While the rules are thus settled in favor of a principal, it does not follow that the reverse is true, and that an agent may come into equity for an accounting against his principal, since generally there is no trust or confidence reposed in the latter, and no duty on his part to account: Padwick v. Stanley, 9 Hare, 627; Smith v. Leveaux, 2 De Gex, J. & S. 1. But there are cases where an agent may maintain the action against his principal; as, for example, where his salary depends on the profits made by his employer: Harrington v. Churchward, 6 Jur., N. S., 576; Shepard v. Brown, 4 Giff. 208; Buel v. Selz, 5 Ill. App. 116; and persons, although not technically partners, who are to receive a certain share of the profits of an undertaking, may likewise maintain the action: Bentley v. Harris, 10 R. I. 434; 14 Am. Rep. 695; Garr v. Redman, 6 Cal. 574; Ferry v. Henry, 4 Pick. 75; Hallett v. Cumston, 110 Mass. 32. The foregoing rules are applicable, for similar reasons, to part owners: Strelly v. Winson, 1 Vern. 297; McLellan v. Osborne, 51 Me. 118; Dyckman v. Valiente, 42 N. Y. 549, 563; and to tenants in common and joint tenants taking more than their share of rents and profits: Early v. Friend, 16 Gratt. 21; Leach v. Beattie, 33 Vt. 195; Wiswell v. Wilkins, 4 Vt. 137 (where there are more than two tenants concerned); Darden v. Cowper, 7 Jones, 210; 75 Am. Dec. 461; Wright v. Wright, 59 How. Pr. 176; Hodges v. Pingree, 10 Gray, 14; Blood v. Blood, 110 Mass. 545; Gates v. Frazer, 9 Ill. App. 624 (no legal liability on one joint owner to account to another with respect to the *use* of a patent right, but the action maintained under an agreement). An action by one tenant in common against another in exclusive possession to *recover* a share of rents, profits, and issues, amounting in the aggregate to a certain sum, cannot be maintained in equity: Pico v. Columbet, 12 Cal. 414; 73 Am. Dec. 550. At the common law, no action of account for taking rents and profits lay against a joint tenant or tenant in common by another, unless the defendant was constituted bailiff: Co. Lit. 200 b; but this was remedied by the statute of 4 Anne, c. 16, sec. 27, and the action could be brought against the defendant as bailiff for receiving more than his share or proportion. This statute has been substantially re-enacted in many of the American states, but the equity jurisdiction exists notwithstanding: Leach v. Beattie, 33 Vt. 195; Wright v. Wright, 59 How. Pr. 176. An accounting is often an incident to a suit for partition between joint tenants and tenants in common: See Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540; Jones v. Massey, 14 S. C. 292; Tyner v. Fenner, 4 Lea, 469; Scott v. Guernsey, 48 N. Y. 106. The

adequate;[4] but of course a stated account may be opened for fraud or error.[5] The remedy of accounting is in most instances a necessary incident and part of the relief granted in suits brought by those beneficially interested, against trustees, either express or implied, and persons standing in fiduciary relations, such as administrators, executors, guardians, directors, and the like. The equitable jurisdiction is also practically exclusive in proceedings for an account and settlement of partnership affairs, including suits for an accounting and settlement of the firm affairs between the copartners themselves; suits for a settlement of the firm affairs between the survivors and the executors or administrators of the deceased, when a partner has died; and suits to settle the affairs of an insolvent firm, and to adjust the demands of the firm creditors and the creditors of the individual partners. The equitable jurisdiction over partnerships is a necessary outgrowth of the jurisdiction over accounting, and the remedies of dissolution, injunction, and receivership are incidents necessary to a final and complete relief.[6]

relation of banker and customer is not fiduciary in its character, and unless there are other circumstances, there can be no accounting between them in equity: Foley v. Hill, 2 H. L. Cas. 28.

The rule is sometimes laid down by text-writers and judges, that where accounts are all on one side, but a discovery is necessary, a proper case is presented for equitable interference, but such a rule seems to be only applicable to cases partaking of a fiduciary character: See cases *ante*, in this note. As to discovery enlarging the equitable jurisdiction over accounting, see vol. 1, §§ 223 *et seq.*

[4] Weed v. Small, 7 Paige, 573; Bullock v. Boyd, 2 Edw. Ch. 293; Dial's Ex'rs v. Rogers, 4 Desaus. Eq. 175; Craig v McKinney, 72 Ill. 305.

[5] Slee v. Bloom, 5 Johns. Ch. 366; 20 Johns. 669; Barrow v. Rhinelander, 1 Johns. Ch. 550.

[6] The subject of partnership is so broad, requiring so much discussion for its adequate treatment, that I shall not attempt to consider it. The reader is referred to the special treatises which deal with the law of partnership.

TABLE OF CASES CITED.

TABLE OF CASES CITED.

A.

Aaron v. Baum, 7 Rob. (N. Y.) 340, p. 2709.
Aaron v. Warner, 62 Miss. 370, p. 2394.
Abbey v. Dewey, 25 Pa. St. 413, p. 1603.
Abbey v. Taber, 58 Hun, 602, 11 N. Y. Supp. 548, affirmed, 134 N. Y. 615, 32 N. E. 649, p. 1023.
Abbot v. Rubber Co., 33 Barb. 578, p. 2060.
Abbott v. Abbott, 18 Neb. 503, 26 N. W. 361, p. 1562.
Abbott v. Allen, 2 Johns. Ch. 519, 7 Am. Dec. 554, p. 148, 215, 219.
Abbott v. Creal, 56 Iowa, 175, 9 N. W. 115, p. 1726.
Abbott v. Davidson, 18 R. I. 91, 25 Atl. 839, p. 1207, 1208.
Abbott v. Edgerton, 53 Ind. 196, p. 2678.
Abbott v. Godfroy's Heirs, 1 Mich. 178, p. 2475.
Abbott v. Goodwin, 20 Me. 408, p. 2586.
Abbott v. Kasson, 72 Pa. St. 183, p. 1411.
Abbott v. Lee, 2 Vern. 284, p. 2305.
Abbott v. L'Hommedieu, 10 W. Va. 677, p. 270.
Abbott v. Moldestad, 74 Minn. 293, 73 Am. St. Rep. 348, 77 N. W. 227, p. 2533.
Abbott v. Reeves, 49 Pa. St. 494, 88 Am. Dec. 510, p. 2017, 2763.
Abbott v. Sworder, 4 De Gex & S. 448, p. 1591, 1666.
Abbott v. Treat, 78 Me. 121, 125, 3 Atl. 44, p. 1560.
Abbott's Ex'r v. Reeves, 49 Pa. St. 494, 88 Am. Dec. 510, p. 2017, 2763.
Abdy v. Gordon, 3 Russ. 278, p. 806.
Abee v. Bargas, (Tex. Civ. App.) 65 S. W. 489, p. 1371.
Abel v. Coons, 7 Cal. 105, 68 Am. Dec. 229, p. 2408.
Abell v. Brady, 79 Md. 94, 28 Atl. 817, p. 2099, 2100.
Abell v. Brown, 55 Md. 217, p. 1057.
Abell v. Howe, 43 Vt. 403, p. 268, 1166, 1168.
Abels v. Mobile Real Estate Co., 92 Ala. 382, 9 South. 423, p. 1220.
Aberaman Iron Works v. Wickens, L. R. 4 Ch. 101, 5 Eq. 485, p. 1226, 1569, 1583, 1590, 2536.
Aberdeen R'y v. Blaikie, 1 Macq. 461, p. 1753, 2083.
Abernathy v. Abernathy, 8 Fla. 243, p. 2107.
Abernethy v. Bass, 9 Tex. Civ. App. 239, 29 S. W. 398, p. 2524.
Abernethy v. Hutchinson, 1 Hull & T. 28, 40, 3 L. J. Ch. 209, p. 2689.
Aborn v. Searles, 18 R. I. 357, 27 Atl. 796, p. 1994, 1996.
Abrahall v. Bubb, 2 Swanst. 172, p. 2682.
Abraham v. Alman, 1 Russ. 509, p. 1925.
Abraham v. Newcombe, 12 Sim. 566, p. 2173.
Abrams v. Seale, 44 Ala. 297, p. 1436.
Abrams v. Sheehan, 40 Md. 446, p. 1106.
Abt v. American T. & Sav. Bank, 159 Ill. 467, 42 N. E. 856, 50 Am. St. Rep. 175, p. 2570.
Academy of Visitation v. Clemens, 50 Mo. 167, p. 223, 1961, 1965, 1975, 1980.
Acer v. Hotchkiss, 97 N. Y. 395, p. 1602, 1646.
Acer v. Westcott, 1 Lans. 193, 197, 46 N. Y. 384, 7 Am. Rep. 355, p. 1050, 1054, 1147.
Acheson v. Fair, 3 Dru. & War. 512, p. 2028.

Achey v. Coleman, 92 Ga. 745, 19 S. E. 710, p. 1282.
Acker v. Phœnix, 4 Paige, 305, p. 1872, 2770.
Acker v. Priest, 92 Iowa, 610, 61 N. W. 235, p. 2005.
Ackerman v. Emott, 4 Barb. 626, 645, 646, p. 2066, 2077.
Ackerman v. Hunsicker, 85 N. Y. 43, 47, 39 Am. Rep. 621, p. 1095, 1131, 2383, 2385, 2387.
Ackerman v. True, 44 App. Div. 106, 60 N. Y. Supp. 608, p. 1086.
Ackert v. Barker, 131 Mass. 436, p. 1703.
Ackley v. Croucher, 203 Ill. 530, 68 N. E. 86, p. 1994.
Ackley v. Westervelt, 86 N. Y. 448, p. 2201.
Ackroyd v. Smithson, 1 Brown Ch. 503, 1 Lead. Cas. Eq., 4th Am. ed., 1171, 1181, p. 178, 1197, 1986, 2324, 2326.
Ackworth v. Ackworth, 1 Brown Ch. 308, note, p. 917.
Acton v. Acton, 1 Mer. 178, p. 2218, 2219, 2224.
Acton v. Acton, Prec. Ch. 237, p. 2602.
Acton v. Waddington, 46 N. J. Eq. 16, 18 Atl. 356, p. 2501, 2511, 2516.
Acton v. White, 1 Sim. & St. 429, p. 2158.
Acton v. Woodgate, 2 Mylne & K. 492, p. 1855, 2564.
Adair v. Adair, 5 Mich. 204, 71 Am. Dec. 779, p. 1230.
Adair v. Adair, 22 Oreg. 115, 29 Pac. 193, p. 2361.
Adair v. Brimmer, 74 N. Y. 539, p. 2048, 2056, 2066, 2068, 2071, 2073.
Adair v. Craig, 135 Ala. 332, 33 South. 902, p. 1765.
Adair v. Cummin, 48 Mich. 375, 12 N. W. 495, p. 1668.
Adair v. Shaw, 1 Schoales & L. 243, 248, 262, p. 175, 181, 1198, 1836, 2016, 2203.
Adair v. Winchester, 7 Gill & J. 114, p. 469, 2557.
Adam v. Coon, 109 U. S. 380, 3 Sup. Ct. 263, p. 377.
Adam v. Joiner, 77 Ill. App. 179, p. 1022.
Adam v. Tolman, 180 Ill. 61, 54 N. E. 61, p. 1274.
Adams's Appeal, 1 Pa. St. 447, p. 1107.
Adams v. Adams, 39 Ala. 274, p. 821.
Adams v. Adams, 21 Ky. Law Rep. 1756, 56 S. W. 151, p. 2055.
Adams v. Adams, 5 Met. 277, p. 824.
Adams v. Adams, 64 N. H. 224, 9 Atl. 100, p. 2045.
Adams v. Adams, 22 Vt. 50, p. 577, 1635.
Adams v. Adams, 21 Wall. 185, 22 L. ed. 504, Ames' Cas. on Trusts, 227, p. 1872, 1905, 2045.
Adams v. Angell, L. R. 5 Ch. Div. 634, 635, p. 1398, 1401, 1402, 1407.
Adams v. Barrett, 5 Ga. 404, p. 1707, 1708, 1712.
Adams v. Brackett, 5 Met. 280, 282, p. 2494.
Adams v. Brown, 7 Cush. 220, p. 2431.
Adams v. Brown, 16 Ohio St. 75, p. 1436, 1438.
Adams v. Buchanan, 49 Mo. 64, p. 2518.
Adams v. Burns, 96 Mo. 361, 10 S. W. 26, p. 2000.
Adams v. Claxton, 6 Ves. 226, 230, p. 195, 2561.
Adams v. Clifton, 1 Russ. 297, p. 2059.
Adams v. Collier, 122 U. S. 382, 7 Sup. Ct. 1208, p. 1332.
Adams v. Corriston, 7 Minn. 456, p. 2359.
Adams v. Cowen, 177 U. S. 471, 20 Sup. Ct. 668, 44 L. ed. 851, p. 1736, 1757, 2110.
Adams v. Cowherd, 30 Mo. 458, p. 2520, 2526.
Adams v. Dixon, 19 Ga. 513, 65 Am. Dec. 608, p. 2642, 2645.
Adams v. Fullam, 43 Vt. 592, p. 2782.
Adams v. Gamble, 12 Ir. Ch. Rep. 102, p. 2149.
Adams v. Gay, 19 Vt. 358, p. 1707, 1708.
Adams v. Green, 34 Barb. 176, p. 621.
Adams v. Guerard, 29 Ga. 651, 76 Am. Dec. 624, p. 1828, 1893.
Adams v. Hill, 29 N. H. 202, p. 1282.
Adams v. Hopkins, (Cal.) 69 Pac. 228, 73 Pac. 971, p. 1297.
Adams v. Irving National Bank, 116 N. Y. 606, 23 N. E. 7, 15 Am. St. Rep. 447, 6 L. R. A. 491, p. 673, 1718, 1735.

Adams v. Johnson, 41 Miss. 258, p. 191, 2470, 2471, 2472.
Adams v. Jones, 39 Ga. 479, 508, p. 2005.
Adams v. Jones, 9 Hare, 485, p. 1548.
Adams v. Lambard, 80 Cal. 426, 22 Pac. 180, p. 2030, 2056, 2089.
Adams v. Lear, 3 La. Ann. 144, p. 2393.
Adams v. Leavens, 20 Conn. 72, p. 1212.
Adams v. Mackey, 6 Rich. Eq. 75, p. 2103, 2104, 2154, 2188, 2198.
Adams v. Perry, 43 N. Y. 487, p. 177, 1968.
Adams v. Popham, 76 N. Y. 410, p. 2687.
Adams v. Robertson, 37 Ill. 45, p. 1487.
Adams v. Rodarmel, 19 Ind. 339, p. 1234.
Adams v. Rutherford, 13 Oreg. 78, 8 Pac. 896, p. 726.
Adams v. Sayre, 70 Ala. 318, p. 1761.
Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801, p. 2347.
Adams v. Stevens, 49 Me. 362, 366, p. 553.
Adams v. Sworder, 2 De Gex, J. & S. 44, p. 1754, 1755, 1769.
Adams v. Taunton, 5 Madd. 435, p. 2045.
Adams v. Vanderbeck, 148 Ind. 92, 45 N. E. 645, 47 N. E. 24, 62 Am. St. Rep. 497, p. 1327, 1329.
Adams v. Wheeler, 122 Ind. 251, 23 N. E. 760, p. 1541.
Adams v. Willimantic etc. Co., 46 Conn. 320, p. 2562, 2567.
Adams-Booth Co. v. Reid, 112 Fed. 106, p. 1037.
Adams Female Academy v. Adams, 65 N. H. 225, 18 Atl. 777, 23 Atl. 430, 6 L. R. A. 785, p. 1975.
Adamson v. Ayres, 5 N. J. Eq. 349, p. 827.
Adamson v. Souder, 205 Pa. St. 498, 55 Atl. 182, p. 1328.
Adams's Heirs v. Adams, 22 Vt. 50, p. 2290.
Adams's Trust, In re, L. R. 12 Ch. Div. 634, p. 2106.
Adams Vestry, In re, 24 Ch. Div. 199, 27 Ch. Div. 394, p. 1926.
Aday v. Echols, 18 Ala. 353, 52 Am. Dec. 225, p. 344.
Adderley v. Dixon, 1 Sim. & St. 607, 608, 610, p. 2601, 2760, 2761, 2762, 2763.
Addington v. Allen, 11 Wend. 374, p. 1588.
Addis v. Campbell, 4 Beav. 401, p. 1728, 1733.
Addison v. Bowie, 2 Bland, 606, 623, p. 847.
Addison v. Cox, L. R. 8 Ch. 76, 79, p. 1210, 1211, 2554.
Addison v. Dawson, 2 Vern. 678, p. 2033.
Additon v. Smith, 83 Me. 551, 22 Atl. 470, p. 2220, 2225.
Adee v. Hallet, 3 App. Div. 308, 38 N. Y. Supp. 273, p. 351.
Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905, p. 1027, 1028, 1325.
Aderholt v. Henry, 87 Ala. 416, 6 South. 625, 6 L. R. A. 451, p. 2451, 2452.
Adey v. Arnold, 2 De Gex, M. & G. 432, p. 2088.
Adkins v. Lewis, 5 Oreg. 202, p. 2428, 2429, 2430.
Adler v. Sargent, 109 Cal. 42, 41 Pac. 799, p. 1096, 1113.
Adler v. Van Kirk L. & C. Co., 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 133, p. 2372, 2400.
Adley v. Whitstable Co., 17 Ves. 315, 324, 329, p. 224, 316, 317, 331.
Adlington v. Cann, 3 Atk. 141, 145, 149, 151, p. 1898, 1902.
Adlum v. Yard, 1 Rawle, 163, 171, 18 Am. Dec. 608, p. 817, 855.
Adnam v. Cole, 6 Beav. 353, p. 890, 1939.
Adney v. Field, Amb. 654, p. 1468.
Adoue v. Strahan, 97 Fed. 961, p. 503.
Adoue v. Tankersley, (Tex. Civ. App.) 28 S. W. 346, p. 1073.
Adsit v. Adsit, 2 Johns. Ch. 448, 451, 7 Am. Dec. 539, p. 809, 810, 818, 820, 832, 836, 841, 849.
Advance Thresher Co. v. Esteb, 41 Oreg. 469, 69 Pac. 447, p. 1080, 1134, 1338, 1357.
Ætna Life Ins. Co. v. Corn, 89 Ill. 170, p. 1403, 1406.

Ætna Life Ins. Co. v. Hesser, 77 Iowa, 381, 42 N. W. 325, 14 Am. St. Rep. 297, 4 L. R. A. 122, p. 1100, 1119.
Ætna Nat. Bank v. Fourth Bk. of N. Y., 46 N. Y. 82, 87, 7 Am. Rep. 314, p. 1913, 2569.
Affleck v. Affleck, 3 Smale & G. 394, p. 1468.
Agar v. Fairfax, 17 Ves. 533, 2 Lead. Cas. Eq., 4th Am. ed., 865–919, 880, 894, p. 233, 2739, 2740.
Agard v. Valencia, 39 Cal. 292, 303, p. 458, 2719, 2769.
Agar-Ellis, In re, L. R. 10 Ch. Div. 49, p. 2618.
Agar-Ellis v. Lascelles, 24 Ch. Div. 317, p. 2616.
Agawam Canal Co. v. Southworth Mfg. Co., 121 Mass. 98, p. 542.
Agnew v. R. R. Co., 24 S. C. 18, 58 Am. Rep. 237, p. 1400, 1402, 1403.
Agnew v. Renwick, 27 S. C. 562, 4 S. E. 223, p. 1280.
Agra etc. Bank, In re, L. R. 2 Ch. 391, p. 1231.
Agricultural etc. Ass'n v. Brewster, 51 Tex. 257, p. 1999.
Ahern v. White, 39 Md. 409, p. 1281.
Aherne v. Hogan, 1 Dru. 310, p. 1674, 1780.
Ahlberg v. German Ins. Co., 94 Mich. 259, 53 N. W. 1102, p. 1158.
Ahl's Appeal, 129 Pa. St. 49, 78 Atl. 475, 477, p. 342.
Ahrend v. Odiorne, 118 Mass. 261, 19 Am. Rep. 449, p. 2503, 2505.
Ahrens v. Jones, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666, p. 2039.
Aiken v. Bruen, 21 Ind. 137, p. 1806, 2447.
Aiken v. Gale, 37 N. H. 501, 505, 511, p. 1411, 2440, 2447, 2451, 2453.
Aiken v. Milwaukee etc. R. R., 37 Wis. 469, p. 1403, 1404, 2448.
Aiken v. Smith, 1 Sneed, 304, p. 1850.
Aikman v. Sanborn, (Cal.) 52 Pac. 729, p. 760.
Aiman v. Stout, 42 Pa. St. 114, p. 1728.
Ainsley v. Mead, 3 Lans. 116, p. 67.
Ainslie v. Boynton, 2 Barb. 258, 263, p. 1226.
Ainslie v. Medlycott, 9 Ves. 12, 21, p. 1561, 1584, 1585.
Ainsworth v. Backus, 5 Hun, 414, p. 2045.
Ainsworth v. Wilding, (1900) 2 Ch. 315, 69 L. J. Ch. 695, 49 Wkly. Rep. 539, p. 282.
Aird's Estate, In re, L. R. 12 Ch. Div. 291, p. 910, 1543.
Airey v. Hall, 3 Smale & G. 315, p. 1872.
Aislabie v. Rice, 3 Madd. 256, p. 1686.
Aitchison v. Dixon, L. R. 10 Eq. 589, 597, 598, p. 2168, 2172.
Akerly v. Vilas, 3 Biss. 338, Fed. Cas. No. 120, p. 496.
Akerly v. Vilas, 21 Wis. 88, p. 1647.
Akers v. Luse, 56 Iowa, 346, 9 N. W. 303, p. 2500, 2514.
Akers v. Rowan, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705, p. 1152, 1172.
Akin v. Jones, 93 Tenn. 353, 42 Am. St. Rep. 921, 27 S. W. 669, 25 L. R. A. 523, p. 1914, 2569.
Akin v. Kellogg, 119 N. Y. 441, 23 N. E. 1046, p. 850, 852, 1564.
Alabama & Vicksburg Ry. Co. v. Jones, 73 Miss. 110, 55 Am. St. Rep. 488, 19 South. 105, p. 1479, 1484, 1496.
Alabama G. S. R. R. Co. v. S. & N. A. R. R. Co., 84 Ala. 570, 3 South. 286, 5 Am. St. Rep. 401, p. 1451.
Ala. etc. Co. v. Pettway, 24 Ala. 544, p. 2757.
Alafiiz v. Casenave, 91 Cal. 41, 27 Pac. 521, p. 2041.
Albany & Boston Min. Co. v. Auditor-General, 37 Mich. 391, p. 2678.
Albany & R. I. & S. Co. v. Southern Agric. Works, 76 Ga. 135, 2 Am. St. Rep. 26, p. 1857, 2013.
Albany City Ins. Co. v. Van Vranken, 42 How. Pr. 281, p. 2662.
Albany City Nat. Bank v. Maher, 19 Blatch. 184, 6 Fed. 417, p. 418, 456.
Albany City Savings Inst. v. Burdick, 87 N. Y. 39, p. 1510, 2725, 2726.
Albany F. Ins. Co. v. Bay, 4 N. Y. 9, p. 2152.
Albert v. Albert, 68 Md. 352, 12 Atl. 11, p. 796.
Albert v. Winn, 5 Md. 66, p. 1902.
Albertson v. Lauglin, 173 Pa. St. 525, 34 Atl. 216, 51 Am. St. Rep. 777, p. 1708.
Albin v. Lord, 39 N. H. 196, p. 2195.

Albion etc. Co. v. Martin, L. R. 1 Ch. Div. 580, p. 2080, 2084.
Albrecht v. C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157, p. 352, 2544.
Albretcht v. Sussman, 2 Ves. & B. 328, p. 319.
Albro v. Blume, 5 App. Div. 309, 39 N. Y. Supp. 215, p. 1068.
Alcock v. Sloper, 2 Mylne & K. 699, p. 2322.
Aldborough v. Trye, 7 Clark & F. 436, p. 1742.
Alden v. Diossy, 16 Hun, 311, p. 1705.
Alden v. Fouracie, 3 Swanst. 489, p. 2027.
Alden v. Garver, 32 Ill. 32, p. 2477.
Alden v. Trubee, 44 Conn. 455, p. 2754, 2756.
Alden v. White, (Ind. App.) 66 N. E. 509, p. 2392, 2396, 2397.
Alder-Goldman Commission Co. v. Hathcock, 55 Ark. 579, 18 S. W. 1048, p. 983.
Alderson, Ex parte, 1 Madd. 53, p. 195, 2561.
Alderson v. Ames, 6 Md. 52, 56, p. 1111, 1281, 2477.
Alderson v. Dole, 74 Fed. 29, 33 U. S. App. 460, 20 C. C. A. 280, p. 502.
Alderson v. White, 2 De Gex & J. 97, p. 2372, 2376.
Aldine Mfg. Co. v. Phillips, 118 Mich. 162, 76 N. W. 371, 74 Am. St. Rep. 380, p. 2467.
Aldrich v. Aldrich, 12 R. I. 141, p. 2049, 2051.
Aldrich v. Annin, 54 Mich. 230, 19 N. W. 964, p. 2275.
Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161, p. 1072.
Aldrich v. Cooper, 8 Ves. 382, 395, 2 Lead. Cas. Eq. 228, 255, 291, 305, p. 235, 2164, 2422, 2444, 2447, 2786, 2796.
Aldrich's Administrator v. Hapgood, 39 Vt. 617, p. 2796.
Aldridge v. Aldridge, 79 Ga. 71, 3 S. E. 619, p. 826.
Aldridge v. Aldridge, 120 N. Y. 614, 24 N. E. 1022, p. 1738.
Aldridge v. Dunn, 7 Blackf. 249, 41 Am. Dec. 224, p. 2511, 2518.
Aldridge v. Harper, 3 Moore & S. 518, p. 635.
Aldridge v. McClelland, 36 N. J. Eq. 288, p. 2089.
Aldridge v. Thompson, 2 Brown Ch. 149, p. 2650.
Alexander v. Alexander, 6 De Gex, M. & G. 593, p. 1925.
Alexander v. Alexander, 46 Ga. 283, p. 2005.
Alexander v. Alexander, 48 Ind. 559, p. 2268.
Alexander v. Alexander, 2 Ves. Sr. 640, p. 1656.
Alexander v. Automatic Telephone Co., [1900] 2 Ch. 56, reversing [1899] 2 Ch. 302, p. 2084.
Alexander v. Bouton, 55 Cal. 15, p. 2200.
Alexander v. Caldwell, 55 Ala. 517, p. 1327.
Alexander v. Crosbie, Lloyd & G. 145, p. 1515.
Alexander v. Duke of Wellington, 2 Russ. & M. 35, 1 Mylne & C. 556, p. 2473.
Alexander v. Ellison, 79 Ky. 148, p. 2480.
Alexander v. Fisher, 7 Ala. 514, p. 2681.
Alexander v. Hooks, 84 Ala. 605, 4 South. 417, p. 2534.
Alexander v. Leakin, 72 Md. 199, 19 Atl. 532, p. 2273.
Alexander v. Merrick, 121 Ill. 606, 13 N. E. 190, p. 652.
Alexander v. Mills, L. R. 6 Ch. 124, p. 2771.
Alexander v. Mortgage Co. of Scotland, 47 Fed. 131, 134, p. 273, 501.
Alexander v. Newton, 2 Gratt. 266, p. 1487.
Alexander v. Pendleton, 8 Cranch. 462, 468, p. 364, 385, 452, 1346, 1393.
Alexander v. Rea, 50 Ala. 450, p. 2726.
Alexander v. Relfe, 9 Mo. App. 133, p. 2662.
Alexander v. Steele, 84 Ala. 332, 4 South. 281, p. 2052.
Alexander v. Warrance, 17 Mo. 228, p. 1849.
Alexander v. Webster, 6 Md. 359, p. 1111.
Alexander v. Worthington, 5 Md. 471, p. 2224.
Alexandria Sav. Inst. v. Thomas, 29 Gratt. 483, p. 2383, 2388.

Aleyn v. Belchier, 1 Eden, 132, 1 Lead. Cas. Eq. 573, 578, 598, p. 1656.
Alford v. Moore, 15 W. Va. 597, p. 1470.
Alger v. Anderson, 92 Fed. 696, 700, 710, p. 341, 494.
Alger v. Kieth, 105 Fed. 105, 44 C. C. A. 371, p. 1623.
Alger v. North End Sav. Bank, 146 Mass. 418, 4 Am. St. Rep. 331, 15 N. E. 916, p. 1864, 1866.
Alger v. Scott, 54 N. Y. 14, p. 2561.
Alger v. Thacher, 19 Pick. 51, 31 Am. Dec. 119, p. 1688.
Allan v. Allan, 15 Ves. 131, 134–136, p. 262, 270, 295.
Allan v. Dallas etc. R. R., 3 Woods, 316, p. 2660.
Allcard v. Skinner, 36 Ch. D. 145, 187, p. 1759, 1780, 1787.
Allday v. Fletcher, 1 De Gex & J. 82, p. 2168, 2172.
Allegany & K. R. R. Co. v. Weidenfeld, 25 N. Y. Supp. 71, 76, 5 Misc. Rep. 43, p. 358, 364, 366.
Allen, Ex parte, 15 Mass. 58, p. 1728.
Allen, In re, 1 Ir. Eq. 455, p. 1142.
Allen v. Addington, 7 Wend. 9, 20, p. 1609.
Allen v. Allen, 47 Mich. 74, 10 N. W. 113, p. 1647.
Allen v. Allen, 75 Minn. 116, 77 N. W. 567, 74 Am. St. Rep. 442, p. 2231.
Allen v. Allen, 121 N. C. 328, 28 S. E. 513, p. 1097.
Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716, p. 892, 895, 900, 903, 914.
Allen v. Anderson, 5 Hare, 163, p. 789, 802.
Allen v. Anderson, 44 Ind. 395, p. 1395.
Allen v. Anthony, 1 Mer. 282, 284, p. 1001, 1018, 1025.
Allen v. Arkenburgh, 158 N. Y. 697, 53 N. E. 1122, p. 2039.
Allen v. Atkinson, 21 Mich. 351, p. 2771, 2775.
Allen v. Ayer, 26 Oreg. 589, 39 Pac. 1, p. 1371.
Allen v. Benners, 10 Phila. 10, p. 2679.
Allen v. Board of Freeholders, 13 N. J. Eq. 68, 74, p. 2683.
Allen v. Bolen, 114 N. C. 560, 18 S. E. 560, p. 1097.
Allen v. Cadwell, 55 Mich. 8, 20 N. W. 692, p. 1023.
Allen v. Callow, 3 Ves. 289, p. 888, 889.
Allen v. Caylor, 120 Ala. 251, 74 Am. St. Rep. 31, 24 South. 512, p. 1994.
Allen v. Chambers, 4 Ired. Eq. 125, p. 1904.
Allen v. City of Buffalo, 39 N. Y. 386, p. 2756.
Allen v. Clark, 2 Blackf. 343, p. 2268.
Allen v. Clark, 17 Pick. 47, p. 2440.
Allen v. Crouter, (N. J. Eq.) 54 Atl. 426, p. 1516.
Allen v. Curtis, 26 Conn. 456, p. 2125.
Allen v. Dallas etc. R. R., 3 Woods, 316, p. 2659.
Allen v. Dermott, 80 Mo. 56, p. 2424.
Allen v. Everly, 24 Ohio St. 97, 114, p. 2351.
Allen v. Galloway, 30 Fed. 466, p. 1482.
Allen v. Gates, 73 Vt. 222, 50 Atl. 1092, p. 1026, 1047, 2474, 2476.
Allen v. Gillette, 127 U. S. 596, 8 Sup. Ct. 1331, p. 1754.
Allen v. Halliday, 28 Fed. 261, p. 1065.
Allen v. Hamilton, 9 Gratt. 255, p. 2703.
Allen v. Hanks, 136 U. S. 300, 311, 10 Sup. Ct. 961, 34 L. ed. 414, p. 516.
Allen v. Hannum, 15 Kan. 625, p. 823, 857.
Allen v. Hart, 72 Ill. 104, p. 1583.
Allen v. Hawley, 66 Ill. 164, 168, p. 1284.
Allen v. Henley, 2 Lea, 141, p. 2796.
Allen v. Hill, 16 Cal. 113, p. 2656.
Allen v. Holden, 32 Ga. 418, p. 1145.
Allen v. Holding, 29 Ga. 485, 32 Ga. 418, p. 1104, 1145.
Allen v. Inhabitants of Jay, 60 Me. 124, 11 Am. Rep. 185, p. 555.
Allen v. Intendant etc. of La Fayette, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497, p. 401, 409, 448, 453.
Allen v. Jackson, 121 Ill. 567, 13 N. E. 840, p. 1782.
Allen v. Jackson, 122 Ill. 567, 13 N. E. 840, p. 2032.
Allen v. Jackson, L. R. 1 Ch. Div. 399, reversing L. R. 19 Eq. 631, p. 1681, 1684.

Allen v. Knight, 5 Hare, 272; affirmed in 11 Jur. 527, p. 1017, 1059, 1288, 1289, 1377.
Allen v. Lathrop, 46 Ga. 133, p. 2383.
Allen v. Loring, 34 Iowa, 499, p. 2500, 2518.
Allen v. Mandaville, 26 Miss. 397, 399, p. 1063, 1067.
Allen v. Martin, L. R. 20 Eq. 462, p. 2687, 2694.
Allen v. Martin, 61 Miss. 78, p. 1667.
Allen v. Mayor etc. 4 E. D. Smith, 404, p. 1477, 1511.
Allen v. McCalla, 25 Iowa, 464, 96 Am. Dec. 56, p. 1155.
Allen v. McGaugney, 31 Ark. 252, p. 2726.
Allen v. McPherson, 1 H. L. Cas. 191, 213, 214, 1 Phill. Ch. 133, 145, 5 Beav. 469, p. 1635, 1654.
Allen v. Merwin, 121 Mass. 378, p. 873.
Allen v. Moore, 30 Colo. 307, 70 Pac. 682, p. 1038.
Allen v. Moss, 27 Mo. 354, p. 1115.
Allen v. Patton, 83 Va. 255, 2 S. E. 143, p. 2488, 2494.
Allen v. Poole, 54 Miss. 323, 333, p. 1007, 1050, 1063, 1067, 1072, 1075, 1146, 1152, 1166.
Allen v. Pray, 12 Me. 138, 142, p. 824.
Allen v. Richardson, L. R. 13 Ch. Div. 524, p. 1539.
Allen v. Root, 39 Tex. 589, p. 1148.
Allen v. Seckham, L. R. 11 Ch. Div. 790, 794, p. 1014.
Allen v. Smith, 29 Ark. 74, p. 464, 1463, 1464.
Allen v. Smitherman, 6 Ired. Eq. 341, p. 1254.
Allen v. South Boston R. R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716, p. 1175.
Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568, p. 1944, 1976.
Allen v. Stewart, 7 Del. Ch. 287, 44 Atl. 786, p. 1221.
Allen v. Stingel, 95 Mich. 195, 54 N. W. 880, p. 986.
Allen v. Tiffany, 53 Cal. 16, p. 2262, 2263.
Allen v. Walker, L. R. 5 Ex. 187, p. 2140.
Allen v. Watt, 79 Ill. 284, p. 1230, 1256.
Allen v. Webb, 64 Ill. 342, p. 2769.
Allen v. Withrow, 110 U. S. 130, 3 Sup. Ct. 517, 28 L. ed. 90, p. 1873.
Allen's Estate, 1 Watts & S. 383, p. 1525.
Allen's Lessee v. Parish, 3 Ohio, 107, p. 1104.
Allen West Comm. Co. v. Brown, 69 Ark. 163, 61 S. W. 913, p. 1099.
Allerton v. Allerton, 50 N. Y. 670, p. 1625.
Alley v. Deschamps, 13 Ves. 225, p. 2779.
Alleyn v. Alleyn, 2 Ves. Sr. 37, p. 875.
Allfrey v. Allfrey, 1 Macn. & G. 87, 99, p. 1648, 1776.
Allhusen v. Whittell, L. R. 4 Eq. 295, p. 2321.
Alliance Bank, Ex parte, L. R. 4 Ch. 423, p. 2478.
Alliance Trust Co. v. Nettleton Hardwood Co., 74 Miss. 585, 21 South. 396, 36 L. R. A. 155, 60 Am. St. Rep. 531, p. 1073.
Alliance Trust Co. v. O'Brien, 32 Oreg. 333, 50 Pac. 801, 51 Pac. 640, p. 1023, 1045.
Allin v. Millison, 72 Ill. 201, p. 1565.
Alling v. Chatfield, 42 Conn. 276, p. 812, 820, 828, 829.
Allis v. Billings, 6 Met. 415, 39 Am. Dec. 744, p. 1725.
Allis v. Hall, (Conn.) 56 Atl. 637, p. 1541.
Allis v. Jones, 45 Fed. 148, p. 635, 2474, 2475.
Allison v. Allison, 7 Dana, 90, p. 1636.
Allison v. Cocke's Ex'rs, 106 Ky. 763, 51 S. W. 593, p. 760.
Allison v. Drake, 145 Ill. 500, 32 N. E. 537, p. 1067, 1069.
Allison v. Dunwody, 100 Ga. 51, 28 S. E. 651, p. 760.
Allison v. Hagar, 12 Nev. 38, p. 1346.
Allison v. Herring, 9 Sim. 583, p. 2798.
Allison v. Louisville etc. R. R. Co., 9 Bush, 247, 252, p. 408, 409.
Allison v. Pitkin, 11 Tex. Civ. App. 655, 33 S. W. 293, p. 1034, 1048.
Allison v. Porter, 29 Ohio St. 136, p. 2197.
Allison v. Thomas, 72 Cal. 562, 1 Am. St. Rep. 89, p. 1343.

Allison v. Wilson's Ex'r, 13 Serg. & R. 330, 332, p. 185, 621.
Allis's Estate, In re, (Wis.) 101 N. W. 365, p. 2071.
Allore v. Jewell, 94 U. S. 506, p. 1647, 1729, 1730, 2729.
Allsopp v. Wheatcroft, L. R. 15 Eq. 59, p. 1688.
Almond v. Almond, 4 Rand. 662, 15 Am. Dec. 781, p. 2176.
Almony v. Hicks, 3 Head, 39, 42, p. 571, 2754, 2756.
Almy v. Jones, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414, p. 1947, 1968, 1980.
Alsop v. Bowers, 76 N. C. 168, p. 2225.
Alsop's Appeal, 9 Pa. St. 374, p. 909, 2208, 2212.
Alstin v. Cundiff, 52 Tex. 465, p. 1331.
Alston, Ex parte, L. R. 4 Ch. 168, p. 2786.
Alston v. Marshall, 112 Ala. 638, 20 South. 850, p. 1330.
Alston v. Rowles, 13 Fla. 117, p. 2190.
Alt v. Alt, 4 Giff. 84, p. 2592.
Alter's Appeal, 67 Pa. St. 341, 5 Am. Rep. 433, p. 1544.
Altman v. Royal Aqua. Soc., L. R. 3 Ch. Div. 228, p. 1690, 2675.
Alton v. First Nat. Bank, 157 Mass. 341, 32 N. E. 228, 34 Am. St. Rep. 285, 18 L. R. A. 144, p. 1503.
Alton v. Medlicot, 2 Ves. Sr. 417, p. 2219.
Alvanley v. Kinnaird, 2 Macn. & G. 1, 7, p. 1517, 1518, 1539.
Alvis v. Morrison, 63 Ill. 181, 14 Am. Rep. 117, p. 1099, 1119.
Alvord v. Smith, 63 Ind. 58, p. 1676.
Alvord v. Spring Valley Gold Co., 106 Cal. 547, 40 Pac. 27, p. 2405.
Amanda Consol. G. M. Co. v. People's M. & M. Co., 28 Colo. 251, 64 Pac. 218, p. 731, 749, 750.
Ambler v. Norton, 4 Hen. & M. 23, 44, p. 821.
Ambrose, In re, 187 Pa. St. 178, 41 Atl. 28, p. 1108.
Ambrose v. Ambrose, 1 P. Wms. 322, p. 1901.
Ambrose v. Huntington, 34 Oreg. 484, 56 Pac. 513, p. 1023.
Ambrouse's Heirs v. Keller, 22 Gratt. 769, p. 2762, 2774.
Amelung v. Seekamp, 9 Gill & J. 468, 472, p. 568.
Ameraman v. Wiles, 24 N. J. Eq. 13, p. 2497.
American Academy v. Harvard College, 12 Gray, 582, p. 176, 1933, 1979.
American Ass'n v. Eastern Kentucky Land Co., 68 Fed. 721, p. 501.
American Ass'n v. Innis, 109 Ky. 595, 60 S. W. 388, p. 659.
American Bank v. Wall, 56 Me. 167, p. 556.
American Bible Soc. v. American Tract Soc., 62 N. J. Eq. 219, 50 Atl. 67, p. 1960, 1975.
Am. Bible Soc. v. Marshall, 15 Ohio St. 537, p. 1976.
American Bible Soc. v. Wetmore, 17 Conn. 181, p. 1972.
American Biscuit Co. v. Klotz, 44 Fed. 721, p. 669, 1687.
American B. & L. Ass'n v. Rainbolt, 48 Nebr. 434, 67 N. W. 493, p. 1155.
American Buttonhole etc. Co. v. Loan Ass'n, 61 Iowa, 464, 16 N. W. 527, p. 2435.
American Cent. Ins. Co. v. Donlon, (Colo. App.) 66 Pac. 249, p. 1158.
American Cent. Ins. Co. v. Landau, 56 N. J. Eq. 513, 39 Atl. 400, p. 358, 360, 413, 426.
American Colonization Soc. v. Wade, 8 Smedes & M. 610, p. 2278.
American Cotton Co. v. Collier, 30 Tex. Civ. App. 105, 69 S. W. 1021, p. 1566, 1639.
American Exch. Nat. Bank v. Fackler, 49 Nebr. 713, 68 N. W. 1039, p. 1391.
American Fire Ins. Co. v. Landfare, 56 Nebr. 482, 76 N. W. 1068, p. 988.
American Freehold L. & M. Co. v. Jefferson, 69 Miss. 770, 12 South. 464, 30 Am. St. Rep. 587, p. 648.
American Freehold L. & M. Co. v. Sewell, 92 Ala. 163, 9 South. 143, 13 L. R. A. 299, p. 648.
American Freehold Land Mortg. Co. v. Felder, 44 S. C. 478, 22 S. E. 598, p. 1155.
American Freehold L. M. Co. v. Walker, 31 Fed. 103, p. 960, 1468, 1469.

American Inv. Co. v. Coulter, 8 Kan. App. 841, 61 Pac. 820, p. 1100, 1124.
American Mortgage Co. v. Hutchinson, 19 Oreg. 334, 24 Pac. 515, 517, p. 1338, 1339, 1343.
American Mut. Life Ins. Co. v. Bertram, (Ind.) 70 N. E. 258, p. 1158.
American Ore Mach. Co. v. Atlas Cement Co., 110 Fed. 53, p. 263.
American Press Ass'n v. Brantingham, 78 N. Y. Supp. 305, 75 App. Div. 435, p. 1245.
American Soda Fountain v. Futrall, (Ark.) 84 S. W. 505, p. 2031, 2034.
American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, affirming 72 Fed. 470, 38 U. S. App. 254, 18 C. C. A. 644, p. 1174.
Ames v. Ames, 1 Cin. Rep. 559, p. 653.
Ames v. Clark, 106 Mass. 573, p. 1845.
Ames v. Foster, 42 N. H. 381, p. 2195.
Ames v. Heslet, 19 Mont. 188, 47 Pac. 805, 61 Am. St. Rep. 496, p. 2013.
Ames v. King, 2 Gray, 379, p. 2690.
Ames v. Miller, (Nebr.) 91 N. W. 250, p. 1102, 1303.
Ames v. N. J. F. Co., 12 N. J. Eq. 68, 72 Am. Dec. 385, p. 250.
Ames v. New York Union Ins. Co., 14 N. Y. 253, p. 1152, 1168.
Ames v. Richardson, 29 Minn. 330, 13 N. W. 137, p. 604.
Ames v. Scudder, 83 Mo. 189, 11 Mo. App. 168, p. 2089.
Amick v. Ellis, 53 W. Va. 421, 44 S. E. 257, p. 343.
Amick v. Woodworth, 58 Ohio St. 86, 50 N. E. 437, p. 1105, 1115, 2424.
Amis v. Myers, 16 How. 492, 493, p. 147, 149.
Amis v. Witt, 33 Beav. 619, p. 2236.
Amler v. Amler, 3 Ves. 583, p. 2309.
Ammon's Appeal, 63 Pa. St. 284, p. 1803, 1804.
Amory v. Attorney-General, 179 Mass. 89, 60 N. E. 391, p. 1963, 1966, 1979.
Amory v. Lawrence, 3 Cliff. 523, Fed. Cas. No. 336, p. 2380.
Amory v. Lord, 9 N. Y. 403, p. 1895.
Amos v. Richardson, 29 Minn. 330, p. 1255.
Amoskeag Mfg. Co. v. Spear, 2 Sand. 599, p. 2690.
Amphlett v. Hibbard, 29 Mich. 298, p. 1285.
Amphlett v. Parke, 2 Russ. & M. 221, p. 2326.
Ancher v. Bank of England, Dough. 637, 639, p. 1218, 1382.
Andel v. Starkel, 192 Ill. 206, 61 N. E. 356, p. 381.
Andersen v. Andersen, (Nebr.) 96 N. W. 276, p. 2280, 2300.
Anderson v. Abbott, 23 Beav. 457, p. 784, 786, 845.
Anderson v. Anderson, 2 Mylne & K. 427, p. 2148, 2161.
Anderson v. Anderson, 112 N. Y. 104, 19 N. E. 427, 2 L. R. A. 175, p. 2303.
Anderson v. Anderson Food Co., (N. J. Eq.) 57 Atl. 489, p. 1516.
Anderson v. Armstead, 69 Ill. 452, 454, p. 1429, 1442, 1443, 1444.
Anderson v. Bank of Br. Columbia, L. R. 2 Ch. Div. 644, p. 249, 253, 277, 278, 279.
Anderson v. Baughman, 7 Mich. 69, 74 Am. Dec. 699, p. 1096, 1125.
Anderson v. Baumgartner, 27 Mo. 80, p. 2396, 2417.
Anderson v. Blood, 152 N. Y. 285, 46 N. E. 493, 57 Am. St. Rep. 515, p. 987.
Anderson v. Brinser, 129 Pa. St. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205, p. 1026, 1047.
Anderson v. Burwell, 6 Gratt. 405, p. 1647.
Anderson v. Butler, 31 S. C. 183, 9 S. E. 797, 5 L. R. A. 166, p. 1754.
Anderson v. Carkins, 135 U. S. 483, 10 Sup. Ct. 905, p. 1696.
Anderson v. Crist, 113 Ind. 65, 15 N. E. 9, p. 1909.
Anderson v. Daly, 38 App. Div. 505, 56 N. Y. Supp. 511, p. 1838.
Anderson v. Dawson, 15 Ves. 532, p. 2156.
Anderson v. Donnell, 66 Ind. 150, p. 2499, 2513.
Anderson v. Eggers, (N. J. Eq.) 49 Atl. 578, reversing 61 N. J. Eq. 85, 47 Atl. 727, p. 1629.
Anderson v. Green, 7 J. J. Marsh. 448, 23 Am. Dec. 417, p. 1806.

Anderson v. Guichard, 9 Hare, 275, p. 2655.
Anderson v. Harvey's Heirs, 10 Gratt. 386, p. 2694.
Anderson v. Hunn, 5 Hun, 79, p. 230, 355, 586.
Anderson v. Kinley, 90 Iowa, 554, 58 N. W. 909, p. 1156.
Anderson v. Lemon, 8 N. Y. 236, 4 Sand. 552, p. 2028.
Anderson v. Lincoln, 5 How. (Miss.) 279, 284, p. 215, 219.
Anderson v. Little, 26 N. J. Eq. 144, p. 653.
Anderson v. McNeal, (Miss.) 34 South. 1, p. 652.
Anderson v. Merideth, 82 Ky. 564, 565, 571, p. 672, 1718.
Anderson v. Mossy Creek Woolen Mills Co., 100 Va. 420, 41 S. E. 854, p. 983.
Anderson v. Nagle, 12 W. Va. 98, p. 1272.
Anderson v. Nicholas, 28 N. Y. 600, p. 1236, 1240.
Anderson v. Pacific Bk., 112 Cal. 598, 53 Am. St. Rep. 228, 44 Pac. 1063, 32 L. R. A. 479, p. 1915.
Anderson v. Piercy, 20 W. Va. 282, p. 2065.
Anderson v. Pignet, L. R. 8 Ch. 180, 187, p. 1411.
Anderson v. Pignet, L. R. 11 Eq. 329, p. 2735.
Anderson v. Pollard, 62 Ga. 46, p. 2608.
Anderson v. Powell, 44 Iowa, 20, p. 2656.
Anderson v. Rainey, 100 N. C. 321, 5 S. E. 182, p. 1597.
Anderson v. Reid, 14 App. D. C. 54, 73, p. 2481, 2482.
Anderson v. Roberts, 18 Johns. 515, 9 Am. Dec. 235, reversing 3 Johns. Ch. 371, 377, p. 1384.
Anderson v. Roberts, 147 Mo. 486, 48 S. W. 847, p. 2060.
Anderson v. Simpson, 21 Iowa, 399, p. 2781.
Anderson v. Spencer, 51 Miss. 869, p. 2536.
Anderson v. Wilkinson, 10 Smedes & M. 601, p. 2642.
Anderson's Appeal, 36 Pa. St. 476, p. 825, 855.
Anding v. Davis, 38 Miss. 574, 77 Am. Dec. 658, p. 1898.
Andrew v. Frierson, 134 Ala. 626, 33 South. 6, p. 310.
Andrew v. Newcomb, 32 N. Y. 417, 420, p. 2472.
Andrew v. New York Bible Soc., 4 Sand. 156, p. 1967.
Andrew v. Spurr, 8 Allen, 412, p. 1516.
Andrews, In re, [1902] 2 Ch. 394, p. 2237.
Andrews, Matter of, 1 Johns. Ch. 99, p. 2612.
Andrews v. Andrews, 110 Ill. 223, p. 1940, 1966, 1973.
Andrews v. Andrews, 114 Iowa, 524, 87 N. W. 494, p. 1996.
Andrews v. Andrews, 81 Me. 337, 17 Atl. 166, p. 1516.
Andrews v. Bank of Cape Ann, 3 Allen, 313, p. 1919.
Andrews v. Bull, 56 Pa. St. 343, p. 2774.
Andrews v. Berry, 3 Anstr. 634, 635, p. 276.
Andrews v. Brown, 3 Cush. 130, p. 345.
Andrews v. Burns, 11 Ala. 691, p. 1104.
Andrews v. Essex Ins. Co., 3 Mason, 6, p. 1516.
Andrews v. Frierson, 134 Ala. 626, 33 South. 6, p. 2565.
Andrews v. Gillespie, 47 N. Y. 487, 490, p. 93, 1225, 1510.
Andrews v. Hart, 17 Wis. 297, p. 2417.
Andrews v. Hobgood, 1 Lea, 693, p. 2393.
Andrews v. Hobson, 23 Ala. 219, p. 1872.
Andrews v. Huckabee, 30 Ala. 143, p. 215.
Andrews v. Hyde, 3 Cliff. 516, Fed. Cas. No. 377, p. 2380.
Andrews v. Jones, 10 Ala. 400, 401, p. 1775, 2169.
Andrews v. Lyons, 11 Allen, 349, p. 1562.
Andrews v. Mathews, 59 Ga. 466, p. 1272.
Andrews v. McCoy, 8 Ala. 920, 42 Am. Dec. 669, p. 1226.
Andrews v. Moen, 162 Mass. 294, 38 N. E. 505, p. 217.

Andrews v. National Foundry & Pipe Works, 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153, p. 1081.
Andrews v. Powys, 2 Brown Parl. C. 504, p. 1635.
Andrews v. Salt, L. R. 8 Ch. 622, p. 2618.
Andrews v. Solomon, 1 Pet. C. C. 356, p. 514, 515.
Andrews v. Wolcott, 16 Barb. 21, p. 2407.
Andrews v. Worcester N. & R. R. Co., 159 Mass. 64, 33 N. E. 1109, p. 1220, 1222.
Andrews Bros. Co. v. Youngstown Coke Co., 39 Fed. 353, p. 518.
Androscoggin etc. R. R. v. Androscoggin R. R., 49 Me. 392, 403, p. 554, 555.
Andrus v. Coleman, 82 Ill. 26, 25 Am. Rep. 289, p. 2499, 2514.
Andrus v. Vreeland, 29 N. J. Eq. 394, p. 1398.
Anewalt's Appeal, 42 Pa. St. 414, p. 2309.
Angel v. Boner, 38 Barb. 425, p. 1402.
Angel v. Smith, 9 Ves. 335, p. 2658.
Angell, Petition of, 13 R. I. 630, p. 1886, 1887.
Angell v. Angell, 1 Sim. & St. 83, 93, p. 260, 294, 296, 297, 298.
Angell v. Draper, 1 Vern. 399, p. 262.
Angell v. Hadden, 15 Ves. 244, p. 2637.
Angell v. McCullough, 12 R. I. 47, p. 2198.
Angerstein, Ex parte, L. R. 9 Ch. 479, p. 2098.
Angier v. Webber, 14 Allen, 211, 92 Am. Dec. 748, p. 542.
Anglo-American Land M. & A. Co. v. Bush, 84 Iowa, 272, 50 N. W. 1063, p. 2395.
Anglo-Italian Bank v. Davies, L. R. 9 Ch. Div. 275, p. 2659, 2661.
Angus v. Clifford, [1891] 2 Ch. 449, p. 1578.
Angus v. Noble, 73 Conn. 56, 46 Atl. 278, p. 1911.
Anketel v. Converse, 17 Ohio St. 11, 91 Am. Dec. 115, p. 1160, 2502, 2513.
Annan v. Hays, 85 Md. 505, 37 Atl. 20, p. 1106, 1130.
Annand v. Honeywood, 1 Vern. 345, p. 2305.
Annapolis etc. R. R. v. Gantt, 39 Md. 115, p. 2348.
Annely v. De Saussure, 12 S. C. 488, p. 2361.
Annie C. Gold M. Co. v. Marks, 13 Colo. App. 248, 58 Pac. 404, p. 1096, 1124.
Annis v. Butterfield, (Me.) 58 Atl. 898, p. 2555.
Anniston Nat. Bank v. School Committee, 118 N. C. 383, 24 S. E. 792, p. 1231.
Anonymous, 1 Atk. 491, p. 181, 2203, 2204.
Anonymous, 3 Atk. 644, p. 264.
Anonymous, 2 Ch. Cas. 207, p. 1962.
Anonymous, 67 N. Y. 598, p. 1615.
Anonymous, 3 P. Wms. 389, n. p. 1833.
Anonymous, 2 Show. 282, p. 644.
Anonymous, 2 Sim. N. S. 54, p. 2616.
Anonymous, 3 Swanston, 79, n.(a), Ames' Cas. on Trusts, 508, p. 2059.
Anonymous, 2 Ves. 451, p. 258.
Anonymous, 12 Ves. 4, p. 2658.
Anonymous, 2 Ves. Sr. 620, p. 284.
Anonymous, 5 Vin. Abr. 522, pl. 38, p. 1525.
Anonymous, Year Book, 5 Edw. IV., 7, pl. 18, Ames' Cas. on Trusts, 352, p. 1848.
Anonymous, 2 Young & C. 310, p. 284.
Anstice v. Brown, 6 Paige, 448, p. 2316.
Anstruther v. Adair, 2 Mylne & K. 513, p. 2172.
Anthony v. Anthony, 23 Ark. 479, p. 2369.
Anthony v. Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657, p. 1508.
Anthony v. Dunlap, 8 Cal. 26, p. 458, 592, 2716, 2719.
Anthony v. Leftwich, 3 Rand. 238, 258, p. 1603, 1607.
Anthony v. Masters, 28 Ind. App. 239, 62 N. E. 505, p. 1226, 1229, 1651.
Anthony v. Wheeler, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. E. 494, p. 1007, 1008.
Antones v. Eslava, 9 Port. 527, p. 1972.
Antrobus v. Davidson, 3 Mer. 569, p. 2793.
Antrobus v. Smith, 12 Ves. 39, p. 961, 1871, 1877.
Apie v. Castleman, 32 Fed. 511, p. 2078.

Aplin, In re, 13 Week. Rep. 1062, p. 795.
Appelman v. Gara, 22 Colo. 397, 45 Pac. 366, p. 1096, 1128.
Apperson v. Bolton, 29 Ark. 418, p. 812, 821, 828.
Apperson v. Burgett, 33 Ark. 328, p. 1271.
Apperson v. Cottrell, 3 Port. 51, 29 Am. Dec. 239, p. 2256, 2257.
Apperson v. Gogin, 3 Ill. App. 48, p. 2765.
Apple v. Allen, 3 Jones Eq. 120, p. 1847, 2159, 2161.
Appleby, In re, [1903] 1 Ch. 565, p. 2331.
Appleton v. American Malting Co., (N. J. Eq.) 54 Atl. 454, p. 2127.
Appleton v. Bowley, L. R. 8 Eq. 139, p. 1849, 2162, 2228.
Appleton v. Boyd, 7 Mass. 131, 134, p. 681.
Apthorp v. Comstock, 2 Paige, 482, p. 2752.
A. R. Beck Lumber Co. v. Rupp, 188 Ill. 562, 80 Am. St. Rep. 190, 59 N. E. 429, p. 1033, 1048, 1274.
Arbuckle v. Gates, 95 Va. 802, 30 S. E. 496, p. 994.
Arbuckle v. Kirkpatrick, 98 Tenn. 221, 60 Am. St. Rep. 854, 39 S. W. 3, 36 L. R. A. 285, p. 1914.
Arbuthnot v. Norton, 5 Moore P. C. C. 219, p. 2554.
Archambea v. Green, 21 Minn. 520, p. 2376.
Archbold v. Scully, 9 H. L. Cas. 360, p. 1787.
Archdeacon v. Bowes, 13 Price, 353, p. 2431.
Archer v. American Water Works, 50 N. J. Eq. 33, 24 Atl. 508, p. 2055.
Archer v. Hale, 1 Moore & P. 285, p. 635.
Archer v. Hudson, 15 L. J. Ch. 211, p. 1773.
Archer v. Jones, 26 Miss. 583, p. 2278.
Archer v. Meadows, 33 Wis. 166, p. 1635.
Archer v. Morse, 2 Vern. 8, p. 1635.
Archibald v. Mutual Life Ins. Co., 38 Wis. 542, p. 2550.
Arcularius v. Geisenhainer, 3 Bradf. 64, 75, p. 1926.
Arden v. Patterson, 5 Johns. Ch. 44, p. 1703, 2555.
Ardesco Oil Co. v. N. A. Oil etc. Co., 66 Pa. St. 375, 381, p. 2793.
Ardesoife v. Bennett, 1 Dick. 463, p. 782, 794.
Ardesoife v. Bennett, 2 Dick. 465, p. 845, 854, 855, 857.
Ardglasse v. Muschamp, 1 Vern. 236, p. 1671.
Argall v. Cook, 43 Conn. 160, p. 1791.
Argo v. Coffin, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86, p. 1729.
Arguello, In re, 97 Cal. 196, 31 Pac. 937, Ames' Cas. on Trusts, 482, p. 2058.
Arguello v. Bours, 67 Cal. 447, 8 Pac. 49, p. 566.
Arkwright v. Newbold, 17 Ch. Div. 320, p. 1578.
Arlin v. Brown, 44 N. H. 102, p. 2503, 2509.
Arlington Mill & Elevator Co. v. Yates, 57 Nebr. 286, 77 N. W. 677, p. 2403.
Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 N. W. 303, p. 1390, 1918.
Armes v. Bigelow, 3 McAr. 442, p. 2780.
Armistead's Ex'rs v. Hart, 97 Va. 316, 33 S. E. 616, p. 2055.
Armitage v. Mt. Sterling Oil & Gas Co., (Ky.) 80 S. W. 177, p. 765.
Armitage v. Wadsworth, 1 Madd. 189, 192, p. 1635, 2727.
Armitage v. Wickliffe, 12 B. Mon. 488, 494, p. 2749.
Armor v. Spalding, 14 Colo. 302, 23 Pac. 789, p. 2380.
Armory v. Lord, 9 N. Y. 403, p. 2110.
Armory v. Reilly, 9 Ind. 490, p. 2528.
Armour v. Alexander, 10 Paige, 571, p. 2028.
Armour v. Michigan Central R. R., 65 Ill. 111, 121–124, 22 Am. Rep. 603, p. 1626.
Armstrong v. Armstrong, L. R. 7 Eq. 518, p. 1921.
Armstrong v. Armstrong, L. R. 12 Eq. 614, p. 2662.
Armstrong v. Armstrong, L. R. 18 Eq. 541, p. 2049.
Armstrong v. Auslin, 45 S. C. 69, 22 S. E. 763, 29 L. R. A. 772, p. 1105, 1118, 1119.

Armstrong v. Brown, 5 Utah, 176, 13 Pac. 364, p. 1066, 1078.
Armstrong v. Burkitt, (Tex. Civ. App.) 34 S. W. 759, p. 2470.
Armstrong v. Carwile, 56 S. C. 463, 35 S. E. 196, p. 1077, 1087, 1279.
Armstrong v. Cooper, 11 Ill. 560, p. 2267.
Armstrong v. Elliott, 29 Mich. 485, p. 1761.
Armstrong v. Gilchrist, 2 Johns. Cas. 424, 430, 431, p. 331, 333, 338.
Armstrong v. Huntons, 1 Rob. (Va.) 323, p. 214.
Armstrong v. Mayer, (Nebr.) 95 N. W. 51, p. 354.
Armstrong v. Morrill, 14 Wall. 120, 139, p. 2045.
Armstrong v. Reeves, 25 L. R. Ir. 325, p. 1947.
Armstrong v. Ross, 20 N. J. Eq. 109, p. 1265, 2196, 2501, 2513.
Armstrong v. Stone, 9 Gratt. 102, 106, p. 2612.
Armstrong v. Stovall, 26 Miss. 575, p. 2155.
Armstrong's Appeal, 63 Pa. St. 372, p. 2218, 2219, 2221, 2223, 2224.
Arnaud v. Grigg, 29 N. J. Eq. 482, p. 2414.
Arndt v. Williams, 16 How. Pr. 244, p. 2716.
Arnett v. Bailey, 60 Ala. 435, p. 2754, 2756.
Arnett's Committee v. Owens, 23 Ky. Law Rep. 1409, 65 S. W. 151, p. 1344, 1725.
Arnison v. Smith, 41 Ch. Div. 348, p. 1567, 1573.
Arnold v. Arnold, 2 Dev. Eq. 467, p. 1520.
Arnold v. Bright, 41 Mich. 207, p. 2729.
Arnold v. Chapman, 1 Ves. Sr. 108, p. 1986.
Arnold v. Cord, 16 Ind. 177, p. 2037.
Arnold v. Dean, 61 Tex. 249, p. 2487.
Arnold v. Dixon, L. R. 19 Eq. 113, p. 2320.
Arnold v. Ellis, 20 Tex. Civ. App. 262, 48 S. W. 883, p. 1995.
Arnold v. Foot, 7 B. Mon. 66, p. 2434.
Arnold v. Gilbert, 5 Barb. 190, 195, p. 2306, 2325.
Arnold v. Gilbert, 3 Sand. Ch. 531, 556, p. 2051, 2325.
Arnold v. Green, 116 N. Y. 566, 23 N. E. 1, p. 2421, 2424.
Arnold v. Hardwick, 7 Sim. 343, p. 1657.
Arnold v. Harris, (Tenn. Ch. App.) 52 S. W. 715, p. 1993, 1995.
Arnold v. Kempstead, Amb. 466, 2 Eden, 236, p. 833, 835.
Arnold v. Morris, 7 Daly, 498, p. 2470, 2474, 2586.
Arnold v. Patrick, 6 Paige, 310, 316, p. 1269, 1278, 1381.
Arnold v. Pawtuxet Val. Water Co., 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602, p. 253.
Arnold v. Randall, (Wis.) 98 N. W. 239, p. 2402.
Arnold v. Richmond Iron Works, 1 Gray, 434, p. 1725.
Arnold v. Smith, 80 Ind. 417, 422, 423, p. 1080, 1347.
Arnold v. Woodhams, L. R. 16 Eq. 29, p. 1657, 2159.
Arnold's Devisees v. Arnold's Ex'r, (Ky.) 17 S. W. 203, p. 1074.
Arnold's Petition, 15 R. I. 15, 23 Atl. 31, p. 1066, 1072, 1073, 1076.
Arnot v. Pittston etc. Co., 68 N. Y. 558, 23 Am. Rep. 190, p. 1689.
Arpshaw v. Arpshaw, 2 Hen. & M. 381, 3 Am. Dec. 632, p. 855.
Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718, p. 2472.
Arrington v. Arrington, 114 N. C. 151, 19 S. E. 351, p. 1073, 1087.
Arrington v. Roper, 3 Tenn. Ch. 572, p. 2198.
Arrison v. Harmstead, 2 Pa. St. 191, 197, p. 1185.
Arrowsmith v. Gleason, 129 U. S. 86, 98, 100, 9 Sup. Ct. 237, 241, 32 L. ed. 630, p. 507, 509, 2294.
Arthington v. Fawkes, 2 Vern. 356, p. 362, 394, 455.
Arthur v. Case, 1 Paige, 447, p. 2686.
Arthur v. Homestead F. Ins. Co., 78 N. Y. 462, 34 Am. Rep. 550, p. 1539, 2725.
Arthur v. Screven, 39 S. C. 77, 17 S. E. 640, p. 1105, 1114.
Arthur Average Ass'n, In re, L. R. 10 Ch. 542, p. 667, 668, 1696.
Artz v. Grove, 21 Md. 456, p. 2373.
Artz v. Yeager, 30 Ind. App. 677, 66 N. E. 917, p. 1300, 1301, 1400.

Arundel v. Trevillian, 1 Ch. Rep. 87, p. 1678.
Arundell v. Phillpot, 2 Vern. 69, p. 1467.
Asay v. Allen, 124 Ill. 391, 16 N. E. 865, p. 2082.
Asche v. Asche, 113 N. Y. 232, 233, 21 N. E. 70, p. 785, 821, 1398, 2310.
Ash v. Bowen, 10 Phila. 96, p. 1830, 1909, 2159.
Ashbrook v. Ryon's Adm'r, 2 Bush, 228, 92 Am. Dec. 481, p. 2236, 2237.
Ashburner v. Macguire, 2 Brown Ch. 108, 2 Lead. Cas. Eq., 4th Am. ed., 600, 620–634, 662–674, p. 2206, 2211, 2214, 2216.
Ashburner v. Parrish, 81 Pa. St. 52, p. 1760.
Ashburnham v. Ashburnham, 13 Jur. 1, 111, p. 847.
Ashbury v. Beasly, 17 Weekly Rep. 638, p. 2058.
Ashby v. Blackwell, 2 Eden, 299, 302, Amb. 503, p. 1252, 2067, 2784.
Ashby v. Holman, 55 N. C. 124, 32 S. E. 992, p. 2287.
Ashby v. Palmer, 1 Mer. 296, p. 621, 1853, 2315, 2331.
Ashcraft v. DeArmond, 44 Iowa, 229, p. 1725.
Ashcraft v. Little, 4 Ired. Eq. 236, p. 2146.
Ashe v. Johnson's Adm'r, 2 Jones Eq. 149, p. 2762, 2764, 2765.
Ashelford v. Willis, 194 Ill. 492, 62 N. E. 817, p. 1039.
Ashhurst v. Mason, L. R. 20 Eq. 225, p. 2090.
Ashley v. Baillie, 2 Ves. Sr. 368, p. 1166.
Ashley v. Cunningham, 16 Ark. 168, p. 1065, 1070.
Ashley v. Holman, 15 S. C. 97, p. 2624.
Ashley's Case, L. R. 9 Eq. 263, p. 1453, 1574, 1788.
Ashmead v. Reynolds, 134 Ind. 139, 33 N. E. 763, 39 Am. St. Rep. 238, p. 1729, 1738.
Ashmore v. Whatley, 99 Ga. 150, 24 S. E. 941, p. 1347.
Ash's Appeal, 80 Pa. St. 497, p. 1830.
Ashton, In re, [1897] 2 Ch. 574, p. 900.
Ashton v. Corrigan, L. R. 13 Eq. 76, p. 2761.
Ashton v. Dashaway Ass'n, 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809, p. 2127.
Ashton v. McDougall, 5 Beav. 56, p. 2165.
Ashton v. Thompson, 32 Minn. 25, 41, 42, p. 1774, 1777, 1778.
Ashton's Appeal, 73 Pa. St. 153, 162, p. 1232, 1327, 1345.
Ashurst v. Given, 5 W. & S. 323, p. 1846.
Ashurst v. Mill, 7 Hare, 502, p. 1515.
Ashurst's Appeal, 60 Pa. St. 290, p. 1789.
Ashurst's Appeal, 77 Pa. St. 464, p. 1830, 1841.
Ashworth v. Outram, L. R. 5 Ch. Div. 923, p. 2142.
Askew v. Myrick, 54 Ala. 30, p. 215, 218, 229, 468, 2103.
Askew v. Rooth, L. R. 17 Eq. 426, p. 2146.
Aslatt v. Corpor. of Southampton, L. R. 16 Ch. Div. 143, p. 2677.
Aspden v. Seddon, L. R. 10 Ch. 394, p. 2673, 2676.
Aspen Mining & S. Co. v. Rucker, 28 Fed. 220, p. 500.
Aspinall v. Duckworth, 35 Beav. 307, p. 2228.
Aspinwall's Estate, In re, 85 Fed. 851, p. 509.
Astley v. Earl of Essex, L. R. 6 Ch. 898, p. 2049.
Astley v. Milles, 1 Sim. 298, 345, p. 1405.
Astley v. Reynolds, 2 Strange, 915, p. 1711.
Astley v. Weldon, 2 Bos. & P. 346, 350–354, p. 727, 731, 733, 745.
Aston v. Aston, 1 Ves. Sr. 264, 267, p. 2163, 2682.
Aston v. Lord Exeter, 6 Ves. 288, p. 2738.
Aston v. Pye, 5 Ves. 350, 354, p. 882.
Aston v. Robinson, 49 Miss. 348, 351, p. 662, 2767.
Aston v. Wood, L. R. 6 Eq. 419, p. 1933, 1949, 1985, 1986.
Astor v. Hoyt, 5 Wend. 603, p. 2360.
Astor v. L'Amoreux, 4 Sand. 524, p. 1894.
Astor v. Mayor et al., 5 Jones & S. 539, p. 2756.

Astor v. Miller, 2 Paige, 68, p. 2360.
Astor v. Wells, 4 Wheat. 466, p. 1120, 1152.
Atcherley v. Vernon, 10 Mod. 518, p. 2311.
Atcheson v. Mallon, 43 N. Y. 147, 3 Am. Rep. 678, p. 1692.
Atchison v. Smith, 25 Tex. 228, p. 2289.
Athenæum Life Ass. Co. v. Pooley, 3 De Gex & J. 294, 299, p. 1226, 1784, 2670, 2707.
Atherton v. Corliss, 101 Mass. 40, 44, p. 824.
Atherton v. Toney, 43 Ind. 211, p. 2403.
Atkins v. Atkins, 70 Vt. 565, 41 Atl. 503, p. 1839.
Atkins v. Chilson, 11 Met. 112, p. 758.
Atkins v. Farr, 1 Atk. 287, p. 1678.
Atkins v. Hatton, 2 Anstr. 386, p. 2737.
Atkins v. Hill, Cowp. 284, 287, p. 2203.
Atkins v. Kron, 5 Ired. Eq. 207, p. 1835.
Atkins v. Rison, 25 Ark. 138, p. 1466.
Atkins v. Sawyer, 1 Pick. 351, 11 Am. Dec. 188, p. 2399.
Atkinson, In re, 2 De Gex, M. & G. 140, p. 1211.
Atkinson v. Beall, 33 Ga. 153, p. 2169, 2170.
Atkinson v. Brooks, 26 Vt. 569, 62 Am. Dec. 592, p. 1330.
Atkinson v. Denby, 7 Hurl. & N. 934, p. 1718.
Atkinson v. Felder, 78 Miss. 83, 29 South. 767, p. 343.
Atkinson v. Greaves, (Miss.) 11 South. 688, p. 1330, 1355.
Atkinson v. Henshaw, 2 Ves. & B. 85, p. 2655.
Atkinson v. Leonard, 3 Brown Ch. 218, 224, p. 67, 211, 227, 460, 462, 463, 1463.
Atkinson v. Lindsey, 39 Ind. 296, p. 2515.
Atkinson v. Littlewood, L. R. 18 Eq. 595, p. 872.
Atkinson v. Mackreth, L. R. 2 Eq. 570, p. 1633.
Atkinson v. Manks, 1 Cow. 691, 703, 706, p. 2635, 2642, 2645, 2646, 2648, 2649, 2650.
Atkinson v. Miller, 34 Va. 115, 11 S. E. 1007, 9 L. R. A. 544, p. 1103, 2475.
Atkinson v. Morrissy, 3 Oreg. 332, p. 1403.
Atkinson v. Runnells, 60 Me. 440, p. 1224.
Atkinson v. Sutton, 23 W. Va. 197, p. 789, 821, 822.
Atkinson v. Ward, 47 Ark. 533, 2 S. W. 77, p. 2030, 2082, 2089.
Atkinson v. Webb, Prec. Ch. 236, p. 874.
Atkinson v. Webb, 2 Vern. 478, p. 874.
Atkyns v. Delmege, 12 I. R. Eq. 1, p. 1154.
Atkyns v. Kinnier, 4 Ex. 776–783, p. 737, 747.
Atlanta & F. R. Co. v. Western R. Co., 50 Fed. 790, 794, 2 U. S. App. 227, 1 C. C. A. 776, p. 505.
Atlanta & West Point R. R. v. Speer, 32 Ga. 550, 79 Am. Dec. 305, p. 2773.
Atlanta Land & Loan Co. v. Haile, 106 Ga. 498, 32 S. E. 606, p. 1051.
Atlanta Mills v. Mason, 120 Mass. 244, p. 541, 542.
Atlanta Nat. B. & L. Ass'n v. Gilmer, 128 Fed. 293, p. 1036, 1451.
Atlanta Trust & Bkg. Co. v. Nelms, 116 Ga. 915, 43 S. E. 380, p. 1486.
Atlantic City v. New Auditorium Pier Co., 63 N. J. Eq. 644, 53 Atl. 99, p. 987.
Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698, p. 1178.
Atlantic De Laine Co. v Tredick, 5 R. I. 171, p. 2706.
Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556, p. 2405, 2407.
Atlantic etc. Tel. Co. v. Baltimore & O. R. R., 14 Jones & S. 377, p. 2633, 2667.
Atlantic Ins. Co. v. Lunar, 1 Sand. Ch. 91, p. 255.
Atlantic State Bank v. Savery, 82 N. Y. 291, 307, p. 1164.
Atlas Bank v. Brownell, 9 R. I. 168, 11 Am. Rep. 231, p. 1622.
Atlas Bank v. Nahant Bank, 3 Met. 581, p. 766, 1721.

Atlas Nat. Bank v. More, 152 Ill. 528, 38 N. E. 684, 43 Am. St. Rep. 274, p. 2014.
Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889, p. 2333.
Atmore v. Walker, 46 Fed. 429, p. 2494.
Attala Iron Ore Co. v. Virginia Iron C. & C. Co., (Tenn.) 77 S. W. 774, p. 2084.
Attala Min. & Mfg. Co. v. Winchester, 102 Ala. 184, 14 South. 565, p. 752, 758.
Attaquin v. Fish, 5 Met. 140, 147, p. 2682, 2694.
Attenborough v. London etc. Dock Co., L. R. 3 C. P. D. 450, p. 2638, 2641, 2642, 2643.
Atterbury v. Wallis, 8 De Gex, M. & G. 454, p. 1005, 1010, 1017, 1152, 1168, 1177, 1178, 1292, 1613.
Attkisson v. Plumb, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788, p. 1436, 1438, 1440.
Att'y-Gen. v. Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251, p. 1011.
Att'y-Gen. v. Alford, 4 De Gex, M. & G. 843, p. 2068, 2069, 2089.
Att'y-Gen. v. Andrew, 3 Ves. 633, p. 1962.
Att'y-Gen. v. Aspinall, 2 Mylne & C. 613, 622, 623, p. 176, 1933.
Att'y-Gen. v. Baker, 9 Rich. Eq. 521, p. 2702.
Att'y-Gen. v. Baliol College, 9 Mod. 407, 411, p. 2481.
Att'y-Gen. v. Barbour, 121 Mass. 568, p. 538, 2108.
Att'y-Gen. v. Baxter, 1 Vern. 248, p. 1962.
Att'y-Gen. v. Birmingham, 4 Kay & J. 528, p. 2685.
Att'y-Gen. v. Birmingham Board, L. R. 17 Ch. Div. 685, 691, p. 2686.
Att'y-Gen. v. Bishop of Llandaff, cited 2 Mylne & K. 586, p. 1962.
Att'y-Gen. v. Bishop of Oxford, cited 4 Ves. 431, p. 1962.
Att'y-Gen. v. Board of Education, (Mich.) 95 N. W. 746, p. 425.
Att'y-Gen. v. Boultbee, 2 Ves. 380, 386, 387, p. 1959.
Att'y-Gen. v. Bowyer, 3 Ves. 714, 726, p. 1959, 1966.
Att'y-Gen. v. Briggs, 164 Mass. 561, 567, 42 N. E. 118, p. 1946, 1963, 1966, 1979.
Att'y-Gen. v. Brown, 1 Swanst. 265, 301, 302, p. 1948, 2093.
Att'y-Gen. v. Brunning, 8 H. L. Cas. 243, 265, p. 2318.
Att'y-Gen. v. Bunce, L. R. 6 Eq. 563, p. 1939, 1959, 1963.
Att'y-Gen. v. Bushby, 24 Beav. 299, p. 1948.
Att'y-Gen. v. Cambridge Gas Co., L. R. 4 Ch. 71, 80, p. 2683, 2684.
Att'y-Gen. v. Chambers, 12 Beav. 159, p. 285.
Att'y-Gen. v. Clarke, Amb. 422, p. 1941.
Att'y-Gen. v. Cleaver, 18 Ves. 211, 217, p. 2683.
Att'y-Gen. v. Clergy Soc., 8 Rich Eq. 190, p. 1977.
Att'y-Gen. v. Cock, 2 Ves. Sr. 273, p. 1939.
Att'y-Gen. v. Cockermouth Local Board, L. R. 18 Eq. 172, p. 2118.
Att'y-Gen. v. Cohoes Co., 6 Paige, 133, 29 Am. Dec. 755, p. 2683.
Att'y-Gen. v. Colney Hatch etc. Asylum, L. R. 4 Ch. 146, p. 2686.
Att'y-Gen. v. Comber, 2 Sim. & St. 93, p. 1941, 1959.
Att'y-Gen. v. Corporation of London, 2 Macn. & G. 247, 256, 257, 13 Beav. 313, p. 270, 272, 288.
Att'y-Gen. v. Crofts, 4 Brown Parl. C. 136, p. 2436.
Att'y-Gen. v. Daugars, 33 Beav. 621, 624, p. 2092.
Att'y-Gen. v. Day, [1900] 1 Ch. 31, p. 1948.
Att'y-Gen. v. Deerfield River Bridge Co., 105 Mass. 1, p. 345.
Att'y-Gen. v. Downing, Amb. 550, 571, p. 1959.
Att'y-Gen. v. Downing, Wilm. 23, p. 168.
Att'y-Gen. v. Doyley, 4 Vin. Abr. 485, 7 Ves. 58, n., p. 1951.
Att'y-Gen. v. Duke of Marlborough, 3 Madd. 498, 538, p. 2682.
Att'y-Gen. v. Duke of Northumberland, L. R. 7 Ch. Div. 745, p. 1942, 1963.

Att'y-Gen. v. Duplessis, Parker, 144, 155–164, 5 Brown Parl. C. 91, p. 262.
Att'y-Gen. v. Earl of Clarendon, 17 Ves. 491, 500, p. 1753.
Att'y-Gen. v. East Lake, 11 Hare, 205, 215, 216, 228, 17 Jur. 801, p. 696, 1933, 1948.
Att'y-Gen. v. East Retford, 2 Mylne & K. 35, p. 283.
Att'y-Gen. v. Eau Claire, 37 Wis. 400, p. 2683.
Att'y-Gen. v. Ely etc. R'y, L. R. 4 Ch. 194, 199, p. 2118.
Att'y-Gen. v. Fishmongers' Co., 5 Mylne & C. 11, p. 1937.
Att'y-Gen. v. Forbes, 2 Mylne & C. 123, p. 2683.
Att'y-Gen. v. Fullerton, 2 Ves. & B. 263, p. 2738.
Att'y-Gen. v. Garrison, 101 Mass. 223, p. 1978.
Att'y-Gen. v. Gaskill, L. R. 20 Ch. Div. 519, p. 245, 248, 249.
Att'y-Gen. v. Gee, L. R. 10 Eq. 131, p. 2683.
Att'y-Gen. v. George, 8 Sim. 138, p. 886.
Att'y-Gen. v. Glyn, 12 Sim. 84, p. 1962.
Att'y-Gen. v. Goodell, 180 Mass. 538, 62 N. E. 962, p. 1943, 1958, 1979.
Att'y-Gen. v. Great East. R'y, L. R. 11 Ch. Div. 449, 485–500, p. 1722, 2118.
Att'y-Gen. v. Great East. R'y, L. R. 6 Ch. 572, p. 2683, 2686.
Att'y-Gen. v. Great North. R'y, 1 Drew. & S. 154, p. 2118.
Att'y-Gen. v. Great West. R'y, L. R. 7 Ch. 767, p. 2118.
Att'y-Gen. v. Green, 2 Brown Ch. 490, p. 1959.
Att'y-Gen. v. Guardians, L. R. 20 Ch. Div. 595, 604–610, p. 2685.
Att'y-Gen. v. Haberdashers' Co., 1 Mylne & K. 420, p. 177, 1935.
Att'y-Gen. v. Hall, 16 Beav. 388, p. 1057.
Att'y-Gen. v. Harley, 4 Madd. 263, p. 889.
Att'y-Gen. v. Hellis, 2 Sim. & S. 67, 76, p. 406, 410, 454.
Att'y-Gen. v. Herrick, Amb. 712, p. 1950.
Att'y-Gen. v. Hickman, 2 Eq. Cas. Abr. 193, p. 1958.
Att'y-Gen. v. Holland, 2 Younge & C. 683, p. 2094.
Att'y-Gen. v. Ironmongers' Co., Craig & P. 208, 10 Clark & F. 908, 2 Beav. 313, p. 1942, 1962, 1963.
Att'y-Gen. v. Jackson, 11 Ves. 365, 367, p. 1958.
Att'y-Gen. v. Jolly, 1 Rich. Eq. 99, 2 Strob. Eq. 379, p. 1954, 1977.
Att'y-Gen. v. Lady Downing, Wilm. 1, 21, p. 1837.
Att'y-Gen. v. Landisfield, 9 Mod. Rep. 286, Ames' Cas. on Trusts, 216, p. 1834.
Att'y-Gen. v. Lawes, 8 Hare, 32, p. 1939.
Att'y-Gen. v. Leeds Corporation, L. R. 5 Ch. 583, p. 2686.
Att'y-Gen. v. Lonsdale, 1 Sim. 105, p. 1948.
Att'y-Gen. v. Lunatic Asylum, L. R. 4 Ch. 146, p. 696, 1450.
Att'y-Gen. v. Manchester R'y, 8 Sim. 436, p. 2698.
Att'y-Gen. v. Marchant, L. R. 3 Eq. 424, p. 1963.
Att'y-Gen. v. Margaret Prof, 1 Vern. 55, p. 1945.
Att'y-Gen. v. Mayor etc. of Dublin, 1 Bligh, N. S., 312, 347, 348, p. 1967.
Att'y-Gen. v. Merrimack M. Co., 14 Gray, 586, 612, p. 1909.
Att'y-Gen. v. Metropolitan Board of Works, 1 Hem. & M. 298, 312, p. 2698.
Att'y-Gen. v. Middleton, 2 Ves. Sr. 327, p. 1967.
Att'y-Gen. v. Mid-Kent R'y, L. R. 3 Ch. 100, p. 2687, 2698, 2766.
Att'y-Gen. v. Moore Ex'rs, 19 N. J. Eq. 503, p. 1975.
Att'y-Gen. v. Mosely, 2 De Gex & S. 398, p. 2051.
Att'y-Gen. v. Nichol, 16 Ves. 338, 342, p. 2684, 2685.
Att'y-Gen. v. Oglander, 3 Brown Ch. 166, p. 1959.
Att'y-Gen. v. Old South Soc., 13 Allen, 474, p. 1978.
Att'y-Gen. v. Painters' Co., 2 Cox 51, p. 1942.
Att'y-Gen. v. Parker, 126 Mass. 216, p. 1945, 1978.

Att'y-Gen. v. Pearson, 3 Mer. 353, 409, 7 Sim. 290, p. 1939, 2108.
Att'y-Gen. v. Price, 17 Ves. 371, p. 1942.
Att'y-Gen. v. Ray, 2 Hare, 518, p. 296.
Att'y-Gen. v. Ray, L. R. 9 Ch. 397, 405, p. 1567, 1583, 1605.
Att'y-Gen. v. Read, L. R. 12 Eq. 38, p. 2621.
Att'y-Gen. v. Richmond, L. R. 2 Eq. 306, p. 2685.
Att'y-Gen. v. Robins, 2 P. Wms. 23, p. 2225, 2226.
Att'y-Gen. v. St. John's Hospital, L. R. 1 Ch. 92, 2 Ch. Div. 554, p. 1963.
Att'y-Gen. v. Salem, 103 Mass. 138, p. 544.
Att'y-Gen. v. Scott, Cas. Temp. Talb. 138, p. 1849.
Att'y-Gen. v. Sheffield Gas. Co., 3 De Gex, M. & G. 304, p. 696, 1450, 2683, 2684.
Att'y-Gen. v. Sibthorp, 2 Russ. & M. 107, p. 1468.
Att'y-Gen. v. Sittingbourne etc. R'y, L. R. 1 Eq. 636, p. 2529.
Att'y-Gen. v. Sitwell, 1 Younge & C. 557, 559, 583, p. 1521, 1659.
Att'y-Gen. v. Skinners' Co., 2 Russ. 407, 420, p. 1967.
Att'y-Gen. v. Sothon, 2 Vern. 497, p. 2033.
Att'y-Gen. v. Soule, 28 Mich. 153, p. 1935, 1945, 1952, 1961, 1970.
Att'y-Gen. v. Stephens, 6 De Gex, M. & G. 111, 133, p. 2738.
Att'y-Gen. v. Stephens, 3 Mylne & K. 347, p. 1836.
Att'y-Gen. v. Stepney, 10 Ves. 22, p. 1939.
Att'y-Gen. v. Steward, 21 N. J. Eq. 340, 20 N. J. Eq. 415, p. 2684, 2686.
Att'y-Gen. v. Tancred, Amb. 351, 1 W. Black. 90, 1 Eden, 10, p. 1945, 1962, 1967.
Att'y-Gen. v. Terry, L. R. 9 Ch. 423, p. 2687.
Att'y-Gen. v. Todd, 1 Keen, 803, p. 1939.
Att'y-Gen. v. Trinity Church, 9 Allen, 422, p. 1978.
Att'y-Gen. v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227, p. 2687.
Att'y-Gen. v. Vigor, 8 Ves. 256, 277, p. 2339.
Att'y-Gen. v. Wallace, 7 B. Mon. 611, p. 1954, 1980.
Att'y-Gen. v. Wax Chandlers' Co., L. R. 5 Ch. 503, p. 1963.
Att'y-Gen. v. Webster, L. R. 20 Eq. 483, p. 1939, 1943, 1948.
Att'y-Gen. v. Whorwood, 1 Ves. Sr. 534, 540, p. 953.
Att'y-Gen. v. Wilkins, 17 Beav. 285, 291, 293, p. 1310, 1315, 1319, 1369, 1390.
Att'y-Gen. v. Wilson, Craig & P 1, 28, 9, Sim. 30, p. 2090, 2092, 2129.
Att'y-Gen. v. Windsor, 8 H. L. Cas. 369, 24 Beav. 679, p. 1986.
Attwater v. Attwater, 18 Beav. 330, p. 2218, 2220.
Attwood v. ———, 5 Russ. 149, p. 1502.
Attwood v. Coe, 4 Sand. Ch. 412, p. 275.
Attwood v. Small, 6 Clark & F. 232, 359, p. 1560, 1566, 1567, 1569, 1581, 1587, 1591, 1594, 1598, 1600, 1789.
Atwater v. Russell, 49 Minn. 57, 51 N. W. 629, 52 N. W. 26, p. 1908, 1970.
Atwell v. Atwell, L. R. 13 Eq. 23, p. 2310.
Atwood v. Bearss, 45 Mich. 469, p. 1357.
Atwood v. Fisk, 101 Mass. 363, 100 Am. Dec. 124, p. 659, 667, 1703.
Atwood v. Lester, 20 R. I. 660, 40 Atl. 866, p. 2017.
Atwood v. Vincent, 17 Conn. 575, p. 2503.
Atwool v. Merryweather, L. R. 5 Eq. 464, note 467, p. 2125.
Aubert's Appeal, 109 Pa. St. 447, 1 Atl. 336, p. 2055.
Aubin v. Holt, 2 Kay & J. 66, 70, p. 669, 1696, 1714.
Aubuchon v. Bender, 44 Mo. 560, p. 1323, 1324.
Auburn etc. Co. v. Douglass, 12 Barb. 553, p. 2684, 2698.
Audenried v. Betteley, 5 Allen, 384, 81 Am. Dec. 755, p. 1562.
Audenreid's Appeal, 89 Pa. St. 114, 33 Am. Rep. 731, p. 1780.
Augerstein v. Martin, Turn. & R. 232, p. 2321.
Au Gres Boon Co. v. Whitney, 26 Mich. 42, p. 2762.

Auguisola v. Arnez, 51 Cal. 435, p. 1895, 2261, 2262.
Augur v. New York Belting etc. Co., 39 Conn. 536, p. 2553, 2567, 2584.
Augusta Saving Bank v. Fogg, 82 Me. 538, 20 Atl. 92, p. 1867, 2242.
Augusta Steam Laundry Co. v. Debow, 98 Me. 496, 57 Atl. 845, p. 751.
Aultman v. Obermeyer, 6 Nebr. 260, p. 2195.
Aultman & Co. v. Utsey, 34 S. C. 559, 13 S. E. 848, p. 974, 1157, 1337, 1341, 1343.
Aurora, The, 1 Wheat. 96, 105, 4 L. ed. 45, p. 2483.
Aurora etc. R. R. v. Lawrenceburgh, 56 Ind. 80, p. 2677.
Austell v. Swan, 74 Ga. 278, p. 849.
Austen v. Halsey, 6 Ves. 475, p. 2497.
Austen v. Taylor, 1 Eden, 361, p. 1884, 1886, 1887.
Austin v. Austin, 34 Beav. 257, 4 De Gex, J. & S. 716, p. 2618.
Austin v. Austin, L. R. 4 Ch. Div. 233, p. 2143, 2144, 2149.
Austin v. Austin, 9 Vt. 420, p. 763.
Austin v. Bell, 20 Johns. 442, 11 Am. Dec. 297, p. 1858.
Austin v. Goodrich, 49 N. Y. 266, p. 2750.
Austin v. Pulschen, 112 Cal. 528, 44 Pac. 788, p. 1032.
Austin v. Sprague Mfg. Co., 14 R. I. 464, p. 1860, 1861.
Austin v. Tawney, L. R. 2 Ch. 143, p. 2778.
Austin v. Underwood, 37 Ill. 438, 87 Am. Dec. 254, p. 1265, 1283, 1284.
Auter v. Miller, 18 Iowa, 405, p. 662, 2768.
Aveline v. Melhuish, 2 De Gex, J & S. 288, p. 1785, 2058, 2096, 2097.
Aveling v. Knipe, 19 Ves. 441, p. 680.
Avent v. McCorkle, 45 Miss. 221, p. 1055, 1146.
Averall v. Wade, Lloyd & G. 252, p. 2786, 2787.
Averbeck v. Hall, 14 Bush, 505, p. 1701, 1703.
Averett v. Lipscombe, 76 Va. 404, p. 2153.
Averill, In re, [1898] 1 Ch. 523, p. 1838.
Averill v. Barber, 24 App. Div. 53, 49 N. Y. Supp. 123, p. 2052.
Averill v. Taylor, 8 N. Y. 44, p. 1412, 2437.
Avery v. Bowman, 40 N. H. 453, 77 Am. Dec. 728, p. 528.
Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272, p. 1284, 2499, 2513, 2519.
Avery v. Empire Woolen Co., 82 N. Y. 582, p. 2695.
Avery v. Griffin, L. R. 6 Eq. 606, p. 2048.
Avery v. Judd, 21 Wis. 262, p. 2362, 2364.
Avery v. Popper, 92 Tex. 337, 49 S. W. 219, 50 S. W. 122, 71 Am. St. Rep. 849, p. 2563.
Avery v. Ryerson, 34 Mich. 362, p. 2435, 2437.
Avery v. Stewart, (N. C.) 48 S. E. 775, p. 2039.
Avery v. Vansickle, 35 Ohio St. 270, p. 2196.
Avery v. Ware, 58 Ala. 475, p. 2798.
Axtell's Petition, In re, 95 Mich. 244, 54 N. W. 889, p. 1011.
Aycinena v. Peries, 6 Watts & S. 243, 257, p. 560.
Aydelott v. Breeding, 22 Ky. Law Rep. 1146, 64 S. W. 916, p. 2077.
Ayers v. Baumgarten, 15 Ill. 444, p. 1666.
Ayers v. Dixon, 78 N. Y. 318, 322, 323, p. 2407, 2414.
Ayers v. Green Gold Min. Co., 116 Cal. 333, 48 Pac. 221, p. 1163.
Ayers v. Rivers, 64 Iowa, 543, 21 N. W. 23, p. 2392.
Ayers v. Wright, 8 Ired. Eq. 229, p. 265.
Ayerst v. Jenkins, L. R. 16 Eq. 275, p. 1788.
Aylett v. Ashton, 1 Mylne & C. 105, 112, p. 183, 669, 1680, 2133, 2184.
Aylett v. Dodd, 2 Atk. 239, p. 733.
Ayliffe v. Murray, 2 Atk. 58, p. 1758, 2097.
Ayloffe v. Duke, 2 Freem. Ch. 152, p. 2700.
Aymar v. Bill, 5 Johns. Ch. 570, p. 2419.
Aymar v. Roff, 3 Johns. Ch. 49, p. 2612.
Aymer v. Gault, 2 Paige, 284, p. 2650.
Aynesworth v. Haldeman, 2 Duvall, 565, 571, p. 1902, 1909, 2005.

Aynsley v. Glover, L. R. 10 Ch. 283, p. 2685.
Ayrault v. Murphy, 54 N. Y. 203, p. 1064, 1088.
Ayre's Case, 25 Beav. 513, 522, p. 1584.
Ayres v. Duprey, 27 Tex. 593, 605, 86 Am. Dec. 657, p. 1274, 1276, 1278, 1279, 1281, 1381.
Ayres v. Lawrence, 63 Barb. 454, 458, p. 434, 435, 438.
Ayres v. Methodist Church, 3 Sand. 351, p. 1967.
Ayres v. Mitchell, 3 Smedes & M. 683, p. 1788.
Ayres v. Randall, 108 Ind. 595, 9 N. E. 464, p. 2413.

B.

Baab v. Houser, (Pa. St.) 53 Atl. 344, p. 1542.
Babbitt v. Kelly, 96 Mo. App. 529, 70 S. W. 385, p. 1155.
Babbott v. Tewksbury, 46 Fed. 86, p. 252.
Babcock v. Bridge, 29 Barb. 427, p. 1126, 2383, 2387.
Babcock v. Case, 61 Pa. St. 427, 430, 100 Am. Dec. 654, p. 1560, 1584.
Babcock v. Eckler, 24 N. Y. 623, p. 1801, 1804.
Babcock v. Hubbard, 56 Conn. 284, 15 Atl. 791, p. 2100.
Babcock v. Jordan, 24 Ind. 14, p. 1328.
Babcock v. Lisk, 57 Ill. 327, p. 1054.
Babcock v. McCamant, 53 Ill. 214, 217, p. 228, 229, 460, 466, 1641, 1652.
Babcock v. New Jersey etc. Co., 20 N. J. Eq. 296, p. 2667, 2686.
Babcock v. Wells, (R. I.) 54 Atl. 596, 599, p. 1339, 1340, 1665.
Babcock v. Wyman, 19 How. 289, 15 L. ed. 644, p. 2380.
Babcock v. Young, 117 Mich. 155, 75 N. W. 302, p. 1303.
Babe v. Phelps, 65 Mo. 27, p. 2780.
Baber's Trusts, In re, L. R. 10 Eq. 554, p. 1856.
Babington v. Greenwood, 1 P. Wms. 532, p. 620.
Bachelder v. Sargent, 47 N. H. 262, p. 2195.
Bachmann v. Wagner, 61 Hun, 625, 16 N. Y. Supp. 67, p. 1086.
Back v. Kett, Jacob, 534, p. 806.
Back v. Stacy, 2 Russ. 121, p. 2685.
Backer v. Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231, p. 1597.
Backhouse v. Charlton, L. R. 8 Ch. Div. 444, p. 2542.
Backler v. Farrow, 2 Hill Ch. 117, p. 2742.
Bacon v. Bacon, Toth. 133, p. 1050.
Bacon v. Bacon, 55 Vt. 243, p. 2051.
Bacon v. Bacon, 5 Ves. 331, p. 2065.
Bacon v. Bonham, 33 N. J. Eq. 614, p. 2574.
Bacon v. Bowdoin, 22 Pick. 401, p. 1412.
Bacon v. Bronson, 7 Johns. Ch. 194, 201, 11 Am. Dec. 449, p. 1586, 1605, 1636.
Bacon v. Cosby, 4 De Gex & S. 261, p. 784, 786.
Bacon v. Cottrell, 13 Minn. 194, p. 2431.
Bacon v. Early, (Iowa) 90 N. W. 353, p. 1065.
Bacon v. Irvine, 70 Cal. 221, 11 Pac. 646, p. 2121.
Bacon v. Jones, 4 Mylne & C. 433, 436, p. 2688.
Bacon v. Leslie, 50 Kans. 494, 34 Am. St. Rep. 134, 31 Pac. 1066, p. 1596.
Bacon v. Pomeroy, 104 Mass. 577, p. 2104.
Bacon v. Ransom, 139 Mass. 117, 29 N. E. 473, p. 1929.
Bacon v. Van Schoonhoven, 87 N. Y. 447, p. 1095, 1300, 1374.
Bacon's Appeal, 57 Pa. St. 504, p. 1830, 1831.
Bacot v. Heyward, 5 S. C. 441, p. 2057, 2066.
Badcock, In re, 4 Mylne & C. 440, p. 2320.
Baddeley v. Baddeley, L. R. 9 Ch. Div. 113, p. 1868, 1872, 1879.
Badeau v. Rogers, 2 Paige, 209, p. 2635, 2650.
Badeau v. Tylee, 1 Sand. Ch. 270, p. 2646.
Badgeley v. Votrain, 68 Ill. 25, 18 Am. Rep. 541, p. 1865.
Badger v. Badger, 2 Wall. 87, 94, p. 1647.
Badger v. Boardman, 16 Gray, 559, p. 767.
Badger v. McNamara, 123 Mass. 117, 119, p. 215, 217, 542.

Badgett v. Keating, 31 Ark. 400, p. 1837.
Badgley v. Bruce, 4 Paige, 98, p. 2734.
Badische etc. Fabrik v. Schote, [1892] 3 Ch. 447, p. 1691.
Badrick v. Stevens, 3 Brown Ch. 431, p. 2211.
Baer's Appeal, 127 Pa. St. 360, 18 Atl. 1, 4 L. R. A. 609, p. 2058, 2071.
Bagat, In re, [1894] 1 Ch. 177, p. 1852.
Baggerly v. Gaither, 2 Jones Eq. 80, p. 1291, 1325, 1349.
Baggett v. Meux, 1 Phill. Ch. 627, 1 Coll. C. C. 138, p. 1847, 2156, 2157, 2158.
Bagley v. Bowe, 105 N. Y. 171, 59 Am. Rep. 488, 11 N. E. 386, p. 1858.
Bagley v. Peddie, 16 N. Y. 470, 69 Am. Dec. 713, p. 721, 733, 741, 745, 747.
Bagnall v. Carlton, L. R. 6 Ch. Div. 371, p. 1613.
Bagnall v. Villar, L. R. 12 Ch. Div. 812, p. 2677.
Bagot, In re, 31 L. J. Ch. 772, p. 2319.
Bagshaw v. Eastern Union R'y, 7 Hare, 114, 130, 131, 2 Hall & T. 201, p. 2114, 2118.
Bagshaw v. Seymour, 4 Com. B., N. S., 873, p. 1574.
Bagshaw v. Spencer, 1 Ves. Sr. 142, 152, p. 1883.
Bagshaw v. Winter, 5 De Gex & S. 466, p. 646.
Bagwell v. Johnson, 116 Ga. 464, 42 S. E. 733, p. 663.
Bahia etc. R'y, In re, L. R. 3 Q. B. 584, p. 1252, 1425, 1441.
Baier v. Berberich, 6 Mo. App. 537, p. 2034.
Bailey, In re, L. R. 12 Ch. Div. 268, p. 2490.
Bailey v. Allegheny Nat. Bank, 104 Pa. St. 425, p. 2315.
Bailey v. Bailey, 2 Del. Ch. 95, p. 2110.
Bailey v. Bailey, 8 Humph. 230, p. 1523.
Bailey v. Barnes, [1894] 1 Ch. 25, 7 Reports, 9, p. 1006, 1290.
Bailey v. Briggs, 56 N. Y. 407, p. 181, 580, 581, 2299, 2301.
Bailey v. Dean, 5 Barb. 297, p. 257, 263.
Bailey v. Dillon, (Mass.) 71 N. E. 538, p. 1679.
Bailey v. Dobbins, (Nebr.) 93 N. W. 687, p. 1997.
Bailey v. Duncan, 4 Mon. 256, 265, 266, p. 821.
Bailey v. Fox, 78 Cal. 389, 20 Pac. 868, p. 1647.
Bailey v. Galpin, 40 Minn. 319, 41 N. W. 1054, p. 1096, 1124.
Bailey v. Gardner, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. Rep. 847, p. 2143.
Bailey v. Gould, Walk. Ch. 478, p. 2419.
Bailey v. Hemenway, 147 Mass. 326, p. 1996.
Bailey v. Hill, 77 Va. 492, p. 2153.
Bailey v. Hughes, 35 Ohio St. 597, p. 2750.
Bailey v. Kilburn, 10 Met. 176, 43 Am. Dec. 423, p. 538.
Bailey v. Levy, 115 Ala. 565, 22 South. 449, p. 1103.
Bailey v. Litten, 52 Ala. 282, p. 1738.
Bailey v. Malvin, 53 Iowa, 371, 5 N. W. 515, p. 2396.
Bailey v. Myrick, 50 Me. 171, p. 1136, 1373, 2440.
Bailey v. Pearson, 29 N. H. 77, p. 2195.
Bailey v. Richardson, 9 Hare, 734, 736, p. 1025, 1047, 1402, 1403, 1404.
Bailey v. Ross, 68 Ala. 735, p. 2265.
Bailey v. Ryder, 10 N. Y. 363, p. 155, 2633.
Bailey v. Sisson, 1 R. I. 233, p. 2739, 2741.
Bailey v. Southern R'y Co., 22 Ky. L. Rep. 1397, 60 S. W. 631, p. 1060.
Bailey v. Southwick, 6 Lans. 356, p. 2299.
Bailey v. Stiles, 2 N. J. Eq. 220, p. 1636, 2033.
Bailey v. Strong, 8 Conn. 278, 280, p. 575, 2263.
Bailey v. Tillinghast, (C. C. A.) 99 Fed. 801, 807, p. 378, 422, 447, 456.
Bailey v. Timberlake, 74 Ala. 221, p. 1104.
Bailey v. Tindall, 59 Tex. 540, p. 2502.
Bailey v. Winn, 101 Mo. 649, 12 S. W. 1045, p. 2350, 2418.

Bailey v. Woodbury, 50 Vt. 166, p. 1738, 1778.
Bailey's Appeal, 96 Pa. St. 253, p. 2034.
Bailey's Petition, 15 R. I. 60, 1 Atl. 131, p. 2045, 2046.
Baillie v. Butterfield, 1 Cox, 392, p. 885.
Baillie v. McKewan, 35 Beav. 177, p. 1377.
Baily v. Dyer, 23 Ky. Law Rep. 1585, 65 S. W. 595, p. 2018.
Baily v. Hornthal, 154 N. Y. 648, 661, 61 Am. St. Rep. 645, 652, 49 N. E. 56, p. 208, 236.
Baily v. Smith, 14 Ohio St. 396, 84 Am. Dec. 385, p. 1228, 2419.
Bain v. Brown, 56 N. Y. 285, p. 1761.
Bainbrigge v. Baddeley, 3 Macn. & G. 413, 419, p. 2653, 2654.
Bainbrigge v. Blair, 8 Beav. 588, p. 2098.
Bainbrigge v. Blair, 3 Beav. 421, p. 2658.
Baines v. Barnes, 64 Ala. 375, p. 2754, 2756.
Baines v. Geary, 35 Ch. Div. 154, p. 1691.
Bainham v. Manning, 2 Vern. 242, p. 667.
Bainter v. Fults, 15 Kan. 323, p. 1729.
Bainton v. Ward, 2 Atk. 172, p. 2223.
Baird v. Tolliver, 25 Tenn. (6 Humph.) 186, 44 Am. Dec. 298, p. 731, 743.
Baker, Ex parte, 6 Ves. 8, p. 2622.
Baker v. Atkins, 107 La. 490, 32 South. 69, p. 1273.
Baker v. Atkins, 62 Me. 205, p. 556.
Baker v. Backus's Adm'r, 32 Ill. 79, p. 2653.
Baker v. Baker, 22 Minn. 262, p. 1997, 2004.
Baker v. Baker, 2 S. Dak. 261, 39 Am. St. Rep. 776, 49 N. W. 1064, p. 2425.
Baker v. Bartlett, 18 Mont. 446, 45 Pac. 1084, 56 Am. St. Rep. 594, p. 1081, 1082, 1097, 1124.
Baker v. Biddle, 1 Bald. 394, 403–411, p. 513, 514, 515, 517.
Baker v. Bishop Hill Colony, 45 Ill. 264, p. 2437.
Baker v. Bliss, 39 N. Y. 70, 74, 78, p. 1007, 1009, 1018.
Baker v. Bradley, 7 De Gex, M. & G. 597, p. 620, 1776, 1778, 1788, 2157, 2158.
Baker v. Brown, 146 Mass. 369, 15 N. C. 783, p. 1844.
Baker v. Carter, 1 Younge & C. 250, p. 1753.
Baker v. Compton, 52 Tex. 252, p. 2502, 2523.
Baker v. Cunningham, 162 Mo. 134, 62 S. W. 445, 85 Am. St. Rep. 490, p. 2428, 2429.
Baker v. Disbrow, 18 Hun, 29, p. 2068, 2080.
Baker v. Ducker, 79 Cal. 365, 21 Pac. 764, p. 2048.
Baker v. Farmer, L. R. 3 Ch. 537, reversing L. R. 4 Eq. 382, p. 2227.
Baker v. Gilman, 52 Barb. 26, p. 1804.
Baker v. Gray, L. R. 1 Ch. Div. 491, p. 1292.
Baker v. Griffin, 50 Miss. 158, p. 1132, 1353.
Baker v. Hardin, 10 Heisk. 300, p. 2006.
Baker v. Hedgecock, 39 Ch. Div. 520, p. 1687.
Baker v. Humphrey, 101 U. S. 499, p. 1338, 1769, 1771.
Baker v. Lee, Re Ilminster School, 8 H. L. C. 495, p. 2108.
Baker v. Lever, 67 N. Y. 304, 23 Am. Rep. 117, p. 1323.
Baker v. Loader, L. R. 16 Eq. 49, p. 1738, 1769.
Baker v. Martin, 8 Sim. 25, p. 2098.
Baker v. Mather, 25 Mich. 51, 53, p. 1050, 1055, 1146, 1358.
Baker v. Massey, 50 Iowa, 399, p. 2726.
Baker v. Maxwell, 99 Ala. 558, 14 South. 468, p. 1597.
Baker v. Monk, 33 Beav. 419, p. 1729, 1731, 1781.
Baker v. Monk, 4 De Gex, J. & S. 388, p. 2729.
Baker v. Morton, 12 Wall. 150, p. 1270.
Baker v. Nall, 59 Mo. 268, p. 1881.
Baker v. New York Nat. Ex. Bank, 100 N. Y. 31, 50 Am. Rep. 150, 2 N. E. 452, p. 2018.
Baker v. Northwestern Guaranty Loan Co., 36 Minn. 185, 30 N. W. 464, p. 1406.

Baker v. Paine, 1 Ves. Sr. 456, p. 1541.
Baker v. Portland, 5 Saw. 566, Fed. Cas. No. 777, p. 441.
Baker v. Red, 4 Dana, 158, p. 1921.
Baker v. Reed, 44 Iowa, 179, p. 2709.
Baker v. Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475, p. 1435.
Baker v. Smith, 13 Met. 34, 41, p. 1954, 1979.
Baker v. Springfield etc. R'y Co., 86 Mo. 75, p. 2051.
Baker v. Sutton, 1 Keen, 224, 233, p. 1933, 1940.
Baker v. Terrill, 8 Minn. 195, 199, p. 1409, 2004, 2426.
Baker v. Vining, 30 Me. 121, 126, 50 Am. Dec. 617, p. 1993, 2000.
Baker v. White, 2 Vern. 215, p. 1678.
Baker v. Whiting, 1 Story, 218, 241, p. 1761.
Baker v. Whiting, 3 Sum. 475, 495, p. 1772, 2028.
Baker v. Williams, 24 Ind. 547, p. 2242.
Baker v. Williams, 34 Ind. 547, p. 2233, 2236, 2247.
Baker v. Woodward, 12 Oreg. 3, 6 Pac. 173, p. 1338.
Baker's Appeal, 120 Pa. St. 33, 13 Atl. 487, p. 2080.
Baker's Trusts, In re, L. R. 13 Eq. 168, p. 2622.
Bakes v. Gilbert, 93 Ind. 70, p. 2499, 2514.
Bakewell v. Ogden, 2 Bush, 265, p. 1469.
Balbach v. Frelinghuysen, 15 Fed. 675, p. 1913.
Balch v. Chaffee, 73 Conn. 318, 47 Atl. 327, 84 Am. St. Rep. 155, p. 2385, 2387.
Balch v. Symes, Turn. & R. 87, p. 273, 289.
Baldock v. Johnson, 14 Oreg. 542, 13 Pac. 434, p. 1498, 1500, 1777.
Baldwin v. Bangor, 36 Me. 518, 524, p. 548, 555.
Baldwin v. Bean, 59 Me. 481, p. 553, 2302.
Baldwin v. Belcher, 3 Dru. & War. 173, 176, p. 2786.
Baldwin v. Canfield, 26 Minn. 43, p. 2125, 2126, 2129.
Baldwin v. Commonwealth, 11 Bush, 417, p. 2764.
Baldwin v. Emery, 89 Me. 496, 36 Atl. 994, p. 2408.
Baldwin v. Humphrey, 44 N. Y. 609, p. 1903.
Baldwin v. Jenkins, 23 Miss. 206, p. 2399.
Baldwin v. Johnson, 1 N. J. Eq. 441, p. 1019.
Baldwin v. Marshall, 2 Humph. 116, p. 1119.
Baldwin v. Rochford, 1 Wils. 229, p. 1740.
Baldwin v. Root, (Tex. Civ. App.) 38 S. W. 630, p. 1155.
Baldwin v. Sager, 70 Ill. 503, p. 1333, 1334, 1336, 1348, 1400, 1403.
Baldwin v. Sherwood, 117 Ga. 827, 45 S. E. 216, p. 1021.
Baldwin v. Thompson, 15 Iowa, 504, p. 1145.
Baldwin v. Van Vorst, 9 N. J. Eq. 577, p. 725, 2779.
Balen v. Lewis, 130 Mich. 567, 90 N. W. 416, 97 Am. St. Rep. 499, p. 2453.
Balen v. Mercier, 75 Mich. 42, 42 N. W. 666, p. 1035, 1096, 1133, 1135, 1146, 1283.
Bales v. Perry, 51 Mo. 449, p. 1438.
Balfour v. Parkinson, 84 Fed. 855, p. 1333, 1391, 1392, 1393.
Balkum v. Owens, 47 Ala. 266, p. 1285.
Ball v. Ball, 2 Sim. 35, p. 2617.
Ball v. Coutts, 1 Ves. & B. 292, 303, p. 2621.
Ball v. Hill, 48 Tex. 634, p. 2502, 2511.
Ball v. Mannin, 3 Bligh, N. S., 1, p. 1727, 1728.
Ball v. Montgomery, 4 Brown Ch. 338, p. 646.
Ball v. Montgomery, 2 Ves. 191, 193, 195, p. 2165, 2172, 2176.
Ball v. Oliver, 2 Ves. & B. 96, p. 2655.
Ball v. Ray, L. R. 8 Ch. 467, p. 2687.
Ball v. Stone, 1 Sim. & St. 210, p. 1518.
Ball v. Tompkins, 41 Fed. 486, 489, p. 508, 511.
Ball v Vason, 56 Ga. 264, p. 2544, 2586.

Ballance v. Lamphier, 42 Ch. Div. 62, p. 1886.
Ballard v. Burgett, 40 N. Y. 314, p. 1238, 1244.
Ballard v. Carr, 48 Cal. 74, p. 1702, 1772.
Ballard v. Carter, 71 Tex. 161, 9 S. W. 92, p. 2503.
Ballard v. McKenna, 4 Rich. Eq. 358, p. 1725.
Ballard v. Taylor, 4 Desaus. Eq. 550, p. 2144.
Ballentine v. Clark, 38 Mich. 395, p. 2726.
Ballin v. Dillaye, 37 N. Y. 35, p. 2196.
Ballin v. Ferst, 55 Ga. 546, p. 264, 265, 2659.
Ballin v. Merchants' Exchange Bank, 89 Wis. 278, 61 N. W. 1118, 46 Am. St. Rep. 834, 27 L. R. A. 357, p. 2013.
Ballinger v. Bourland, 87 Ill. 513, 29 Am. Rep. 69, p. 1862.
Ballinger v. Edwards, 4 Ired. Eq. 449, p. 648, 1705.
Ballou v. Andrews Bkg. Co., 128 Cal. 562, 61 Pac. 102, p. 983.
Ballou v. Inhabitants of Hopkinton, 4 Gray, 324, 328, p. 397, 398, 451, 453.
Balmear v. Otis, 4 Dill. 558, p. 2748, 2749.
Balsh v. Hyham, 2 P. Wms. 453, p. 2101.
Balsley v. Balsley, 116 N. C. 472, 21 S. E. 954, p. 358, 2285.
Baltimore High Grade Brick Co. v. Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148, p. 972.
Baltimore & Liberty Turnpike Co. v. Moale, 71 Md. 353, 18 Atl. 658, p. 2500.
Baltimore & O. R. Co. v. Canton Co., 70 Md. 405, 17 Atl. 394, p. 1164.
Baltimore Retort etc. Co. v. Mali, 65 Md. 93, 3 Atl. 286, 57 Am. Rep. 304, p. 2237.
Bamberger v. Geiser, 24 Oreg. 203, 33 Pac. 609, p. 1227, 1299, 1301.
Bamford v. Creasy, 3 Giff. 675, p. 755, 1466.
Banbury v. Briscoe, 2 Cas. Ch. 42, p. 2727.
Banco De Lima v. Anglo-Peruvian Bank, L. R. 8 Ch. Div. 160, 175, p. 1166.
Bancroft v. Bancroft, 104 Mass. 226, p. 2225, 2226.
Bancroft v. Consen, 13 Allen, 50, p. 701, 958, 1127, 2024.
Bancroft v. Cosby, 74 Cal. 583, 16 Pac. 504, p. 2499, 2519.
Bancroft v. Otis, 91 Ala. 279, 24 Am. St. Rep. 904, 8 South. 286, p. 1751.
Bang v. Brett, 62 Minn. 4, 63 N. W. 1067, p. 1177.
Bangor v. Masonic Lodge, 73 Me. 428, 40 Am. Rep. 369, p. 1934, 1944.
Bangor Electric Lt. & Power Co. v. Robinson, 52 Fed. 520, p. 1242.
B. & M. R. R. v. P. & D. R. R., 57 N. H. 200, p. 529.
Bank v. Bradley, 15 Lea, 279, p. 2525, 2526.
Bank v. Fordyce, 9 Pa. St. 275, p. 1226.
Bank v. Godfrey, 23 Ill. 579, 606, 607, p. 1048, 1329.
Bank v. Jerome, 18 Conn. 443, p. 1231.
Bank v. Johnson, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614, p. 2470, 2471, 2476, 2522.
Bank v. Lanier, 11 Wall. 369, p. 1252, 1382.
Bank v. Sneed, 97 Tenn. 120, 56 Am. St. Rep. 788, 36 S. W. 716, 34 L. R. A. 274, p. 1165, 1726.
Bank v. Snively, 23 Md. 253, p. 1994.
Bank v. Stone, 80 Ky. 109, p. 1332.
Bank of Ada v. Gullickson, 64 Minn. 91, 66 N. W. 131, p. 1097, 1124.
Bank of America v. Banks, 101 U. S. 240, 25 L. ed. 850, p. 1447, 2200.
Bank of America v. Pollock, 4 Edw. Ch. 215, p. 2030.
Bank of Bellows Falls v. Rutland etc. R. R. Co., 28 Vt. 470, 477, p. 220, 221, 312, 1637, 2706, 2707.
Bank of Benson v. Hove, 45 Minn. 40, 47 N. W. 449, p. 1096.
Bank of Bethel v. Pahquioque Bank, 14 Wall. 383, p. 2660.
Bank of Bristol v. Bradley, 15 Lea, 279, p. 2525.
Bank of California v. Collins, 5 Hun, 209, p. 2552.
Bank of California v. Fresno etc. Co., 53 Cal. 201, p. 2675.
Bank of Chillicothe v. Dodge, 8 Barb. 233, p. 1478, 1506.
Bank of Commerce v. Chambers, 96 Mo. 459, 10 S. W. 38, p. 564, 1845.

Bank of Commerce v. Lanahan, 45 Md. 396, p. 1860.
Bank of Commerce's Appeal, 73 Pa. St. 59, 64, p. 1223, 1382.
Bank of Commerce's Appeal, 44 Pa. St. 423, p. 2383.
Bank of England v. Tarleton, 23 Miss. 173, p. 2393, 2395.
Bank of Florence v. Gregg, 46 S. C 169, 24 S. E. 64, p. 2489.
Bank of Greensboro v. Chambers, 30 Gratt. 202, 32 Am. Rep. 661, p. 2141, 2153.
Bank of Greensboro v. Clapp, 79 N. C. 482, p. 1111.
Bank of Hamilton v. Dudley's Heirs, 2 Pet. 492, p. 501.
Bank of Harlem v. City of Bayonne, 48 N. J. Eq. (3 Dick.) 246, 21 Atl. 478, affirmed, 48 N. J. Eq. 646, 25 Atl. 20, p. 2560, 2567.
Bank of Hindustan v. Alison, L. R. 6 Com. P. 54, 222, p. 1436.
Bank of Indiana v. Anderson, 14 Iowa, 544, 83 Am. Dec. 390, p. 2417.
Bank of Ipswick v. Brock, 13 S. Dak. 409, 83 N. W. 436, p. 2421, 2424.
Bank of Ireland v. Evans's Charities, 5 H. L. Cas. 389, p. 1422, 1442, 1650.
Bank of Kentucky v. Schuylkill Bank, 1 Pars. Cas. 181, 219, p. 560.
Bank of Kentucky v. Stone, 88 Fed. 383, 391, p. 386, 452, 497.
Bank of Kentucky v. Vance's Adm'rs, 4 Litt. 168, p. 2787.
Bank of Louisville v. Curren, 36 Iowa, 555, p. 994.
Bank of Marysville v. Brewing Co., 50 Ohio St. 151, 33 N. E. 105, 40 Am. St. Rep. 660, p. 2569.
Bank of Mendocino v. Baker, 82 Cal. 114, 22 Pac. 1037, 6 L. R. A. 833, p. 1023, 1024.
Bank of Miss. v. Duncan, 52 Miss. 740, p. 577, 2276, 2653, 2654.
Bank of Mobile v. T. Sav. Inst., 62 Miss. 250, p. 1101, 1123.
Bank of Montgomery's Appeal, 36 Pa. St. 170, p. 2388, 2389.
Bank of Montreal v. Chicago etc. R. R., 48 Iowa, 518, p. 2662.
Bank of Muskingum v. Carpenter's Administrator, Wright, 729, 732, p. 570.
Bank of Muskingum v. Carpenter's Adm'rs, 7 Ohio 21, 28 Am. Dec. 616, p. 2470, 2475.
Bank of Mut. Redemption v. Hill, 56 Me. 385, 388, 96 Am. Dec. 470, p. 556.
Bank of Napa v. Godfrey, 77 Cal. 612, 20 Pac. 142, p. 2396.
Bank of Newberry v. Eastman, 44 N. H. 431, p. 1147.
Bank of New Milford v. Town of New Milford, 36 Conn. 93, 94, p. 1144, 1177.
Bank of N. O. v. Matthews, 49 N. Y. 12, p. 1696.
Bank of Orleans v. Flagg, 3 Barb. Ch. 316, p. 1019, 1024, 1048.
Bank of Orleans v. Torrey, 7 Hill, 260, 9 Paige, 649, 662, p. 1761.
Bank of Overton v. Thompson, 118 Fed. 798, 802, 803, (C. C. A.) p. 1176, 1179.
Bank of Pittsburgh v. Whitehead, 10 Watts, 397, 36 Am. Dec. 186, p. 1156.
Bank of Republic v. Baxter, 31 Vt. 101, p. 1609, 1613, 1618.
Bank of Republic v. Millard, 10 Wall. 152, 19 L. ed. 897, p. 2569.
Bank of Rome v. Haselton, 83 Tenn. (15 Lea) 216, p. 1155.
Bank of Shelby v. James, 95 Tenn. 8, 30 S. W. 1038, p. 2154, 2158.
Bank of Spring City v. Rhea County, (Tenn. Ch. App.) 59 S. W. 442, p. 1214, 1231.
Bank of State of Indiana v. Anderson, 14 Iowa, 544, 83 Am. Dec. 390, p. 1300.
Bank of State of S. C. v. Campbell, 2 Rich. Eq. 179, p. 1269, 1279.
Bank of State of S. C. v. S. C. Mfg. Co., 3 Strob. 190, p. 1105.
Bank of Stockham v. Alter, 61 Nebr. 359, 85 N. W. 300, p. 224, 352.
Bank of Stockton v. Howland, 42 Cal. 129, p. 683, 2607.
Bank of Turkey v. Ottoman Co., L. R. 2 Eq. 366, p. 2670.
Bank of Ukiah v. Petaluma Sav. Bank, 100 Cal. 590, 35 Pac. 170, p. 1270.
Bank of Ukiah v. Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118, p. 2330, 2331, 2332, 2333.
Bank of U. S. v. Biddle. 2 Pars. Cas. 31, p. 226, 324, 560, 1647.

Bank of U. S. v. Covert, 13 Ohio, 240, p. 23, 892, 2394.
Bank of United States v. Daniel, 12 Pet. 32, p. 1483, 1503.
Bank of United States v. Davis, 2 Hill, 451, 461, 464, p. 1156, 1157, 1162, 1164, 1165, 1169.
Bank of United States v. Housman, 6 Paige, 526, p. 1799, 1800, 1803, 1989.
Bank of United States v. Lee, 13 Pet. 107, p. 1724.
Bank of U. S. v. Schultz, 2 Ohio, 471, p. 2752, 2758.
Bank of Utica v. Finch, 3 Barb. Ch. 293, p. 2383.
Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189, 7 Paige, 517, p. 147, 149, 270, 277, 283.
Bank of Washington v. Nock, 9 Wall. 373, 19 L. ed. 717, p. 2470, 2472.
Bank of Woodland v. Hiatt, 58 Cal. 234, p. 1590, 1598.
Bankart v. Houghton, 27 Beav. 425, 428, p. 696, 1450.
Bankart v. Tennant, L. R. 10 Eq. 141, p. 1451.
Bankers' Loan & I. Co. v. Blair, 99 Va. 606, 39 S. E. 231, 86 Am. St. Rep. 914, p. 1106, 1122, 1124, 1127.
Bankes, In re, [1902] 2 Ch. 333, p. 2159.
Bankes v. Le Despencer, 11 Sim. 508, 527, p. 2051.
Bankhead v. Alloway, 6 Cold. 56, p. 1581, 1583.
Bankhead v. Owen, 60 Ala. 457, p. 2498, 2511, 2515, 2516, 2520.
Banks v. Ammon, 27 Pa. St. 172, p. 1124.
Banks v. Banks, 17 Beav. 352, p. 783.
Banks v. Goodfellow, L. R. 5 Q. B. 549, p. 1726.
Banks v. Judah, 8 Conn. 145, 146, 147, p. 1761, 1772.
Banks v. Long, 79 Ala. 319, p. 1328.
Banks v. Phelan, 4 Barb. 80, p. 1960.
Banks v. Sutton, 2 P. Wms. 700, p. 1848.
Banks v. Thompson, 75 Ala. 531, p. 1067.
Banks v. Wilkes, 3 Sand. Ch. 99, p. 2061, 2094, 2095, 2096.
Bank's Appeal, 91 Pa. St. 163, p. 1283.
Banman v. Street, 76 Ill. 526, p. 2191.
Banning v. Edes, 6 Minn. 402, p. 1281.
Banning v. Sabin, 45 Minn. 431, 48 N. W. 8, p. 2427.
Bannister, In re, L. R. 12 Ch. Div. 131, 142, p. 1585.
Bannister v. Bannister, 37 S. C. 529, 16 S. E. 612, p. 821, 832.
Banta v. Palmer, 47 Ill. 99, p. 1590, 1594.
Banta v. Savage, 12 Nev. 751, p. 1563.
Bantree v. Watson, 3 Mylne & K. 339, p. 1743.
Bap. Ass'n v. Hart's Ex'rs, 4 Wheat. 1, p. 1954, 1962, 1966, 1978.
Baptist Church, Petition of, 51 N. H. 424, p. 529, 2280.
Bap. Church v. Presb. Church, 18 B. Mon. 635, p. 1979.
Baptist Female Univ. v. Borden, 137 N. C. 476, 44 S. E. 47, 1007, p. 2318.
Barb v. Sayers, 107 Pa. St. 246, p. 1283.
Barber, In re, L. R. 11 Ch. Div. 442, p. 2172.
Barber, In re, 36 Misc. Rep. 433, 73 N. Y. Supp. 749, p. 2055.
Barber v. Barber, 21 How. 582, 584, 591, 592, p. 494, 497, 498, 513, 515, 517.
Barber v. Rukeyser, 39 Wis. 590, p. 1470.
Barber v. Taylor, 9 Dana, 84, p. 904, 907.
Barber v. Wadsworth, 115 N. C. 29, 20 S. E. 178, p. 1097, 1147.
Barber v. Wood, L. R. 4 Ch. Div. 885, p. 1543.
Barbour v. De Forest, 95 N. Y. 13, p. 1896.
Barbour v. Nichols, 3 R. I. 187, p. 1127.
Barchent v. Selleck, 89 Minn. 513, 95 N. W. 455, p. 1046, 1452.
Barclay, In re, [1899] 1 Ch. 674, p. 2089.
Barclay v. Henderson, 44 Ala. 269, p. 2756.
Barclay v. Pearson, [1893] 2 Ch. 154, p. 1676.
Barclay v. Wainwright, 3 Ves. 462, p. 888, 889.
Barclay's Appeal, 93 Pa. St. 50, p. 559.
Barclay's Estate, 11 Phila. 123, p. 2232, 2236, 2247.
Bard v. Bingham, 54 Ala. 463, p. 2656.

Bard v. Penn etc. Fire Ins. Co., 153 Pa. St. 257, 34 Am. St. Rep. 704, 25 Atl. 1124, p. 1159.
Bardon v. Hartley, 112 Wis. 74, 87 N. W. 809, p. 2040.
Bardon v. Land & River Imp. Co., 157 U. S. 327, 330, 15 Sup. Ct. 650, 651, p. 502.
Bardswell v. Bardswell, 9 Sim. 319, p. 1909, 1929.
Bare v. Bare, 91 Iowa, 143, 59 N. W. 20, p. 829.
Barefield, In re, 177 N. Y. 387, 101 Am. St. Rep. 814, 69 N. E. 732, p. 1911.
Barfield v. Nicholson, 2 Sim. & St. 1, p. 2676.
Barfield v. Price, 40 Cal. 535, p. 2729.
Bargent v. Thomson, 4 Giff. 473, p. 717.
Barger v. Barger, 30 Oreg. 268, 47 Pac. 702, p. 1996.
Barham v. Hostetter, 67 Cal. 272, 7 Pac. 689, p. 374, 397.
Baring v. Nash, 1 Ves. & B. 551, p. 2739, 2740.
Barker, In re, [1892] 2 Ch. 491, p. 1911.
Barker, In re, L. R. 17 Ch. Div. 241, p. 2320, 2331.
Barker, Matter of, 2 Johns. Ch. 232, 234, p. 2622, 2624.
Barker v. Barker, 14 Wis. 131, p. 701, 958, 2024.
Barker v. Bell, 37 Ala. 354, 358, p. 1272, 2345, 2399.
Barker v. Birch, 1 De Gex & S. 376, p. 1633.
Barker v. Elkins, 1 Johns. Ch. 465, p. 2702.
Barker v. Fitzgerald, (Ill.) 68 N. E. 430, p. 1504, 1505, 1509, 1540.
Barker v. Flood, 103 Mass. 474, p. 1407.
Barker v. Ford, 103 Mass. 474, p. 1408.
Barker v. Furlong, [1891] 2 Ch. 172, p. 1838.
Barker v. Greenwood, 4 Mees. & W. 421, p. 1918.
Barker v. Harrison, 2 Coll. C. C. 546, p. 1761, 1763.
Barker v. Hill, 2 Ch. Rep. 113, p. 1468.
Barker v. Ray, 2 Russ. 63, p. 1634.
Barker v. Rayner, 2 Russ. 122, p. 2211.
Barker v. Rukeyser, 39 Wis. 590, p. 1642.
Barker v. Swain, 4 Jones Eq. 220, p. 2648.
Barker v. Wood, 9 Mass. 419, p. 1979.
Barker v. Vansommer, 1 Brown Ch. 149, p. 1705.
Barker's Estate, In re, 159 Pa. St. 518, 28 Atl. 365, p. 1846.
Barker's Trusts, In re, 1 Ch. Div. 43, Ames' Cas. on Trusts, 223, p. 2107.
Barkley v. Barkley, 14 Rich. Eq. 12, p. 2764.
Barkley v. Donnelly, 112 Mo. 561, 19 S. W. 305, p. 1943, 1955, 1961, 1975.
Barkley v. Lane's Ex'r, 6 Bush, 587, p. 1906, 1908.
Barley v. Walford, 9 Q. B. 197, p. 1576.
Barlow v. Myers, 64 N. Y. 41, 21 Am. Rep. 582, reversing 6 N. Y. Sup. Ct. 183, p. 1233.
Barlow v. Scott, 24 N. Y. 40, 45, p. 231, 355, 569, 586.
Barlow v. Scott's Adm'rs, 12 Iowa, 63, p. 683, 2607.
Barlow v. Vanheythuysen, 11 Hare, 126, p. 1801.
Barnard v. Adams, 58 Fed. 313 (C. C. Iowa), p. 1965.
Barnard v. Bagshaw, 3 De Gex, J. & S. 355, p. 2094.
Barnard v. Campau, 29 Mich. 162, p. 992, 1009, 1119, 1146.
Barnard v. Campbell, 65 Barb. 286, p. 1385.
Barnard v. Campbell, 55 N. Y. 456, 462, 463, p. 1426, 1435, 1443, 1444.
Barnard v. Cave, 26 Beav. 253, p. 1517, 1520.
Barnard v. Eaton, 2 Cush. 294, 304, p. 2344.
Barnard v. Flinn, 8 Ind. 204, p. 1535.
Barnard v. Ford, L. R. 4 Ch. 247, p. 2168, 2173.
Barnard v. Hoyt, 63 Ill. 341, p. 2748.
Barnard v. Jennison, 27 Mich. 230, p. 2380, 2382, 2431.
Barnard v. Lee, 97 Mass. 92, p. 2769, 2779.
Barnard v. Patterson, (Mich.) 100 N. W. 893, p. 2430, 2431.
Barnard v. Simms, 42 Barb. 304, p. 2750.

Barnard v. Viele, 21 Wend. 88, p. 1701.
Barnard v. Whipple, 29 Vt. 401, 70 Am. Dec. 422, p. 1276.
Barned Banking Co., In re, 39 L. J. Ch. 635, p. 1915.
Barned's Bank, In re, L. R. 2 Ch. 350, p. 264.
Barned's Banking Co., In re, L. R. 3 Ch. 105, p. 1650.
Barnes, In re, 4 Misc. Rep. 136, 23 N. Y. Supp. 600, p. 2089.
Barnes v. Addy, L. R. 9 Ch. 244, p. 2029, 2032.
Barnes v. Barnes, 66 Me. 286, p. 1738.
Barnes v. Barnes, 65 N. C. 261, p. 2761.
Barnes v. Bartlett, 47 Ind. 98, p. 1487.
Barnes v. Beloit, 19 Wis. 93, p. 434, 439.
Barnes v. Boston etc. R. R., 130 Mass. 388, p. 2780.
Barnes v. Brown, 80 N. Y. 527, 535, p. 1783, 2080, 2083.
Barnes v. Clement, 12 S. D. 270, 81 N. W. 301, p. 760.
Barnes v. Compton's Adm'rs, 8 Gill, 391, p. 2272.
Barnes v. Dow, 59 Vt. 530, 10 Atl. 258, p. 1847.
Barnes v. Hathorn, 54 Me. 124, p. 2684.
Barnes v. Jamison, 24 Tex. 362, p. 1355.
Barnes v. Lloyd, 1 How. 584, p. 568.
Barnes v. McClinton, 3 Penr. & W. 67, 23 Am. Dec. 62, p. 973, 977, 979, 984.
Barnes v. Mott, 64 N. Y. 397, 21 Am. Rep. 625, p. 2424.
Barnes v. Racster, 1 Younge & C. 401, p. 2787.
Barnes v. Sammons, 128 Ind. 596, 27 N. E. 747, p. 468.
Barnes v. Taylor, 30 N. J. Eq. 7, p. 2034, 2042.
Barnes v. Taylor, 27 N. J. Eq. 259, p. 697, 1901.
Barnes v. Thuet, 116 Iowa, 359, 89 N. W. 1085, p. 2033, 2040.
Barnes v. Trenton Gas Co., 27 N. J. Eq. 33, p. 1174, 1175.
Barnesly v. Powel, 1 Ves. Sr. 284, 287, p. 1549, 1635, 1654.
Barnet v. Barnet, 15 Serg. & R. 72, p. 1115.
Barnet v. Dougherty, 32 Pa. St. 371, p. 2040.
Barnet v. Turnp. Co., 15 Vt. 757, p. 1461.
Barnett v. Barnett, 6 J. J. Marsh. 499, p. 1550.
Barnett v. Cline, 60 Me. 205, p. 2757.
Barnett v. Nelson, 54 Iowa, 41, 37 Am. Rep. 183, 6 N. W. 41, p. 2428, 2429.
Barnett v. Riser's Ex'rs, 63 Ala. 347, p. 2498, 2520.
Barnett v. Sheffield, 1 De Gex, M. & G. 371, 379, p. 2049, 2065.
Barnett v. Spratt's Adm'rs, 4 Ired. Eq. 171, p. 1668, 2771.
Barnett v. Squyres, (Tex. Civ. App.) 52 S. W. 612, p. 1275.
Barnett v. Squyres, 93 Tex. 193, 54 S. W. 241, 77 Am. St. Rep. 854, p. 1280, 1356.
Barnett v. Vincent, 69 Tex. 685, 7 S. W. 525, 5 Am. St. Rep. 98, p. 1025.
Barnett v. Weston, 12 Ves. 129, p. 1295.
Barnett's Appeal, 46 Pa. St. 392, 86 Am. Dec. 502, p. 1830, 1831, 1846.
Barnett's Adm'r v. Barnett, 1 Met. (Ky.) 257, 258, 259, p. 852.
Barnewell v. Lord Cawdor, 3 Madd. 453, p. 2222.
Barney, In re, [1894] 3 Ch. 562, p. 1838.
Barney v. Douglas, 19 Vt. 98, p. 1212.
Barney v. Griffin, 2 N. Y. 365, p. 1858.
Barney v. Grover, 28 Vt. 391, p. 1225.
Barney v. Little, 15 Iowa, 527, p. 1114.
Barney v. McCarthy, 15 Iowa, 510, 83 Am. Dec. 427, p. 1100, 1119, 1373.
Barney v. Myers, 28 Iowa, 472, p. 2448.
Barney v. Saunders, 16 How. 535, 542, 543, 14 L. ed. 1047, p. 2058, 2068, 2077.
Barnhart v. Greenshields, 9 Moore P. C. C. 18, 33, 34, 36, p. 993, 1025, 1033, 1047, 1292, 2379.
Barnsdale v. Lowe, 2 Russ. & M. 142, p. 296.

Barnum v. Le Master, 110 Tenn. 638, 75 S. W. 1045, p. 2140.
Barnum v. Mayor etc. of Baltimore, 62 Md. 275, 50 Am. Rep. 219, p. 1971.
Barnum v. Phenix, 60 Mich. 388, 27 N. W. 577, p. 1227.
Barnum v. Reed, 136 Ill. 398, 26 N. E. 572, p. 1865, 1869.
Barnum v. Young, 10 Nebr. 309, p. 2195.
Barny v. Beak, 2 Ch. Cas. 136, p. 1705.
Baron de Womes v. Miller, L. R. 16 Eq. 554, p. 2702.
Barr v. Deniston, 19 N. H. 170, 180, p. 407.
Barr v. Hatch, 3 Ohio, 527, p. 1469.
Barr v. N. Y. etc. R. R. Co., 96 N. Y. 444, p. 416.
Barr v. O'Donnell, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429, p. 2040, 2041.
Barr v. Pittsburgh Plate-Glass Co., 57 Fed. 86, 6 C. C. A. 260, 17 U. S. App. 124, p. 2084.
Barr v. Weld, 24 Pa. St. 84, p. 1977.
Barrack v. McCulloch, 3 Kay & J. 110, p. 2146.
Barratt v. Wyatt, 30 Beav. 442, p. 2067.
Barrell v. Jay, 16 Mass. 221, p. 1903, 2100.
Barrell v. Sabine, 1 Vern. 268, p. 2372.
Barret v. Wells, Prec. Ch. 131, p. 1679.
Barret v. Blagrave, 5 Ves. 555, 6 Ves. 104, p. 2675.
Barrett v. Baker, 136 Mo. 512, 37 S. W. 130, p. 992.
Barrett v. Ball, 101 Mo. App. 288, 73 S. W. 865, p. 1770.
Barrett v. Bamber, 9 Phila. 202, p. 1771.
Barrett v. Bamber, 81 Pa. St. 247, p. 2024, 2028, 2030, 2032.
Barrett v. Beckford, 1 Ves. Sr. 519, 1 P. Wms. 324, note 1, p. 875, 955.
Barrett v. Bloomfield Sav. Inst., 64 N. J. Eq. 425, 54 Atl. 543, p. 2128.
Barrett v. Hartley, L. R. 2 Eq. 789, 795, p. 2097, 2371.
Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, p. 2341, 2347, 2418.
Barrett v. Lewis, 106 Md. 120, 5 N. E. 910, p. 2499.
Barrett v. Twin City Power Co., 118 Fed. 861, p. 353, 499.
Barrett v. Sargent, 18 Vt. 365, 369, p. 148, 571.
Barrett v. Weber, 125 N. Y. 18, 25 N. E. 1068, p. 1704, 1735.
Barrett's Case, 3 De Gex, J. & S. 30, p. 1567, 1573.
Barribeau v. Brant, 17 How. 43, p. 1665.
Barrier v. Kelly, (Miss.) 33 South. 974, p. 772, 775, 777, 780, 781, 783, 787.
Barroilhet v. Batelle, 7 Cal. 450, p. 2474, 2476.
Barron v. Barron, 24 Vt. 375, p. 646, 2139.
Barron v. Grillard, 3 Ves. & B. 165, p. 276.
Barron v. Mullin, 21 Minn. 374, p. 2662.
Barron v. Paulling, 38 Ala. 292, p. 2428.
Barron v. Porter, 44 Vt. 587, p. 1212.
Barron v. Robbins, 22 Mich. 35, p. 2749.
Barrow v. Barrow, 18 Beav. 529, p. 1515, 2144.
Barrow v. Barrow, 5 De Gex, M. & G. 782, 794, p. 646, 2170, 2173.
Barrow v. Barrow, 4 Kay & J. 409, 419, p. 845.
Barrow v. Greenough, 3 Ves. 152, p. 1653.
Barrow v. Paxton, 5 Johns. 258, 4 Am. Dec. 354, p. 2460.
Barrow v. Rhinelander, 1 Johns. Ch. 550, p. 2801.
Barrow v. Richard, 8 Paige, 351, 35 Am. Dec. 713, p. 1200.
Barrow v. Trustees, [1891] 1 Q. B. 417, p. 755, 759.
Barrows v. Baughman, 9 Mich. 213, p. 1096.
Barrows v. Sweet, 143 Mass. 316, 9 N. E. 665, p. 1549.
Barrs v. Fewkes, 2 Hem. & M. 60, 11 Jur., N. S., 669, p. 1986, 2326.
Barr's Trusts, In re, 4 Kay & J. 219, p. 1211.
Barry v. Butlin, 1 Curteis' Ecc. 637, p. 1768.

Barry v. Croskey, 2 Johns. & H. 1, 21, p. 992.
Barry v. Equitable Life Ins. Co., 59 N. Y. 587, 591, p. 1239, 1241.
Barry v. Lambert, 98 N. Y. 300, 50 Am. Rep. 677, p. 1906.
Barry v. Merch. Exch. Co., 1 Sand. Ch. 280, p. 2383, 2387, 2388, 2389.
Barry v. Round, 119 Iowa, 105, 93 N. W. 67, p. 1542.
Barry v. Wisdom, 5 Ohio St. 241, p. 732.
Barstow v. Beckett, 122 Fed. 140, p. 986.
Barstow v. Savage Mining Co., 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349, p. 1240.
Barth v. Deuel, 11 Colo. 494, 19 Pac. 471, p. 1860.
Barthell v. Roderick, 34 Iowa, 517, p. 1550.
Barthet v. Elias, 2 Abb. N. C. 364, p. 1706.
Bartholomew v. Bentley, 1 Ohio St. 37, p. 2125.
Bartle v. Coleman, 29 U. S. (4 Pet.) 184, 7 L. ed. 825, p. 664.
Bartlett, In re, 163 Mass. 509, 40 N. E. 899, p. 1934, 1940, 1946, 1948, 1979.
Bartlett v. Bartlett, 14 Gray, 277, p. 1989.
Bartlett v. Bartlett, 15 Nebr. 593, 19 N. W. 691, p. 2041.
Bartlett v. Blaine, 83 Ill. 25, 25 Am. Rep. 346, p. 1603.
Bartlett v. Crittenden, 4 McLean, 300, p. 2689.
Bartlett v. Drew, 57 N. Y. 587, 60 Barb. 648, p. 2011, 2012, 2030.
Bartlett v. Fitz, 59 N. H. 502, p. 2089.
Bartlett v. Gillard, 3 Russ. 149, 156, p. 290, 875, 876, 886.
Bartlett v. Glascock, 4 Mo. 62, 66, p. 974, 977, 982.
Bartlett v. Johnson, 9 Allen, 530, p. 189, 2463.
Bartlett v. Judd, 21 N. Y. 200, 203, 78 Am. Dec. 131, p. 93, 1524, 2722.
Bartlett v. King, 12 Mass. 537, 7 Am. Dec. 99, p. 1979.
Bartlett v. Nye, 4 Met. 378, p. 1966, 1967, 1979.
Bartlett v. Parks, 1 Cush. 82, p. 543.
Bartlett v. Pickersgill, 1 Eden, 515, p. 1999.
Bartlett v. Remington, 59 N. H. 364, p. 1873.
Bartlett v. Salmon, 6 De Gex, M. & G. 33, p. 1633.
Bartlett v. Van Zandt, 4 Sand. Ch. 396, p. 2172.
Bartlett v. Wade, 66 Vt. 629, 30 Atl. 4, p. 2393.
Bartling v. Brasuhn, 102 Ill. 441, p. 2380.
Barton v. Barton, 75 Ala. 400, p. 1356.
Barton v. Barton, 32 Md. 214, p. 2193.
Barton v. Barton, 2 Vern. 308, p. 1682.
Barton v. Briscoe, Jacob, 603, p. 2160.
Barton v. Cooke, 5 Ves. 461, p. 2208.
Barton v. Drake, 21 Minn. 299, p. 2755, 2757.
Barton v. Pioneer S. & L. Co., 69 Minn. 85, 71 N. W. 906, 65 Am. St. Rep. 549, p. 1436.
Barton v. Vanheythuysen, 11 Hare, 126, 131, 132, p. 1791.
Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176, p. 415, 443, 445.
Bartz v. Paff, 95 Wis. 95, 69 N. W. 297, 37 L. R. A. 848, p. 2043.
Barziza v. Story, 39 Tex. 354, p. 1761, 1764.
Basan v. Brandon, 8 Sim. 171, p. 2214.
Bascom v. Albertson, 34 N. Y. 584, 604, 587–621, p. 177, 1936, 1954, 1967, 1968.
Bascom v. Smith, 34 N. Y. 320, p. 1402.
Basey v. Gallagher, 20 Wall. 670, 679, 1 Mont. Ter. 457, p. 494.
Baskcomb v. Beckwith, L. R. 8 Eq. 100, p. 1518, 1539, 1609, 1619.
Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. ed. 500, p. 2232, 2234, 2236.
Basket v. Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842, p. 666, 671, 1697, 1709, 1713, 1716.
Baskins v. Calhoun, 45 Ala. 582, p. 2726.
Bass v. Bass, 4 Hen. & M. 478, p. 324.
Bass v. Wheless, 2 Tenn. Ch. 531, p. 1372.

Basse v. Gallegger, 7 Wis. 442, 76 Am. Dec. 225, p. 725.
Basset v. Nosworthy Cas. T. Finch, 102, 2 Lead. Cas. Eq. 1, 4, 31, 33–42, 46, 73–96, and notes, p. 266, 695, 1187, 1188, 1315, 1318, 1322, 1367, 1368, 1371.
Bassett v. Brown, 105 Mass. 551, p. 1603.
Bassett v. Brown, 100 Mass. 355, p. 148, 535, 540, 1637, 1643.
Bassett v. Mason, 18 Conn. 131, p. 1400, 1402.
Bassett v. Salisbury M. Co., 47 N. H. 426, 437, 439, p. 529, 530, 696, 1450, 1788, 2684.
Bassett v. Shoemaker, 46 N. J. Eq. 538, 19 Am. St. Rep. 435, 20 Atl. 52, p. 1755.
Bassford v. Blakesley, 6 Beav. 131, 133, p. 273, 289.
Basye v. Ambrose, 28 Mo. 39, p. 744.
Batavia v. Wallace, 102 Fed. 240, 42 C. C. A. 310, p. 973, 983, 1157.
Batchelder v. Batchelder, 20 Wis. 452, p. 2293.
Batchelor v. Middleton, 6 Hare, 75, p. 2437.
Batdorf v. Albert, 59 Pa. St. 59, p. 1590, 1594.
Bate v. Bate, 7 Beav. 528, p. 261.
Bate v. Hooper, 5 De Gex, M. & G. 338, p. 1503, 2067, 2069.
Bateman v. Backus, 4 Dak. 433, 34 N. W. 66, p. 1082.
Bateman v. Burr, 57 Cal. 480, p. 1860, 1861, 1895.
Bateman v. Hotchkin, 10 Beav. 426, p. 2223.
Bateman v. Willoe, 1 Schoales & L. 201, 204, 205, 206, p. 211, 1476, 1510, 2701.
Bates v. A. E. Johnson Co., 79 Minn. 354, 82 N. W. 649, p. 1155.
Bates v. American Mortgage Co., 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340, p. 1157.
Bates v. Ball, 72 Ill. 108, p. 1732, 1733.
Bates v. Bates, 134 Mass. 110, 45 Am. Rep. 305, p. 1935, 1978.
Bates v. Butler, 46 Me. 387, p. 1736.
Bates v. Delavan, 5 Paige, 299, p. 2771.
Bates v. Hurd, 65 Me. 180, p. 1901, 1903.
Bates v. Johnson, Johns. 304, p. 1375.
Bates v. Johnson Co., A. E., 79 Minn. 354, 82 N. W. 649, p. 1155.
Bates v. Kempton, 7 Gray, 382, p. 2233, 2236.
Bates v. Norcross, 14 Pick. 224, p. 1132.
Bates v. Plowsky, 62 How. Pr. 429, p. 2791.
Bates v. Ruddick, 2 Iowa, 423, 65 Am. Dec. 774, p. 2440, 2448.
Bates v. Spooner, 75 Conn. 501, 54 Atl. 305, p. 2312.
Bates v. Underhill, 3 Redf. 365, p. 2061, 2094, 2095.
Bates v. United States, 4 Ct. of Cl. 569, p. 2555.
Batesville etc. Co. v. Myer etc. Co., 68 Ark. 115, 56 S. W. 784, p. 1221.
Bath Paper Co. v. Langley, 23 S. C. 129, p. 353, 2018.
Bath Sav. Inst. v. Hathorn, 88 Me. 122, 51 Am. St. Rep. 382, 33 Atl. 836, 32 L. R. A. 377, p. 1864, 1866.
Batstone v. Salter, L. R. 19 Eq. 250, 10 Ch. 431, p. 1998.
Battersea Park, In re, 9 Jur., N. S., 883, p. 2319.
Battle v. Bering, 7 Yerg. 529, 27 Am. Dec. 526, p. 2631.
Battle v. Davis, 66 N. C. 252, p. 2653, 2654, 2657, 2662.
Batts v. Scott, 37 Tex. 59, p. 1337.
Batty v. Chester, 5 Beav. 103, p. 667, 1702, 1711, 1715.
Batty v. Lloyd, 1 Vern. 141, p. 1669.
Baud v. Fardell, 7 De Gex, M. & G, 628, p. 2065, 2069, 2070, 2073.
Bauer v. Platt, 72 Hun, 326, 25 N. Y. Supp. 426, p. 415.
Baugher v. Merryman, 32 Md. 185, p. 2369, 2372, 2373, 2380.
Baugh's Ex'rs v. Walker, 77 Va. 99, p. 2079.
Baum v. Baum, 109 Wis. 47, 85 N. W. 122, 83 Am. St. Rep. 854, 53 L. R. A. 650, p. 1679.
Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153, p. 2499, 2511, 2514, 2519.
Baum v. Trantham, 45 S. C. 291, 23 S. E. 54, p. 1066, 1087.
Baumgarten v. Broadway, 77 N. C. 8, p. 2675.
Baumgartner v. Peterson, 93 Iowa, 572, 62 N. W. 27, p. 1226.

Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661, p. 1316, 1437, 1449, 1787.
Bawden, In re, [1894] 1 Ch. 693, p. 2223, 2490.
Baxendale v. McMurray, L. R. 2 Ch. 790, p. 2686.
Baxendale v. Seale, 19 Beav. 601, p. 1501, 1508, 1518, 1519.
Baxter v. Boyer, 19 Ohio, 490, p. 825.
Baxter v. Child, 39 Me. 110, p. 550.
Baxter v. Conolly, 1 Jacob & W. 576, p. 2773.
Baxter v. Deneen, (Md.) 57 Atl. 601, p. 667, 1676, 1708.
Baxter v. Farmer, 7 Ired. Eq. 239, p. 245, 260, 262.
Baxter v. Lansing, 7 Paige, 350, 353, p. 753, 759, 766.
Baxter v. Moore, 5 Leigh, 219, p. 2793.
Baxton v. Monkhouse, Coop. 41, p. 2659.
Bay v. Coddington, 20 Johns. 637, 5 Johns. Ch. 54, 9 Am. Dec. 268, p. 1330.
Bay v. Williams, 112 Ill. 91, 54 Am. Rep. 209, p. 2409.
Bayard v. Hoffman, 4 Johns. Ch. 450, p. 2788.
Bay City Bridge Co. v. Van Etten, 36 Mich. 210, p. 217, 1643.
Bayer v. Cockerill, 3 Kan. 282, p. 1075.
Bayerque v. Cohen, 1 McAll. 117, Fed. Cas. No. 1134, p. 502.
Bayes v. Howes, 24 Ky. L. Rep. 281, 68 S. W. 449, p. 823.
Baylee v. Quinn, 2 Dru. & War. 116, p. 890.
Bayler v. Comm, 40 Pa. St. 37, 80 Am. Dec. 551, p. 2574.
Bayles v. Baxter, 22 Cal. 575, p. 1992.
Bayles v. Young, 51 Ill. 127, p. 1145.
Bayless v. Bayless, 6 Baxt. 324, p. 2489.
Bayley v. Bailey, 5 Gray, 505, 510, p. 1101.
Bayley v. Bayley, (N. J. Eq.) 57 Atl. 271, p. 1077.
Bayley v. Boulcott, 4 Russ. 345, p. 1907.
Bayley v. Greenleaf, 7 Wheat. 45, 46, p. 1217, 1270, 2504, 2515, 2516, 2518.
Bayley v. Williams, 4 Giff. 638, p. 1718.
Bayliss v. Williams, 6 Cold. 440, p. 1752, 2729.
Bayliss v. Young, 51 Ill. 127, p. 1358.
Baylor v. Scottish-Am. Mortgage Co., 66 Fed. 631, 13 C. C. A. 659, p. 1342.
Baynard v. Norris, 5 Gill, 468, 483, 46 Am. Dec. 647, p. 1019, 1146, 1393, 1515.
Baynard v. Woolley, 20 Beav. 583, p. 2017, 2092, 2094, 2538.
Bayne v. Ferguson, 5 Dow. 151, p. 1781, 1787.
Bayspoole v. Collins, L. R. 6 Ch. 228, 232, p. 1805.
Bay State Iron Co. v. Goodall, 39 N. H. 223, 230, p. 530, 2788.
Beach v. Clark, 6 Conn. 354, p. 2346.
Beach v. Cooke, 28 N. Y. 508, 86 Am. Dec. 260, p. 2434, 2437.
Beach v. Dyer, 93 Ill. 295, p. 2034, 2778, 2779.
Beach v. Elmira, 22 Hun, 158, p. 2687.
Beach v. Guaranty Sav. & Loan Ass'n, (Oreg.) 76 Pac. 16, p. 2125.
Beach v. Lattner, 101 Ga. 357, 28 S. E. 110, p. 1297.
Beach v. Norton, 9 Conn. 182, p. 2263.
Beach v. Osborne, 74 Conn. 405, 50 Atl. 1019, p. 1098.
Beach v. Shaw, 57 Ill. 17, p. 2437.
Beadel v. Perry, L. R. 3 Eq. 465, p. 2687, 2698.
Beadles v. Miller, 9 Bush, 405, p. 986.
Beadon v. King, 17 Sim. 34, p. 282.
Beak's Estate, In re, L. R. 13 Eq. 489, p. 2232, 2238, 2246.
Beakley v. Robert, 120 Mich. 209, 79 N. W. 193, p. 1338.
Beal v. Gordon, 55 Me. 482, p. 1357.
Beal v. Harrington, 116 Ill. 113, 4 N. E. 664, p. 2499, 2509, 2516.
Beal v. Hilliary, 1 Md. 186, 54 Am. Dec. 649, p. 2273.
Beal v. Warren, 2 Gray, 447, p. 1112, 1800, 1806, 2193.
Beale v. Ex'rs of Fox, 4 Ga. 404, 425, 426, p. 567.
Beale v. Knowles, 45 Me. 479, p. 2193.
Beale v. Symonds, 16 Beav. 406, p. 2436.
Beall v. Barclay, 10 B. Mon. 261, p. 2440.
Beall v. Butler, 54 Ga. 43, p. 1287, 1372.

Beall v. Fox, 4 Ga. 404, p. 1968, 1973.
Beall v. Smith, L. R. 9 Ch. 85, 91, p. 2625.
Beals v. Cobb, 51 Me. 348, p. 2193.
Beals v. Neddo, 2 Fed. 43, p. 1226.
Beals v. Neddo, 1 McCrary, 206, p. 2419.
Beals v. See, 10 Pa. St. 56, 49 Am. Dec. 573, p. 1725.
Beals' Ex'r v. Storm, 26 N. J. Eq. 372, p. 2147, 2168, 2195.
Bean v. Boothby, 57 Me. 295, p. 1404, 1405, 2193.
Bean v. Coleman, 44 N. H. 539, 547, p. 522, 531.
Bean v. Everett, 21 Ky. L. Rep. 1790, 56 S. W. 403, p. 1279.
Bean v. Haffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138, p. 1672.
Bean v. Smith, 2 Mason, 252, 267, 268, 272-282, p. 516, 1384.
Bear v. Koenigstein, 16 Nebr. 65, 20 N. W. 104, p. 1996.
Bear v. Whisler, 7 Watts, 144, 147, p. 2504.
Beard v. Beard, 25 W. Va. 486, 52 Am. Rep. 219, p. 1503.
Beard v. Dedolph, 29 Wis. 136, p. 2200.
Beard v. Fitzgerald, 105 Mass. 134, p. 2444, 2447.
Beard v. Knox, 5 Cal. 252, 257, 63 Am. Dec. 125, p. 809, 841, 842.
Beard v. Linthicum, 1 Md. Ch. 345, p. 1523, 2769.
Beard v. Nutthall, 1 Vern. 427, p. 634.
Beard v. Smith, 6 T. B. Mon. 430, 505, p. 2749.
Beard v. White, (Ga.) 48 S. E. 400, p. 1712.
Bearden v. Jones, (Tenn. Ch. App.) 48 S. W. 88, p. 664.
Bearden v. White, (Tenn. Ch. App.) 42 S. W. 476, p. 2054.
Bearden v. Wook, 1 A. K. Marsh. 450, p. 2777.
Beardsley v. Cram, 137 Cal. 328, 70 Pac. 175, p. 1449, 1452.
Beardsley v. Day, 52 Minn. 451, p. 1122.
Beardsley v. Day, 54 Minn. 504, 55 N. W. 46, p. 1097.
Beardsley v. Duntley, 69 N. Y. 577, p. 1528, 1534, 1559, 1590.
Beardsley v. Knight, 10 Vt. 185, 33 Am. Dec. 193, p. 1523.
Beardsley v. Selectmen of Bridgeport, 53 Conn. 489, 3 Atl. 557, 55 Am. Rep. 152, p. 1942, 1955, 1961, 1972.
Beardsley Scythe Co. v. Foster, 36 N. Y. 561, p. 2789.
Bear's Adm'r v. Bear, 33 Pa. St. 525, p. 2197.
Beasley v. Magrath, 2 Schoales & L. 31, 35, p. 1773, 1776.
Beatie v. Butler, 21 Mo. 313, 64 Am. Dec. 234, p. 1033, 1048, 1147.
Beatson v. Beatson, 12 Sim. 281, 294, p. 1872.
Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463, p. 1021, 1333, 1354.
Beattie v. Dickinson, 39 Ark. 205, p. 2530, 2535.
Beatty v. Byers, 18 Pa. St. 105, p. 2333.
Beatty v. Clark, 20 Cal. 11, 30, p. 1468, 2101, 2102.
Beatty v. Dixon, 56 Cal. 622, p. 421, 455.
Beatty v. Kurtz, 2 Pet. 566, 584, p. 2687.
Beaty v. Curson, L. R. 7 Eq. 194, p. 2089.
Beauchamp v. Marquis of Huntley, Jacob, 546, p. 2718.
Beauclerk v. Mead, 2 Atk. 167, p. 2312.
Beaufort v. Collier, 6 Humph. 487, 44 Am. Dec. 321, p. 2144, 2161.
Beaufoy, In re, 1 Smale & G. 20, p. 2322.
Beaumont, In re, [1902] 1 Ch. 889, p. 2238.
Beaumont v. Bramley, Turn. & R. 41, 50, p. 1515, 1516.
Beaumont v. Carter, 32 Beav. 586, p. 2173.
Beaumont v. Oliveira, L. R. 6 Eq. 534, 4 Ch. 309, 314, p. 1933, 1945.
Beaumont's Trusts, In re, 32 Beav. 191, p. 2321.
Beaupland v. McKeen, 28 Pa. St. 124, 131, 70 Am. Dec. 115, p. 1388, 1437.
Beavan v. Carpenter, 11 Sim. 22, p. 296.
Beavan v. Earl of Oxford, 6 De Gex, M. & G. 507, 517, 518, p. 1090, 1268.
Beavan v. Lord Oxford, 6 De Gex, M. & G. 492, p. 1207.

Beaver v. Beaver, 117 N. Y. 421, 18 Am. St. Rep. 531, 6 L. R. A. 403, 22 N. E. 940, p. 1867, 1873, 1912.
Beaver v. Beaver, 23 Pa. St. 167, p. 2793.
Bebee v. Bank of New York, 1 Johns. 529, 549, 552, 573, p. 1255, 1257.
Bechinall v. Arnold, 1 Vern. 354, p. 267, 1368.
Bechtold v. Read, 49 N. J. Eq. (4 Dick.) 111, 22 Atl. 1085, p. 2281.
Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430, p. 2773.
Beck v. Beck, 43 N. J. Eq. 39, p. 1994.
Beck v. Burdett, 1 Paige, 305, 308, 19 Am. Dec. 436, p. 540, 2788, 2789.
Beck v. Flournoy Live-Stock & R. E. Co., 65 Fed. 30, 12 C. C. A. 497, 27 U. S. App. 618, p. 669, 1696.
Beck v. Kantorowicz, 3 Kay & J. 230, p. 1764.
Beck v. McGillis, 9 Barb. 35, p. 2208, 2212, 2213.
Beck v. Stepham, 9 How. Pr. 193, p. 2649.
Beck v. Tarrant, 61 Tex. 402, p. 2437, 2439, 2440.
Beck v. Uhrich, 13 Pa. St. 636, 639, 53 Am. Dec. 507, 16 Pa. St. 499, p. 1334, 1336, 1337, 1348.
Becker v. Howard, 4 Hun, 361, p. 1080.
Becker v. Kehr, 49 Pa. St. 223, p. 2494.
Becker v. Sandusky City Bank, 1 Minn. 311, p. 2722.
Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029, p. 1561.
Becker v. Stroeher, 167 Mo. 306, 66 S. W. 1083, p. 1066, 1133, 1903.
Becker v. Ten Eyck, 6 Paige, 68, p. 1697.
Becker v. Union Dime Sav. Inst., 15 App. Div. 553, 44 N. Y. Supp. 521, p. 1866.
Beckett v. Cordley, 1 Brown Ch. 353, 357, 358, p. 692, 1190, 1194, 1261, 1294.
Beckford v. Beckford, Lofft, 490, p. 1998.
Beckford v. Kemble, 1 Sim. & St. 7, p. 2718.
Beckford v. Wildman, 16 Ves. 438, p. 273, 289.
Beckham v. Drake, 8 Mees. & W. 846, 9 Mees. & W. 79, 11 Mees. & W. 315, p. 2552.
Beckley v. Newland, 2 P. Wms. 182, p. 1679, 1745, 2574, 2601.
A. R. Beck Lumber Co. v. Rupp, 188 Ill. 562, 80 Am. St. Rep. 190, 59 N. E. 429, p. 1033, 1048, 1274.
Beckman v. Stanley, 8 Nev. 257, p. 2200.
Beckman v. Wilson, 61 Cal. 355, p. 2430.
Beck's Adm'rs v. De Babtists, 4 Leigh, 349, p. 1105.
Beck's Estate, In re, 133 Pa. St. 51, 19 Am. St. Rep. 623, 19 Atl. 302, p. 1846.
Beckton v. Beckton, 27 Beav. 99, p. 903.
Beckwith v. Dargets, 18 Iowa, 303, p. 2752.
Beckwith v. Howard, 6 R. I. 1, p. 2676.
Beckwith v. St. Philip's Parish, 69 Ga. 564, p. 1955, 1973.
Beckwith v. Union Bank, 9 N. Y. 211, 212, p. 1212, 1233.
Bective v. Hodgson, 10 H. L. Cas. 656, p. 2326.
Beddoe, In re, [1893] 1 Ch. 547, p. 2101.
Bedel v. Loomis, 11 N. H. 74, p. 1665.
Bedell v. Carll, 33 N. Y. 581, p. 2236.
Bedell v. Hoffman, 2 Paige, 199, p. 2635.
Bedford v. Bedford, 99 Ky. 273, 35 S. W. 926, p. 1946, 1949, 1955, 1961, 1980, 2309.
Bedford v. Burton, 106 U. S. 341, 1 Sup. Ct. 98, 27 L. ed. 112, p. 2198.
Bedford Quarries Co. v. Thomlinson, 95 Fed. 208, 36 C. C. A. 272, p. 508.
Bedilian v. Seaton, 3 Wall. Jr. 279, Fed. Cas. No. 1,218, p. 2036.
Bedingfeld and Herring's Contract, In re, [1893] 2 Ch. 332, p. 2050.
Beebe v. Austin, 15 Johns. 477, p. 1281, 1282.
Beebe v. Knapp, 28 Mich. 53, p. 1583.
Beebe v. Young, 14 Mich. 136, p. 1517, 1524.
Beech v. Keep, 18 Beav. 285, p. 1872, 1879.
Beecher v. Beecher, 43 Conn. 556, p. 632, 766.

Beecher v. Foster, 51 W. Va. 605, 42 S. E. 647, p. 2088.
Beecher v. Lewis, 84 Va. 630, p. 352.
Beecher v. Major, 2 Drew. & S. 431, p. 1996, 2000.
Beecker v. Beecker, 7 Johns. 99, 5 Am. Dec. 246, p. 2203.
Beeckman v. Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229, p. 1064.
Beekman v. Bonsor, 23 N. Y. 298, 575, 80 Am. Dec. 269, p. 177, 1895, 1968, 2045.
Beekman v. Frost, 18 Johns. 544, 9 Am. Dec. 246, p. 1119, 1122.
Beekman v. Hudson, 20 Wend. 53, p. 1684.
Beer v. Landman, 88 Tex. 450, 31 S. W. 805, p. 1676, 1704, 1708.
Beers v. Hawley, 2 Conn. 467, p. 1089.
Beeson v. Beeson, 9 Pa. St. 279, p. 1755.
Beeson v. Green, 103 Iowa, 406, 72 N. W. 555, p. 2405, 2413.
Beeston v. Booth, 4 Madd. 161, 168, 170, p. 2225, 2226.
Behlow v. Fisher, 102 Cal. 208, 36 Pac. 509, p. 126.
Beidler v. Beidler, (Ark.) 74 S. W. 13, p. 1278.
Bein v. Heath, 12 How. 168, p. 494.
Beindorf v. Kaufman, 41 Nebr. 824, 60 N. W. 101, p. 1735.
Beivley v. Carter, L. R. 4 Ch. 230, p. 2771.
Belaney v. Belaney, L. R. 2 Ch. 138, p. 1397.
Belaney v. Ffrench, L. R. 8 Ch. 918, p. 284, 287.
Belchier, In re, Ambler, 218, Ames' Cas. on. Trusts, 516, p. 2060.
Belchier v. Butler, 1 Eden, 523, p. 1291.
Belden v. Meeker, 47 N. Y. 307, 2 Lans. 470, p. 1299, 1302, 2562.
Belden v. Sedgwick, 68 Conn. 560, 37 Atl. 417, p. 2190.
Belding v. Archer, 131 N. C. 287, 42 S. E. 800, p. 2065.
Belding v. Manly, 21 Vt. 550, p. 2396, 2397.
Belford v. Crane, 16 N. J. Eq. 265, 84 Am. Dec. 155, p. 2195.
Belfour v. Weston, 1 Term Rep. 310, p. 1460.
Belknap v. Belknap, 2 Johns. Ch. 463, p. 2693.
Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120, p. 1477, 2729.
Belknap v. Trimble, 3 Paige, 577, 600, p. 2686.
Bell v. Bell, 25 S. C. 149, p. 2309.
Bell v. Bruen, 1 How. 169, p. 2769.
Bell v. Campbell, 123 Mo. 1, 45 Am. St. Rep. 505, 25 S. W. 359, p. 1718, 1735.
Bell v. Carter, 17 Beav. 11, p. 2369.
Bell v. City of Boston, 101 Mass. 506, 511, p. 536.
Bell v. Clark, 111 Pa. St. 92, p. 559.
Bell v. Clarke, 25 Beav. 437, p. 1679.
Bell v. Coleman, 5 Madd. 22, p. 943.
Bell v. Couch, 132 N. C. 346, 43 S. E. 911, p. 1097.
Bell v. Cundall, Amb. 102, p. 1383.
Bell v. Cunningham, 1 Sum. 89, p. 2709.
Bell v. Day, 32 N. Y. 165, p. 1625.
Bell v. Ellis, 33 Cal. 620, 626, p. 1621.
Bell v. Evans, 10 Iowa, 353, p. 1270.
Bell v. Fleming's Ex'rs, 12 N. J. Eq. 13, 490, p. 1126, 2383, 2388.
Bell v. Gamble, 9 Humph. 117, p. 2707.
Bell v. Gardiner, 4 Man. & G. 11, 4 Scott N. R. 621, p. 1477, 1511.
Bell v. Gaylord, 6 N. M. 227, 27 Pac. 494, p. 1087.
Bell v. Haw, 8 Martin, N. S., 243, p. 1146.
Bell v. Howard, 9 Mod. 302, p. 1728.
Bell v. Hunt, 3 Barb. Ch. 391, p. 2635.
Bell v. Kellar, 13 B. Mon. 381, p. 2153.
Bell v. Lawrence, 51 Ala. 160, p. 1502, 1508.
Bell v. Marsh, [1903] 1 Ch. 528, p. 1443.
Bell v. Mayor, 10 Paige, 49, p. 1411, 1412, 2360, 2430, 2431, 2437, 2441, 2443.
Bell v. Moon, 79 Va. 341, p. 2551.
Bell v. Morse, 6 N. H. 205, p. 2419.
Bell v. Pelt, 51 Ark. 433, 11 S. W. 684, 14 Am. St. Rep. 57, 4 L. R. A. 247, p. 2473, 2474.
Bell v. Peterson, 105 Wis. 607, 81 N. W. 279, p. 1089.
Bell v. Pleasant, (Cal.) 78 Pac. 957, p. 1354, 1356.
Bell v. Richmond, 4 Abb. Pr., N. S., 44, 50 Barb. 571, p. 292.

Bell v. Solomons, (Cal.) 75 Pac. 649, p. 981.
Bell v. Tenny, 29 Ohio St. 240, p. 1403.
Bell v. Thomas, 2 Iowa, 384, p. 1358.
Bell v. Thompson, 34 Ala. 633, p. 2776.
Bell v. Twilight, 18 N. H. 159, 45 Am. Dec. 367, p. 1028.
Bell v. Twilight, 22 N. H. 500, p. 1036, 1060, 1147.
Bell v. Watkins, 82 Ala. 512, 60 Am. Rep. 756, 1 South. 92, p. 1920.
Bell v. Williams, 1 Head, 229, p. 2709.
Bell v. Woodward, 34 N. H. 90, p. 1402.
Bellairs v. Bellairs, L. R. 18 Eq. 510, p. 1683.
Bellamy v. Bellamy, 6 Fla. 62, 103, p. 671, 672, 1716, 1719, 1754.
Bellamy v. Hawkins, 16 Fla. 733, p. 215, 218.
Bellamy v. Sabine, 1 De Gex & J. 566, 578, 580, 584, p. 1061, 1064, 1083, 1084.
Bellamy v. Sabine, 2 Phill. Ch. 42[illegible] p. 1628, 1776.
Bellamy v. Woodson, 4 Ga. 175, 48 Am. Dec. 221, p. 2710.
Bellas v. Lloyd, 2 Watts, 401, p. 1058.
Bellas v. McCarty, 10 Watts, 13, p. 981, 1009, 1108, 1111, 1188, 1190, 1334, 1379, 1380.
Bellasis v. Compton, 2 Vern. 294, p. 1905, 2000.
Bellasis v. Uthwatt, 1 Atk. 426, 428, p. 920.
Bellasis's Trust, In re, L. R. 12 Eq. 218, p. 1886.
Bell County v. Alexander, 22 Tex. 350, 73 Am. Dec. 268, p. 1834, 1977.
Bellew v. Russell, 1 Ball & B. 96, p. 1788.
Bellinger, In re, [1898] 2 Ch. 534, p. 1850.
Bellinger v. Lehman, Durr & Co., 103 Ala. 385, 15 South. 600, p. 236.
Bellingham Bay Boom Co. v. Brisbois, 14 Wash. 173, 44 Pac. 153, p. 1207.
Bellis's Trusts, In re, L. R. 5 Ch. Div. 504, p. 2490.
Belloc v. Rogers, 9 Cal. 123, 129, p. 566.
Bellomy's Adm'r v. Bellomy, 3 Bush, 109, p. 2271.
Bellows v. Rosenthal, 31 Ind. 116, p. 2192.
Bellows v. Sowles, 57 Vt. 411, p. 2291.
Bellows v. Stone, 14 N. H. 175, p. 528, 1515, 1523.
Bell's Estate, In re, L. R. 9 Eq. 172, p. 2663.
Bellwood v. Wetherell, 1 Younge & C. 211–218, p. 270.
Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213, p. 1410, 2402, 2404, 2407, 2447.
Belmont v. O'Brien, 12 N. Y. 394, p. 1897.
Belmont Nail Co. v. Columbia I. & S. Co., 46 Fed. 8, p. 1078.
Belohradsky v. Kuhn, 69 Ill. 547, p. 2670.
Beloved Wilkes's Charity, In re, 3 Macn. & G. 440, p. 2050, 2065.
Belt v. Ferguson, 3 Grant Cas. 289, p. 2166.
Belt's Estate, In re, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74, p. 2051, 2052.
Belzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705, p. 2201.
Beman v. Rufford, 1 Sim., N. S., 550, p. 2118.
Bemis v. Call, 10 Allen, 512, p. 1404, 1409, 1447.
Bemis v. Plato, 119 Iowa, 127, 93 N. W. 83, p. 1763.
Bemmerly v. Woodward, 124 Cal. 568, 57 Pac. 561, p. 2080.
Bemmerly v. Woodward, 136 Cal. 326, 68 Pac. 1017, p. 1835.
Benbow v. Townsend, 1 Mylne & K. 506, p. 1907, 1988, 2000, 2001.
Benbowz v. Low, L. R. 16 Ch. Div. 93, p. 270.
Benbury v. Benbury, 2 Dev. & B. Eq. 235, 238, p. 2088.
Bence v. Shearman, [1898] 2 Ch. 582, 67 Law J. Ch. 513, 78 Law T., N. S., 804, p. 1224.
Bench v. Sheldon, 14 Barb. 66, p. 1609, 1611.
Bender v. Kingman, 64 Nebr. 766, 90 N. W. 886, p. 1333.
Bender v. Luckenback, 162 Pa. St. 13, 29 Atl. 295, 296, p. 615.
Bender v. Sherwood, 15 How. Pr. 258, p. 2642.

Bending v. Bending, 3 Kay & J. 261, p. 831, 838.
Benedict v. Arnoux, 154 N. Y. 715, 49 N. E. 326, p. 1174.
Benedict v. Benedict, 85 N. Y. 625, p. 2502.
Benedict v. Gilman, 4 Paige, 58, p. 2430.
Benedict v. Huntington, 32 N. Y. 219, p. 1858.
Benedict v. Lynch, 1 Johns. Ch. 370, 7 Am. Dec. 484, p. 761, 2769, 2779.
Benedict v. Roome, 106 Mich. 378, 64 N. W. 193, p. 1735.
Benedict v. T. L. V. Land & Cattle Co., (Nebr.) 92 N. W. 210, p. 1102, 1112, 1117.
Benedict v. Wilmarth, (Fla.) 35 South. 84, p. 181, 182, 855, 2248, 2249, 2298.
Benett v. Wyndham, 4 De Gex, F. & J. 259, p. 401.
Bengel v. Volz, 142 Ill. 214, 31 N. E. 13, 34 Am. St. Rep. 64, 16 L. R. A. 321, p. 1549.
Bengon v. Nettlefold, 3 Macn. & G. 94, 102, 103, 1702.
Bengough v. Walker, 15 Ves. 507, p. 917.
Benham v. Hendrickson, 32 N. J. Eq. 441, p. 2299, 2302.
Benham v. Keane, 3 De Gex, F. & J. 318, p. 1137, 1139.
Benham v. Keane, 1 Johns. & H. 685, p. 1357.
Benham v. Rowe, 2 Cal. 387, 56 Am. Dec. 342, p. 2231, 2429.
Benjamin v. Cavaroc, 2 Woods, 172, Fed. Cas. No. 1,300, p. 499.
Benn v. Dixon, 10 Sim. 636, p. 2205.
Benneson v. Bill, 62 Ill. 408, p. 2661.
Bennet, Ex parte, 2 Atk. 527, p. 724.
Bennet v. Davis, 2 P. Wms. 316, p. 2139.
Bennet v. Fooks, 1 Nebr. 465, p. 1102.
Bennet v. Vade, 2 Atk. 324, 327, p. 265, 1635, 1727.
Bennett, Ex parte, 10 Ves. 381, 393, 394, p. 1753, 1754, 1755, 1758.
Bennett v. Abrams, 41 Barb. 619, p. 2764.
Bennett v. Austin, 81 N. Y. 308, 332, 333, p. 1644, 1750, 1761, 1764, 2032, 2434.
Bennett v. Bates, 94 N. Y. 354, p. 2402.
Bennett v. Bennett, [1893] 2 Ch. 413, p. 2098.
Bennett v. Bennett, (Nebr.) 91 N. W. 409, p. 1729, 1738.
Bennett v. Bennett, 63 N. J. Eq. 306, 49 Atl. 501, p. 214, 215.
Bennett v. Buchan, 61 N. Y. 222, 225, p. 1007.
Bennett v. Butterworth, 11 How. 669, 674, 675, 13 L. ed. 859, p. 494, 496.
Bennett v. Camp, 54 Vt. 36, p. 1997.
Bennett v. Cook, 2 Hun, 526, p. 2432.
Bennett v. Cooper, 9 Beav. 252, p. 193, 2547, 2574.
Bennett v. Dillingham, 2 Dana, 436, p. 2169.
Bennett v. Dollar Sav. Bank, 87 Pa. St. 382, p. 2040.
Bennett v. First Nat. Bank, (Iowa) 102 N. W. 129, p. 2423.
Bennett v. Fulmer, 49 Pa. St. 155, p. 1902.
Bennett v. Glossop, 3 Hare, 578, p. 271.
Bennett v. Hayter, 2 Beav. 81, p. 1962.
Bennett v. Hutson, 33 Ark. 762, p. 1985, 1986.
Bennett v. Ingoldsby, Finch, 262, p. 2725.
Bennett v. Judson, 21 N. Y. 238, p. 1583, 1604, 1625.
Bennett v. Kimball, 175 Mass. 199, 55 N. E. 893, p. 2274.
Bennett v. Le Roy, 14 How. Pr. 178, p. 2716.
Bennett v. Mahew, 1 Brown Ch. 232, 2 Brown Ch. 287, p. 2024.
Bennett v. McMillin, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. Rep. 591, p. 1609.
Bennett v. Nichols, 12 Mich. 22, p. 215, 219.
Bennett v. Packer, 70 Conn. 357, 39 Atl. 739, 66 Am. St. Rep. 112, p. 821, 1683.
Bennett v. Robinson, 10 Watts, 348, p. 1684.
Bennett v. Shipley, 82 Mo. 448, p. 2501, 2509.
Bennett v. Solomon, 6 Cal. 134, p. 2418.

Bennett v. Stevenson, 53 N. Y. 508, p. 725, 726.
Bennett v. Titherington, 6 Bush, 192, p. 1202, 1348.
Bennett v. Union Bank, 5 Humph. 612, p. 1860, 2376.
Bennett v. Vade, 9 Mod. 312, 315, p. 1728.
Bennett v. Van Syckel, 4 Duer, 162, p. 2028.
Benney v. Cleen, 15 Wash. 581, 46 Pac. 1037, p. 1278.
Bennington v. Harwood, Turn. & R. 477, 485, p. 2432.
Benoist v. Thomas, 121 Mo. 660, 27 S. W. 609, p. 213.
Bensel v. Gray, 80 N. Y. 517, p. 2771, 2775.
Bensell v. Chancellor, 5 Whart. 371, 376, 34 Am. Dec. 561, p. 1725.
Bensick v. Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422, p. 1409, 2406.
Bensiek v. Thomas, 66 Fed. 104, p. 638, 640.
Bensimer v. Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 775, p. 2475.
Bensley v. Hornier, 42 Wis. 631, p. 1707.
Bensley v. Mountain Lake W. Co., 13 Cal. 306, 307, 319, 73 Am. Dec. 575, p. 1086, 2686.
Benson, In re, [1899] 1 Ch. 39, p. 2065.
Benson v. Benson, 1 P. Wms. 130, p. 2331.
Benson v. Bunting, 127 Cal. 532, 59 Pac. 991, 78 Am. St. Rep. 81, p. 1499.
Benson v. Cowell, 52 Iowa, 137, p. 2729.
Benson v. Dempster, 183 Ill. 297, 55 N. E. 651, p. 1907.
Benson v. Gibson, 3 Atk. 395, p. 717.
Benson v. Heathorn, 1 Younge & C. 326, 342, p. 1764, 2125, 2129.
Benson v. Keller, 37 Oreg. 120, 60 Pac. 918, p. 1628.
Benson v. Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816, p. 1481, 1490.
Benson v. Whittam, 5 Sim. 22, p. 1921.
Benson Bank v. Hove, 45 Minn. 40, 47 N. W. 449, p. 1115.
Bensusan v. Nehemias, 4 De Gex & S. 381, p. 872.
Bent v. Young, 9 Sim. 185, p. 180, 256.
Bentley, In re, 64 L. J. Ch. 782, p. 1852.
Bentley v. Bates, 4 Younge & C. 182, p. 2657.
Bentley v. Craven, 18 Beav. 75, p. 1761, 1764, 1782.
Bentley v. Dixon, 60 N. J. Eq. 353, 46 Atl. 689, p. 2281.
Bentley v. Harris, 10 R. I. 434, 14 Am. Rep. 695, p. 2800.
Bentley v. Mackay, 15 Beav. 12, p. 1879.
Bentley v. Mackay, 4 De Gex, F. & J. 279, 31 L. J. Ch. 709, p. 1515, 1516, 1540.
Bentley v. Robson, 117 Mich. 691, 76 N. W. 146, p. 1734.
Bentley v. Whittemore, 18 N. J. Eq. 366, p. 1487.
Benton, In re, L. R. 19 Ch. Div. 277, p. 2143, 2158.
Benton v. Minneapolis Tailoring & Mfg. Co., 73 Minn. 498, 76 N. W. 265, p. 1175.
Benton v. Pratt, 2 Wend. 385, 20 Am. Dec. 623, p. 1577.
Benton v. Shafer, 47 Ohio St. 117, 24 N. E. 197, 7 L. R. A. 812, p. 1068, 1087.
Benton v. Shreeve, 4 Ind. 66, p. 1672.
Bent-Otero Imp. Co. v. Whitehead, 25 Colo. 354, 71 Am. St. Rep. 140, 54 Pac. 1023, p. 2049.
Bentz v. Hoffman, 5 Hun, 113, p. 2607.
Bentz v. Thurber, 1 Thomp. & C. 645, p. 683.
Benwell v. Inns, 24 Beav. 307, p. 1688, 1691.
Benyon v. Benyon, 17 Ves. 34, p. 886.
Benyon v. Cook, L. R. 10 Ch. 389, p. 1742.
Benyon v. Fitch, 35 Beav. 570, p. 1745.
Benyon v. Nettlefold, 3 Macn. & G. 94, 102, 103, p. 667, 1716.
Berdaw v. Cockerill, 20 Ohio St. 163, p. 1105, 1358.
Berden v. Milwaukee Mut. Life Ins. Co., (Mich.) 99 N. W. 411, p. 2275.

Berdoe v. Dawson, 34 Beav. 603, p. 1778.
Beresford v. Archbishop of Armagh, 13 Sim. 643, p. 2147.
Beresford v. Hobson, 1 Madd. 362, p. 2170.
Bergeman v. Indianapolis & St. L. R. Co., 104 Mo. 77, 15 S. W. 992, p. 1155.
Bergen v. Bennett, 1 Caines, 20, p. 1754.
Bergen v. Producers' Marble Yard, 72 Tex. 53, 11 S. W. 1027, p. 1344, 1348, 1384.
Bergen v. Udall, 31 Barb. 9, p. 1778.
Berger v. Armstrong, 41 Iowa, 447, p. 2675.
Berger v. Berger, 104 Wis. 282, 80 N. W. 585, 76 Am. St. Rep. 877, p. 2503.
Berger v. Clark, 79 Pa. St. 340, p. 2197.
Berger v. Duff, 4 Johns. Ch. 368, p. 2059.
Bergeron v. Pamlico Ins. & B. Co., 111 N. C. 45, 15 S. E. 883, p. 1158, 1514.
Bergman v. Bergman, 43 Oreg. 456, 72 Pac. 1086, 73 Pac. 341, 99 Am. St. Rep. 771, p. 1078.
Bergman v. Blackwell, (Tex. Civ. App.) 23 S. W. 243, p. 1051.
Beringer v. Lutz, 188 Pa. St. 364, 41 Atl. 643, p. 1996.
Berkey v. Cornell, 90 Fed. 711, 717, p. 495.
Berkley v. Lamb, 8 Nebr. 399, p. 1102.
Berkley-Freeman v. Bishop, 2 Atk. 39, p. 1742.
Berlin v. Perry, 71 Wis. 495, 38 N. W. 82, 5 Am. St. Rep. 236, p. 1689.
Bernal v. Bernal, 3 Mylne & C. 559, p. 1942.
Bernal v. Lord Donegal, 3 Dow. 133, 1 Bligh, N. S., 594, p. 1745, 1787.
Bernard v. Flinn, 8 Ind. 204, p. 1659.
Bernard v. Minshull, Johns. 276, p. 1924, 1925.
Bernard v. Toplitz, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465, p. 2435.
Bernardy v. Colonial & U. S. Mortgage Co., (S. Dak.) 98 N. W. 166, p. 1134, 1136.
Berney v. Sewell, 1 Jacob & W. 647, p. 2431, 2658.
Berney Nat. Bank v. Pinckard, 87 Ala. 577, 6 South. 364, p. 1273.
Bernhardt v. Brown, 122 N. C. 587, 65 Am. St. Rep. 725, 29 S. E. 884, p. 1097, 1115.
Bernheimer v. Calhoun, 44 Miss. 426, p. 2276.
Bernstein, In re, 3 Redf. 20, p. 2045, 2046, 2106.
Bernstein v. Humes, 60 Ala. 582, 31 Am. Rep. 52, p. 1144.
Bernz v. Marcus Sayre Co., 52 N. J. Eq. 275, 30 Atl. 21, p. 216.
Berrien v. Berrien, 4 N. J. Eq. 37, p. 1902.
Berrien v. McLane, 1 Hoff. Ch. 421, p. 1767, 1770.
Berrien v. Thomas, 65 Ga. 61, p. 2048.
Berrington v. Evans, 3 Younge & C. 384, 392, p. 2470.
Berrinkott v. Traphagen, 39 Wis. 219, p. 725, 741.
Berrisford v. Milward, 2 Atk. 49, p. 1194, 1294, 1386.
Berry v. American Central Ins. Co., 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254, p. 1494.
Berry v. Briant, 2 Drew. & S. 1, p. 1919, 1921.
Berry v. Hall, 105 N. C. 154, 10 S. E. 903, p. 1665.
Berry v. Lovi, 107 Ill. 612, p. 1668.
Berry v. Moeller, (N. J. Eq.) 59 Atl. 97, p. 2127.
Berry v. Mut. Ins. Co., 2 Johns. Ch. 603, 608, p. 692, 1188, 1261.
Berry v. Robinson, 9 Mo. 273, p. 2279.
Berry v. Rood, 168 Mo. 316, 67 S. W. 644, p. 1159.
Berry v. Russell, 65 N. H. 646, 23 Atl. 522, p. 1372.
Berry v. Teel, 12 R. I. 267, 268, p. 2198.
Berry v. Usher, 11 Ves. 87, p. 178.
Berry v. Van Winkle, 2 N. J. Eq. 269, p. 345, 2782.
Berry v. Wiedman, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866, p. 1993.
Berry v. Williamson, 11 B. Mon. 245, 251, p. 1886, 1887, 2107.
Berry v. Wisdom, 3 Ohio St. 244, p. 744.
Berryhill v. Potter, 42 Minn. 279, 44 N. W. 251, p. 1275.

Berryhill v. Smith, 59 Minn. 285, 61 N. W. 144, p. 1273.
Berryman v. Cincinnati etc. R'y, 14 Bush, 755, p. 1699.
Bertha L. & M. Co. v. Vaughan, 88 Fed. 566, 571, p. 509.
Berthold v. Fox, 13 Minn. 501, 97 Am. Dec. 243, p. 2359.
Berthold v. Holman, 12 Minn. 335, 93 Am. Dec. 233, p. 2359.
Bertie v. Lord Falkland, 2 Cas. Ch. 129, 2 Vern. 333, 2 Freem. 220, p. 1682.
Bertram v. Cook, 32 Mich. 518, p. 1340.
Besant, In re, L. R. 11 Ch. Div. 508, p. 2616, 2618.
Besant v. Wood, L. R. 12 Ch. Div. 605, 620, 624, p. 669, 670, 1679.
Besley v. Besley, L. R. 9 Ch. Div. 103, p. 1509.
Besley v. Lawrence, 11 Paige, 581, p. 2786.
Besondy, In re, 32 Minn. 385, 50 Am. Rep. 579, 20 N. W. 366, p. 2619.
Bessemer Irr. Ditch Co. v. Woolley, (Colo.) 76 Pac. 1053, p. 338.
Besser v. Hawthorn, 3 Oreg. 129, p. 1403, 2361.
Best, In re, [1904] 2 Ch. 354, p. 1951.
Best v. Drake, 11 Hare, 371, p. 373.
Best v. Stow, 2 Sand. Ch. 298, p. 1513, 1517, 1520, 1532.
Best v. Zutavern, 53 Nebr. 604, 74 N. W. 64, p. 1022.
Bethea v. Bethea, 116 Ala. 265, 22 South. 561, p. 642, 660.
Bethel v. Abraham, L. R. 3 Ch. Div. 590, note, p. 917.
Bethell v. Abraham, L. R. 17 Eq. 24, p. 2070, 2073.
Bethell v. Bethell, 92 Md. 318, 327, p. 155, 1559, 1560, 1582.
Bethell v. Casson, 1 Hem. & M. 806, p. 270, 284, 287.
Bethlehem v. Annis, 40 N. H. 34, 40, 77 Am. Dec. 700, p. 2553, 2554.
Bethlehem v. Perseverance Fire Co., 81 Pa. St. 445, p. 1948.
Betser v. Rankin, 77 Ill. 289, p. 1113.
Betts v. Burch, 4 Hurl. & N. 511, p. 729.
Betts v. Gunn, 31 Ala. 219, p. 1506.
Betts v. Sykes, 82 Ala. 378, 2 South. 648, p. 2498, 2508, 2509.
Betz v. Snyder, 48 Ohio St. 492, 28 N. E. 234, 13 L. R. A. 235, p. 1104.
Beurhaus v. City of Watertown, 94 Wis. 617, 69 N. W. 986, p. 1947.
Bevan v. Att'y-Gen., 4 Giff. 361, p. 2218.
Bevan v. Citizens' Nat. Bk., 19 Ky. L. Rep. 1261, 43 S. W. 242, p. 2018, 2024, 2025.
Bevan v. Cooper, 7 Hun, 117, p. 2224.
Bevan v. Cooper, 72 N. Y. 317, p. 2491, 2493.
Beveridge v. Hewitt, 8 Ill. App. 467, p. 2709.
Beverley v. Brooke, 4 Gratt. 187, 208, p. 2653, 2658.
Beverley v. Ellis, 1 Rand. 102, p. 1105, 1119.
Beverley v. Walden, 20 Gratt. 147, p. 1728.
Beville v. Jones, 74 Tex. 148, 11 S. W. 1128, p. 1729.
Bevins v. Jarnigan, 3 Baxt. 282, p. 1781.
Bevins v. Marvin, 96 Ga. 268, 22 S. E. 923, p. 2265.
Bewrhaus v. Cole, 94 Wis. 617, 69 N. W. 986, p. 1969.
Bexar B. & L. Ass'n v. Lockwood, (Tex. Civ. App.) 54 S. W. 253, p. 1155.
Bexwell v. Christie, Cowp. 395, p. 1693.
Beyfus v. Bullock, L. R. 7 Eq. 391, p. 2671.
Beyfus v. Lawley, [1903] App. Cas. 411, p. 2223.
Bibb v. Hunter, 79 Ala. 351, p. 1995, 2000.
Bibb v. Smith, 12 Heisk. 728, p. 1993.
Bibby v. Thompson, 32 Beav. 646, p. 1909.
Bible v. Marshall, 103 Tenn. 324, 52 S. W. 1077, p. 785, 1984, 1992, 1995, 1996, 2006.
Bickel's Appeal, 86 Pa. St. 204, p. 1983.
Bickerstaff v. Marlin, 60 Miss. 509, 45 Am. Rep. 418, p. 1775, 1778.
Bickford v. Bickford's Estate, 68 Vt. 525, 35 Atl. 471, p. 1906.
Bickley v. Commercial Bank of Columbia, 43 S. C. 528, 21 S. E. 886, p. 200, 239, 1552.

Bicknell v. Bicknell, 31 Vt. 498, p. 2539.
Bidder v. Bridges, L. R. 29 Ch. Div. 34, p. 271.
Biddinger v. Wyland, 67 Md. 359, 10 Atl. 202, p. 983.
Biddle's Appeal, 80 Pa. St. 258, p. 1920, 1927, 1929.
Biddle v. Moore, 3 Pa. St. 161, 175, 176, p. 229, 467, 1560.
Biddle v. Pugh, 59 N. J. Eq. 480, 45 Atl. 626, p. 2414.
Biddle v. Ramsey, 52 Mo. 153, 159, p. 384, 451, 564, 569.
Biddles v. Biddles, 16 Sim. 1, p. 1921.
Biddles v. Jackson, 3 De Gex & J. 544, p. 2168.
Biddles v. Jackson, 3 De Gex & J. 544, p. 2173.
Biddulph v. Biddulph, 12 Ves. 161, p. 1853, 2316, 2333.
Biddulph v. Williams, L. R. 1 Ch. Div. 203, p. 1985, 1986.
Bidwell v. Astor Ins. Co., 16 N. Y. 263, 267, p. 94, 231, 346, 355, 586, 592, 1524.
Bidwell v. Pittsburgh, 85 Pa. St. 412, 417, 27 Am. Rep. 662, p. 1429.
Bidwell v. Webb, 10 Minn. 59, 88 Am. Dec. 56, p. 2749.
Biegler v. Merchants' Loan & Tr. Co., 164 Ill. 197, 45 N. E. 512, p. 353.
Biemann v. White, 23 S. C. 490, p. 1022.
Bierce v. Red Bluff Hotel Co., 31 Cal. 160, p. 1152, 1163, 1166.
Bierne v. Mann, 5 Leigh, 364, p. 2710.
Bigelow v. Andress, 31 Ill. 322, p. 2791.
Bigelow v. Cassedy, 26 N. J. Eq. 557, p. 2437.
Bigelow v. Chatterton, 51 Fed. 614, 10 U. S. App. 267, 2 C. C. A. 402, p. 504.
Bigelow v. Foss, 59 Me. 162, p. 1447.
Bigelow v. Granite State Fire Ins. Co., 94 Me. 39, 46 Atl. 808, p. 1158.
Bigelow v. Hartford Bridge Co., 14 Conn. 565, 36 Am. Dec. 502, p. 2683.
Bigelow v. Heaton, 6 Hill, 43, p. 1621.
Bigelow v. Topliff, 25 Vt. 273, 60 Am. Dec. 264, p. 1098, 1117, 1438.
Bigelow v. Town of Washburn, 98 Wis. 553, 74 N. W. 362, p. 342.
Bigelow v. Willson, 1 Pick. 485, p. 2437.
Biggerstaff v. Marston, 161 Mass. 101, 36 N. E. 785, p. 1227.
Biggerstaff v. Murphy, 3 Tex. Civ. App. 363, 22 S. W. 768, p. 1355.
Biggleston v. Grubb, 2 Atk. 48, p. 933, 937, 943.
Biggs v. Hoddinott, [1898] 2 Ch. 307, 67 Law J. (Ch.) 540, 78 Law T., N. S., 201, 47 Wkly. Rep. 84, p. 2371.
Biggs v. Kouns, 7 Dana, 405, 411, p. 2649.
Biggs v. Lawrence, 3 Tenn. Rep. 454, p. 1720.
Bigham v. Coleman, 71 Ga. 576, p. 2018.
Bigland v. Huddleston, 3 Brown Ch. 285, p. 783, 786, 846.
Bigler v. Jack, 114 Iowa, 667, 87 N. W. 700, p. 649, 2372, 2374, 2378.
Bigley v. Jones, 114 Pa. St. 517, 7 Atl. 54, p. 1372, 1373.
Bignell, In re, [1892] 1 Ch. 59, p. 2098.
Biglow v. Leabo, 8 Oreg. 147, p. 1738, 2729.
Bignold v. Audland, 11 Sim. 23, p. 2642.
Bignold's Trusts, In re, L. R. 7 Ch. 223, p. 2106, 2108.
Bilbie v. Lumley, 2 East, 469, p. 1482, 1503.
Bill v. Cureton, 2 Mylne & K. 503, p. 1879.
Bill v. Price, 1 Vern. 467, p. 1744.
Billage v. Southee, 9 Hare, 534, 540, 594, p. 1738, 1749, 1780.
Billings v. Brogden, 38 Ch. Div. 546, p. 2057.
Billings v. Clinton, 6 S. C. 90, p. 1993, 1999.
Billings v. Marsh, 153 Mass. 311, 25 Am. St. Rep. 635, 26 N. E. 1000, 10 L. R. A. 764, p. 1844.
Billings v. O'Brien, 45 How. Pr. 392, 14 Abb. Pr., N. S., 238, p. 2555.
Billingslea v. Ward, 33 Md. 48, 51, p. 1904.
Billington v. Welsh, 5 Binney (Pa.) 129, 6 Am. Dec. 406, p. 1038.
Billon v. Hyde, 1 Atk. 126, p. 211.
Billups v. Sears, 5 Gratt. 31, 37, 38, 50 Am. Dec. 105, p. 224, 337, 338.

Bindseil v. Smith, 61 N. J. Eq. 654, 47 Atl. 456, p. 207, 234, 235.
Binford v. Bawden, 1 Ves. 512, 2 Ves. 38, p. 2331.
Bingham, In re, 127 N. Y. 296, 27 N. E. 1055, 57 Hun, 586, 10 N. Y. Supp. 325, p. 1085.
Bingham v. Bingham, 1 Ves. Sr. 126, p. 1499, 1501, 1503, 1540, 2033.
Bingham v. Kirkland, 34 N. J. Eq. 229, p. 1107, 1135, 1363.
Bingham's Appeal, 64 Pa. St. 345, p. 961.
Binnerman v. Weaver, 8 Md. 517, p. 1684.
Binney v. Annan, 107 Mass. 94, 9 Am. Rep. 10, p. 2601, 2763.
Binney's Case, 2 Bland, 99, p. 696.
Binnington v. Harwood, Turn. & R. 477, p. 2432.
Binsse v. Paige, 1 Abb. App. 138, p. 1398, 14111, 2402, 2404.
Binst v. Dawes, 3 Rich. Eq. 281, p. 855.
Birch v. Anthony, 109 Ga. 349, 34 S. E. 561, 77 Am. St. Rep. 379, p. 1680.
Birch v. Ellames, 2 Anstr. 427, p. 1001, 1016, 1198, 1292.
Birch v. Sherratt, L. R. 2 Ch. 644, p. 2488.
Birch v. Wade, 3 Ves. & B. 198, p. 1924.
Birchard v. Scott, 39 Conn. 63, p. 1945, 1961, 1973.
Bircher v. Walther, 163 Mo. 461, 63 S. W. 691, p. 2018.
Birchett v. Bolling, 5 Munf. 442, p. 2766.
Birch-Wolfe v. Birch, L. R. 9 Eq. 683, p. 2682.
Bird v. Dennison, 7 Cal. 297, p. 1095, 1111.
Bird v. Fox, 11 Hare, 40, p. 1059.
Bird v. Gilliam, 34 S. E. 196, 125 N. C. 76, p. 1670.
Bird v. Hall, 73 Me. 73, p. 554.
Bird v. Hull, 30 Mich. 374, p. 2772.
Bird v. Jones, 37 Ark. 195, p. 1323, 1371.
Bird v. Maybury, 33 Beav. 351, p. 1919, 1921.
Bird v. Merklee, 144 N. Y. 544, 39 N. E. 645, 27 L. R. A. 423, p. 1969.
Bird v. Rector etc. of St. John's Epis. Church, 154 Ind. 138, 56 N. E. 129, p. 739, 740.
Bird v. Stout, 40 W. Va. 43, 20 S. E. 852, p. 2494.
Bird v. Wilkinson, 4 Leigh, 266, p. 1105.
Bird v. Winger, 24 Wash. 269, 64 Pac. 178, p. 363.
Bird Iron & Coal Co. v. Humes, 157 Pa. St. 278, 37 Am. St. Rep. 727, 27 Atl. 750, p. 2084.
Birdsall v. Colie, 10 N. J. Eq. 63, p. 2656.
Birdsall v. Grant, 37 App. Div. 348, 57 N. Y. Supp. 705, p. 1911.
Bird's Trusts, In re, L. R. 3 Ch. Div. 214, p. 1543.
Birke v. Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474, p. 1409, 2407, 2412, 2425, 2426.
Birkett, In re, L. R. 9 Ch. Div. 576, p. 1933, 1941.
Birkley v. Presgrave, 1 East, 227, p. 429.
Birks v. Micklethwait, 33 Beav. 409, p. 2092.
Birley v. Birley, 25 Beav. 299, p. 1657.
Birmingham v. Kirwan, 2 Schoales & L. 444, 449, 450, 452, p. 783, 786, 809, 811, 818, 819, 834, 835, 836, 1918.
Birmingham v. Lesau, 77 Me. 494, 1 Atl. 51, p. 765.
Birmingham v. Wilcox, 120 Cal. 467, 52 Pac. 822, p. 2072.
Birmingham, etc., Ry., In re, L. R. 18 Ch. Div. 155, p. 2662.
Birmingham Traction Co. v. S. B. T. & T. Co., 119 Ala. 144, 24 South. 731, p. 382, 450.
Birmingham Trust & Sav. Bank v. Louisiana Nat. Bank, 99 Ala. 379, 13 South. 112, 20 L. R. A. 600, p. 1156.
Birnie v. Main, 29 Ark. 591, p. 1129, 1280, 2453, 2454.
Biron v. Mount, 24 Beav. 642, p. 1855, 1856.
Bisbee v. Carey, 17 Wash. 224, 49 Pac. 220, p. 1281.
Bisco v. Earl of Banbury, 1 Cas. Ch. 257, p. 1001, 1050.
Biscoe v. Jackson, 35 Ch. Div. 460, p. 1963.
Biscoe v. State, 23 Ark. 592, p. 2100.
Bishop v. Aldrich, 48 Wis. 619, p. 2729.

Bishop v. Curtis, 18 Q. B. 878, p. 1848.
Bishop v. Day, 13 Vt. 81, 37 Am. Dec. 582, p. 2793.
Bishop v. Douglass, 25 Wis. 696, p. 2405.
Bishop v. Garcia, 14 Abb. Pr., N. S., 69, p. 1224.
Bishop v. Holcomb, 10 Conn. 444, p. 1212.
Bishop v. Ogden, 9 Phila. 524, p. 2426.
Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339, p. 1689.
Bishop v. Rosenbaum, 58 Miss. 84, p. 418, 455.
Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533, p. 1118, 1323, 1355.
Bishop v. Seaman's Bk. for Savings, 33 App. Div. 181, 53 N. Y. Supp. 488, p. 1866.
Bishop v. Wall, L. R. 3 Ch. Div. 194, p. 2156.
Bishop v. Williams, 18 Ill. 101, 15 Ill. 553, p. 2374.
Bishop v. Woodward, 103 Ga. 281, 29 S. E. 968, p. 464.
Bishop of Hereford v. Adams, 7 Ves. 324, p. 1941.
Bishop of Peterborough v. Mortlock, 1 Brown Ch. 565, p. 2209.
Bishop of Winchester v. Fournier, 2 Ves. Sr. 445, p. 2729.
Bishop of Winchester v. Knight, 1 P. Wms. 406, p. 316.
Bisley v. N. M. Co., 123 N. Y. 555, 25 N. E. 990, p. 1573.
Biss, In re, [1903] 2 Ch. 40, 55, 64, p. 2026.
Bissell v. Beckwith, 33 Conn. 357, p. 310, 2707.
Bissell v. Kellogg, 60 Barb. 617, p. 648, 1706.
Bissell v. Farmers and Mechanics' Bank, 5 McLean, 495, p. 2764.
Bissell v. Michigan Southern etc. R. R. Co., 22 N. Y. 258, p. 1721.
Bittenbender v. Bittenbender, 185 Pa. St. 135, 39 Atl. 838, p. 341.
Bitting's Appeal, 17 Pa. St. 211, p. 1444.
Bivins v. Jarnigan, 3 Baxt. 282, p. 1738, 1781.
Bixbey v. Eley, 2 Brown Ch. 325, p. 1468.
Bixler v. Kunkle, 17 Serg. & R. 298, 303, p. 559.
Bizer v. Perry, 58 Md. 112, p. 1971.
Bizzell v. Nix, 60 Ala. 281, 31 Am. Rep. 38, p. 2498, 2511, 2528.
Black v. Black, 26 N. J. Eq. 431, p. 257, 274, 534, 537.
Black v. Boyd, 50 Ohio St. 46, 33 N. E. 207, p. 228, 237, 462, 463.
Black v. Cord, 2 Har. & G. 100, p. 1666.
Black v. Delaware etc. Co., 22 N. J. Eq. 130, 393, p. 2114, 2118.
Black v. Good Intent etc. Co., 31 La. Ann. 497, p. 2698.
Black v. Gregg, 58 Mo. 565, p. 2475.
Black v. Huggins, 2 Tenn. Ch. 780, p. 2121.
Black v. Morse, 7 N. J. Eq. 509, p. 2447.
Black v. Phila. etc. R. R., 58 Pa. St. 249, p. 2683.
Black v. Reno, 59 Fed. 917, p. 1227, 1301.
Black v. Scott, 9 Fed. 186, 191, p. 511.
Black v. Shreeve, 7 N. J. Eq. 440, 456, 457, p. 384, 413, 451, 456, 2794.
Black v. Smith, 13 W. Va. 780, p. 467.
Blackall v. Combs, 2 P. Wms. 70, p. 307.
Blackburn v. Gregson, 1 Brown Ch. 420, p. 192, 2497, 2505.
Blackburn v. Randolph, 33 Ark. 119, p. 2726.
Blackburn v. Stables, 2 Ves. & B. 367, p. 1885, 1887.
Blackburn v. Tucker, 72 Miss. 735, 17 South. 737, p. 1974.
Blackburn v. Tweedie, 60 Mo. 505, p. 2475.
Blackburn Building Soc. v. Cunliffe, Brooks & Co., 22 Ch. Div. 71, p. 2605.
Blackerby v. Holton, 5 Dana, 520, p. 2271.
Blackett v. Bates, L. R. 1 Ch. 117, p. 2764.
Blackett v. Lamb, 14 Beav. 482, p. 783, 795.
Black Hills Nat. Bank v. Kellogg, 4 S. Dak. 312, 56 N. W. 1071, p. 1156.
Blackie v. Clark, 15 Beav. 595, p. 1670.
Blackler v. Boott, 114 Mass. 24, p. 881, 888.

Blacklow v. Laws, 2 Hare, 40, 49, p. 2144.
Blackman v. Henderson, 116 Iowa, 578, 87 N. W. 655, 90 N. W. 825, 56 L. R. A. 902, p. 1100, 1115, 1357.
Blackmar v. Sharp, 23 R. I. 412, 50 Atl. 852, p. 2383.
Blackmer v. Phillips, 67 N. C. 340, p. 2775.
Blackmore v. Shelby, 8 Humph. 439, p. 1773.
Blackshear v. Burke, 74 Ala. 239, p. 2103.
Blackstone v. Blackstone, 3 Watts, 335, 337, 27 Am. Dec. 359, p. 2208, 2211, 2212.
Blackwell v. Barnett, 52 Tex. 326, p. 1860.
Blackwell v. British-Am. Mtge. Co., 65 S. C. 105, 43 S. E. 395, p. 1105.
Blackwell v. Oldham, 4 Dana, 195, p. 1637.
Blackwell v. Webster, 29 Fed. 614, p. 1703.
Blackwilder v. Loveless, 21 Ala. 371, 374, p. 662, 1072, 1731, 2767.
Blackwood v. Jones, 4 Jones Eq. 54, p. 1452.
Blagrave v. Routh, 2 Kay & J. 509, p. 1769.
Blagrove v. Coore, 27 Beav. 138, p. 2213.
Blague v. Gold, Cro. Car. 447, p. 1547.
Blaiklock v. Grindle, L. R. 7 Eq. 215, p. 796, 799.
Blain v. Harrison, 11 Ill. 384, p. 1369, 2736.
Blaine v. Bourne, 11 R. I. 119, p. 1914.
Blair, In re, 1 Mylne & C. 300, 302, p. 2622.
Blair v. Bass, 4 Blackf. 539, p. 2417.
Blair v. Bromley, 5 Hare, 542, 556, 559, 2 Phill. Ch. 354, 361, p. 1631, 1633, 1648.
Blair v. Chicago etc. R. R. Co., 89 Mo. 383, 1 S. W. 350, p. 1500.
Blair v. Duncan, [1902] A. C. 37, p. 1950.
Blair v. Hill, 50 App. Div. 33, 63 N. Y. Supp. 670, p. 2021.
Blair v. McDonnell, 5 N. J. Eq. 327, p. 1515.
Blair v. Owles, 1 Munf. 38, p. 1348.
Blair v. Porter, 13 N. J. Eq. 267, p. 2636.
Blair v. Smith, 114 Ind. 114, 5 Am. St. Rep. 593, 15 N. E. 817, 822, p. 121, 224, 342, 488, 685, 2586.
Blair v. Wait, 69 N. Y. 113, 116, p. 1426.
Blair v. Ward, 10 N. J. Eq. 126, p. 1130, 2455.
Blair v. Whitaker, (Ind. App.) 69 N. E. 182, p. 1019, 1154.
Blair v. Wilson, 57 Iowa, 178, 10 N. W. 327, p. 821, 852.
Blaisdell v. Smith, 3 Ill. App. 150, p. 2522, 2523, 2527.
Blaisdell v. Stephens, 14 Nev. 17, 23, 33 Am. Rep. 523, p. 2746.
Blaisdell v. Stevens, 16 Vt. 179, 186, p. 981, 1148.
Blake v. Barnes, 63 Hun, 633, 28 Abb. N. C. 401, 18 N. Y. Supp. 471, p. 2283.
Blake v. Bigelow, 5 Ga. 437, p. 1079.
Blake v. Blackley, 109 N. C. 257, 13 S. E. 786, 26 Am. St. Rep. 566, p. 2196.
Blake v. Blake, L. R. 15 Ch. Div. 481, p. 2215, 2315.
Blake v. Blake, 2 Schoales & L. 26, p. 2204.
Blake v. Brooklyn, 26 Barb. 301, p. 2694.
Blake v. Bunbury, 1 Ves. 514, 523, 4 Brown Ch. 21, p. 782, 785, 789, 792, 794, 816, 857.
Blake v. Butler, 10 R. I. 133, 137, 138, p. 577, 578, 2287.
Blake v. Clary, 83 Me. 154, 21 Atl. 841, p. 1155.
Blake v. Graham, 6 Ohio St. 580, 67 Am. Dec. 360, p. 1132.
Blake v. Hall, 57 N. H. 373, p. 2195.
Blake v. Heyward, 1 Bail. Eq. 208, p. 1315, 2736.
Blake v. Pegram, 101 Mass. 592, p. 2100.
Blake v. Williams, 36 N. H. 39, p. 2417.
Blakeley v. Biscoe, 1 Hemp. 114, 115, p. 215, 514, 515, 2799.
Blakeley Ordnance Co., In re, L. R. 3 Ch. 154, p. 1231.
Blakely v. Brady, 2 Dru. & Walsh, 311, p. 1872, 1878.
Blakeman v. Blakeman, 39 Conn. 320, p. 1485, 1499, 2726.

Blakemore v. Blakemore, 19 Ky. Law Rep. 1619, 44 S. W. 96, p. 1495, 1500.
Blakemore v. Glamorganshire Canal Nav., 1 Mylne & K. 154, 183, p. 2684, 2698.
Blakeney v. Blakeney, 6 Sim. 52, p. 1921.
Blakeney v. Dufour, 15 Beav. 40, p. 2856.
Blakeslee v. Blakeslee, 22 Pa. St. 237, p. 1529.
Blakeslee v. Mobile Life Ins. Co., 57 Ala. 205, p. 2142, 2145, 2153.
Blakeslee v. Murphy, 44 Conn. 188, p. 2709.
Blakey v. Blakey's Heirs, 9 Ala. 391, p. 2255, 2256.
Blalock v. Equitable L. Assur. Soc., 75 Fed. 43, 21 C. C. A. 208, p. 494.
Blanchard, In re, 3 De Gex, F. & J. 131, p. 2106.
Blanchard v. Blood, 2 Barb. 352, p. 2139.
Blanchard v. Dedham Gas Co., 12 Gray, 213, p. 1220.
Blanchard v. Detroit etc. R. R., 31 Mich. 43, 18 Am. Rep. 142, p. 2761, 2769.
Blanchard v. Doering, 23 Wis. 200, p. 2694.
Blanchard v. Moore, 4 J. J. Marsh. 471, p. 1513.
Blanchard v. Sheldon, 43 Vt. 512, p. 1872.
Blanchard v. Tyler, 12 Mich. 339, 86 Am. Dec. 57, p. 1202, 2749.
Blanchard v. Ware, 43 Iowa, 530, 531, 37 Iowa, 305, 307, p. 1007, 1064, 1075, 1145.
Blanchard v. Williamson, 70 Ill. 647, p. 697, 2266, 2267.
Blanchet v. Foster, 2 Ves. Sr. 264, p. 2165.
Bland v. Bland, 2 Cox, 349, p. 1925.
Bland v. Bland, 90 Ky. 400, 29 Am. St. Rep. 390, 14 S. W. 423, 9 L. R. A. 599, p. 1844.
Bland v. Dawes, L. R. 17 Ch. Div. 794, 797, p. 2143, 2145.
Bland v. Lloyd, 24 La. Ann. 603, p. 1774.
Bland v. Talley, 50 Ark. 76, 6 S. W. 234, p. 2040.
Blandy v. Widmore, 1 P. Wms. 324, 2 Vern. 209, 2 Lead. Cas. Eq., 4th Am. ed., 834, 842, p. 949, 955, 957.
Blaney, Estate of. 73 Iowa, 114, 34 N. W. 768, p. 821, 852.
Blaney v. Bearce, 2 Me. 132, p. 2347.
Blank v. Bryant, 55 N. Y. 649, p. 2201.
Blankenship v. Douglas, 26 Tex. 225, 82 Am. Dec. 608, p. 1269.
Blann v. Bell, 2 De Gex, M. & G. 775, p. 2322.
Blanton v. King, 2 How. (Miss.) 856, p. 336, 573, 2251, 2277.
Blasdel v. Fowle, 120 Mass. 447, 21 Am. Rep. 533, p. 539.
Blatch v. Wilder, 1 Atk. 420, p. 1921.
Blatchford v. Woolley, 2 Drew. & S. 204, p. 2149, 2155.
Blatchley v. Osborn, 33 Conn. 226, 233, p. 346, 974, 981, 984, 987, 997, 1144.
Blauvelt v. Ackerman, 23 N. J. Eq. 495, p. 2052.
Blauvelt v. Ackerman, 20 N. J. Eq. 141, 148, 149, p. 2032, 2080.
Blauvelt v. Van Winkle, 29 N. J. Eq. 111, p. 2486.
Blazo v. Cochrane, 71 N. H. 585, 53 Atl. 1026, p. 2236.
Bleakley's Appeal, 66 Pa. St. 187, 191, p. 659, 663, 665, 2762, 2796.
Bledsoe v. Games, 30 Mo. 448, p. 2501.
Bledsoe v. Nixon, 68 N. C. 521, p. 1482.
Bleight v. Manufacturers' etc. Bank, 10 Pa. St. 131, p. 2309.
Blencowe, Ex parte, L. R. 1 Ch. 393, p. 2088.
Blenkinsopp v. Blenkinsopp, 1 De Gex, M. & G. 495, 500, 12 Beav. 568, 586, p. 1652, 1793, 2728.
Blennerhasset v. Day, 2 Ball & B. 104, 116, p. 1653, 1788.
Blevins v. Rogers, 32 Ark. 258, p. 2498, 2519.
Blewitt, In re, 6 De Gex, M. & G. 187, p. 2622.
Blight v. Schenck, 10 Pa. St. 285, 51 Am. Dec. 478, p. 2060.
Blight's Heirs v. Banks, 6 T. B. Mon. 192, 198, 17 Am. Dec. 136, p. 1346, 1348, 1393.
Bliley v. Wheeler, 5 Colo. App. 287, 38 Pac. 603, p. 756.

Blin v. Pierce, 20 Vt. 25, p. 2561.
Bliss v. Am. Bible Soc., 2 Allen, 334, p. 1961, 1978.
Bliss v. Lawrence, 58 N. Y. 442, 17 Am. Rep. 273, p. 2554.
Bliss v. Matteson, 45 N. Y. 22, 24, p. 182, 2041.
Bliss v. Seeley, 191 Ill. 461, 61 N. E. 524, p. 1100.
Bliss v. Smith, 34 Beav. 508, p. 2798.
Bliss v. Young, 7 Kan. App. 728, 52 Pac. 577, p. 1298.
Blissett v. Daniel, 10 Hare, 493, 522, 536, 538, p. 1782, 2028.
Bliven v. Seymour, 88 N. Y. 469, p. 2216, 2225, 2226, 2031, 2745.
Blivins v. Case, 66 Ark. 416, 51 S. W. 65, p. 2258.
Blizzard v. Craigmiles, 7 Lea, 693, p. 2376.
Block & Pollak Iron Co. v. Holcomb-Brown Iron Co., 105 Iowa, 624, 75 N. W. 499, 67 Am. St. Rep. 319, p. 1352, 1356.
Blodgett v. American Nat. Bank, 49 Conn. 9, p. 2105.
Blodgett v. Blodgett, 48 Vt. 32, p. 2462.
Blodgett v. Hildreth, 103 Mass. 484, p. 1660, 1902.
Blodgett v. Hobart, 18 Vt. 414, p. 1529, 1534.
Blogg v. Johnson, L. R. 2 Ch. 225, 228, p. 2068.
Blondell v. Consolidated Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187, p. 382.
Blondheim v. Moore, 11 Md. 365, p. 2653, 2654.
Blood v. Blood, 110 Mass. 545, p. 542, 2799, 2800.
Blood v. Blood, 23 Pick. 80, p. 1114.
Blood v. Crew-Levick Co., 177 Pa. St. 606, 35 Atl. 871, 55 Am. St. Rep. 741, p. 2405.
Blood v. Crew-Levick Co., 171 Pa. St. 328, 33 Atl. 344, 37 Wkly. Notes Cas. 181, p. 2408.
Blood v. Le Serena L. & W. Co., 134 Cal. 361, 66 Pac. 317, p. 1154.
Bloodgood v. Mass. B. & L. Ass'n, 19 Misc. Rep. 460, 44 N. Y. Supp. 63, p. 1838.
Bloom v. Noggle, 4 Ohio St. 45, 56, p. 1105, 1140, 1358, 2539.
Bloom v. Van Rensselaer, 15 Ill. 503, p. 1861.
Bloomer v. Henderson, 8 Mich. 395, 402, 404, 405, 77 Am. Dec. 453, p. 1030, 1227, 1257, 1382.
Bloomer v. Spittle, L. R. 13 Eq. 427, p. 1541, 2726.
Bloomer's Appeal, 83 Pa. St. 45, p. 2106.
Bloomfield State Bank v. Miller, 55 Nebr. 243, 70 Am. St. Rep. 381, 75 N. W. 569, 44 L. R. A. 387, p. 2539.
Bloomstein v. Clees, 3 Tenn. Ch. 433, p. 1434.
Blouin v. Phaneuf, 81 Me. 176, 46 Atl. 540, p. 1909, 1920.
Blount v. Burrow, 1 Ves. 546, p. 2232.
Blount v. Robeson, 3 Jones Eq. 73, p. 1764.
Blount v. Walker, 31 S. C. 13, 9 S. E. 804, p. 1989.
Blow v. Maynard, 2 Leigh, 30, p. 2793.
Blower v. Morret, 2 Ves. Sr. 420, p. 2225, 2226, 2227.
Bloye's Trust, In re, 1 Macn. & G. 488, 494, 495, p. 1753, 1755, 1760, 1763, 1771, 2085.
Bluck v. Galesworthy, 2 Giff. 453, p. 281.
Bludworth v. Lake, 33 Cal. 255, p. 1992, 2354.
Blue v. Blue, 38 Ill. 9, 87 Am. Dec. 267, p. 2440.
Blue v. Patterson, 1 Dev. & B. Eq. 457, p. 1635.
Blue Jacket v. Scherr, 50 W. Va. 533, 40 S. E. 514, p. 407, 410, 454.
Blum v. Mitchell, 59 Ala. 535, p. 2428, 2429, 2432.
Blum v. Rogers, 71 Tex. 668, 9 S. W. 595, p. 1993, 1995.
Blumenthal, In re, 18 Bank. Reg. 555, p. 1791.
Blumenthal v. Brainerd, 38 Vt. 402, 410, 91 Am. Dec. 349, p. 1166.
Blumenthal v. Tassey, 29 Minn. 177, 12 N. W. 517, p. 1228.
Blumer v. Hunter, L. R. 8 Eq. 46, p. 1799.
Blundell, In re, 30 Beav. 360, p. 1937.
Blundell v. Brettargh, 17 Ves. 232, 240, p. 1460.
Blundell v. Stanley, 3 De Gex & S. 433, p. 1405.

Blunt v. Hay, 4 Sand. Ch. (N. Y.) 362, p. 399.
Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709, p. 2417.
Blydenburgh v. Thayer, 3 Keyes, 293, p. 1233.
Blyer v. Monholland, 2 Sand. Ch. 478, p. 2402.
Blythe v. Hinckley, 84 Fed. 246, 256, p. 504.
Boal v. Morgner, 46 Mo. 48, p. 2144.
Boals v. Bachman, 201 Ill. 340, 66 N. E. 336, p. 651.
Boardman v. Florez, 37 Mo. 559, p. 304.
Boardman v. Hayne, 29 Iowa, 339, p. 1226.
Boardman v. Jackson, 119 Mass. 161, p. 540, 1637.
Boardman v. Lake Shore etc. R'y, 84 N. Y. 157, p. 2765.
Boardman v. Meriden Britannia Co., 35 Conn. 402, 95 Am. Dec. 270, p. 2690.
Boardman v. Mosman, 1 Brown Ch. 68, p. 2095.
Boardman v. Willard, 73 Iowa, 22, 34 N. W. 487, p. 1910.
Board of Charities and Corrections v. Lockard, 198 Pa. St. 572, 48 Atl. 496, 82 Am. St. Rep. 817, p. 1846.
Board of Commissioners v. Babcock, 5 Oreg. 472, p. 1118.
Board of Commissioners v. Brown, 28 Ind. 161, p. 407.
Board of Commissioners v. Elston, 32 Ind. 27, 2 Am. Rep. 327, p. 651.
Board of Commissioners v. Ingram, 31 Colo. 319, 73 Pac. 37, p. 1096, 1144.
Board of Commissioners v. Lafayette etc. R. R., 50 Ind. 85, p. 2125.
Board of Commissioners v. Markle, 46 Ind. 96, 103-105, p. 407, 408.
Board of Commissioners v. McCarty, 27 Ind. 475, p. 408.
Board of Commissioners v. McClintock, 51 Ind. 325, 328, p. 408.
Board of Commissioners v. Templeton, 51 Ind. 266, p. 408.
Board of Dom. Missions of R. Ch. in Am. v. Mechanics' Sav. Bank, 40 App. Div. 120, 54 N. Y. Supp. 28, 57 N. Y. Supp. 582, p. 1866.
Board of Education v. Duparquet, 50 N. J. Eq. 234, 24 Atl. 922, p. 1207.
Board of Education v. Edson, 18 Ohio St. 221, 98 Am. Dec. 114, p. 1961.
Board of Education v. Scoville, 13 Kan. 17, p. 2639, 2651.
Board of Foreign Missions v. Culp, 151 Pa. St. 467, 25 Atl. 117, 31 Wkly. Notes Cas. 135, p. 1941, 1956.
Board of Supervisors v. Deyoe, 77 N. Y. 219, p. 395, 413, 432, 455, 456.
Board of Trade v. Christie Grain & Stock Co., 116 Fed. 944, p. 1676.
Board of Trade v. Donovan Commission Co., 121 Fed. 1012, p. 1676.
Board of Trade v. Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 31 Am. St. Rep. 919, 16 L. R. A. 530, p. 2201.
Board of Trade v. L. A. Kinsey Co., (C. C. A.) 130 Fed. 507, p. 1716.
Board of Trade v. O'Dell Commission Co., 115 Fed. 74, 574, 588, p. 667, 1676, 1716.
Board of Trustees v. Blair, 45 W. Va. 812, 32 S. E. 203, p. 2086.
Board of Trustees v. Serrett, 31 La. Ann. 719, p. 1435.
Board of Trustees of Westminster Collegt v. Piersol, 161 Mo. 270, 61 S. W. 811, p. 2404.
Boards, In re, [1895] 1 Ch. 499, p. 2490.
Boatmen's Sav. Bank v. Collins, 75 Mo. 280, p. 2195.
Boaz v. Boaz, 36 Ala. 334, p. 2109.
Boaz v. Milliken, 83 Ky. 634, p. 2066.
Bobb v. Bobb, 76 Mo. 419, p. 424.
Bobb v. Woodward, 50 Mo. 95, p. 1603.
Bobb v. Woodward, 42 Mo. 482, 488, p. 212, 355, 486.
Bobo v. Grinke, 1 Mull. Eq. 304, p. 234.
Bock v. Gorrissen, 2 De Gex, F. & J. 434, p. 2478.
Bockes v. Lansing, 74 N. Y. 437, p. 2756.
Boddy v. Henry, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769, p. 1576.
Bode v. New England Inv. Co., 6 Dak. 499, 42 N. W. 658, 45 N. W. 197, p. 406, 454.
Bodenham v. Pritchard, 1 Barn. & C. 350, p. 1547.

Bodine v. Glading, 21 Pa. St. 50, 59 Am. Dec. 749, p. 750.
Bodine v. Killeen, 53 N. Y. 93, p. 1446.
Bodley v. Taylor, 5 Cranch, 191, 221, 222, p. 494, 512, 516.
Bodly v. ———, 2 Cas. Ch. 15, p. 667.
Bodwell v. Heaton, 40 Kan. 36, 18 Pac. 901, p. 1516.
Boeckler v. McGowan, 9 Mo. App. 373, p. 2194.
Boehl v. Wadgymar, 54 Tex. 589, p. 2474.
Boehm v. Wood, 2 Jacob & W. 236, p. 2659.
Boerum v. Schenck, 41 N. Y. 182, p. 2085.
Boevink v. Christiaanse, (Nebr.) 95 N. W. 652, p. 244.
Bogan v. Daughdrill, 51 Ala. 312, 314, p. 2761, 2767, 2775.
Bogart v. Phillips, 112 Mich. 697, 71 N. W. 320, p. 2406.
Bogert v. Bogert, 2 Edw. Ch. 399, p. 261.
Bogert v. City of Elizabeth, 27 N. J. Eq. 568, p. 2749.
Bogert v. Hertell, 4 Hill, 492, 495, 500, p. 2325.
Boggs v. Fowler, 16 Cal. 559, 76 Am. Dec. 561, p. 2354.
Boggs v. Merced M. Co., 14 Cal. 279, 367, 368, 379, p. 1430, 1434, 2686.
Boggs v. Varner, 6 Watts & S. 460, 469, 472, 474, p. 994, 1039, 1042, 1057, 1107, 1113, 1334.
Boggs v. Wann, 58 Fed. 681, p. 495.
Bogie v. Bogie, 41 Wis. 209, p. 1729, 1730.
Bogk v. Gassert, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. ed. 631, p. 2373, 2376.
Bogle v. Hammons, 2 Heisk. 136, p. 2729.
Bogue v. Williams, 48 Ill. 371, p. 1023, 1037, 1145.
Bogy v. Roberts, 48 Ark. 17, 3 Am. St. Rep. 211, 2 S. W. 186, p. 2001.
Bohanan v. Bohanan, 96 Ill. 591, p. 2780.
Bohart v. Chamberlain, 99 Mo. 622, 13 S. W. 85, p. 201, 463, 1463, 1460.
Bohle v. Hasselbroch, 64 N. J. Eq. 334, 51 Atl. 508, 61 L. R. A. 323, p. 2019.
Bohlen v. Cleveland, 5 Mason, 174, p. 1212.
Bohlen's Estate, 75 Pa. St. 304, p. 2050, 2060.
Bohlman v. Coffin, 4 Oreg. 313, p. 1148.
Bohlman v. Green Bay etc. R'y, 40 Wis. 157, 169, p. 2695.
Bohm v. Bohm, 9 Colo. 100, 10 Pac. 790, p. 2040.
Bohn v. Davis, 75 Tex. 24, 12 S. W. 837, p. 1756.
Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337, p. 1690.
Bohn Sash & Door Co. v. Case, 42 Nebr. 281, 60 N. W. 576, p. 2425.
Boisseau v. Boisseau, 79 Va. 73, 52 Am. Rep. 616, p. 2048.
Boland v. Tiernay, 118 Iowa, 59, 91 N. W. 836, p. 2312.
Boland v. Whitman, 33 Ind. 64, p. 1625.
Bold v. Hutchinson, 20 Beav. 250, 5 De Gex, M. & G. 558, 566, p. 1516, 1543, 1561, 2591.
Boles v. Merrill, 173 Mass. 491, 73 Am. St. Rep. 308, 53 N. E. 894, p. 1566.
Boles & British Land Co.'s Contract, In re, [1902] 1 Ch. 244, p. 1756.
Boling v. Howell, 93 Ind. 329, p. 1328.
Bolland, Ex parte, L. R. 17 Eq. 115, p. 2141.
Bolland v. O'Neal, 81 Minn. 15, 83 Am. St. Rep. 362, 83 N. W. 471, p. 1039.
Bolles v. Carli, 12 Minn. 113, 120, p. 148, 1281, 1284.
Bolles v. Chauncey, 8 Conn. 389, p. 1127.
Bolles v. Duff, 54 Barb. 215, p. 2661.
Bolles v. State Trust Co., 27 N. J. Eq. 308, p. 1837.
Bollin v. Connelly, 73 Pa. St. 336, p. 1075.
Bolling v. Carter, 9 Ala. 921, p. 1077.
Bolt v. Gray, 54 S. C. 95, 32 S. E. 148, p. 216.
Bolt v. Rogers, 3 Paige, 156, p. 664.
Bolton v. Bolton, [1891] 3 Ch. 270, p. 2621.
Bolton v. Bolton, L. R. 7 Eq. 298, p. 2741.

Bolton v. Corporation of Liverpool, 3 Sim. 467, 1 Mylne & K. 88, p. 280, 281.
Bolton v. Curre, [1895] 1 Ch. 545, p. 2087.
Bolton v. Jones, 5 Pa. St. 145, 47 Am. Dec. 404, p. 1356.
Bolton v. Roebuck, 77 Miss. 710, 27 South. 630, p. 1024.
Bonaparte v. Camden etc. R. R., Bald. 205, 231, p. 2687.
Bonbright v. Bonbright, (Iowa) 98 N. W. 784, p. 1490.
Bond, In re, L. R. 4 Ch. Div. 238, p. 1925.
Bond v. Bond, 7 Allen, 1, p. 2097.
Bond v. Bunting, 78 Pa. St. 210, p. 1871, 1876.
Bond v. Greenwald, 7 Baxt. 466, p. 2703.
Bond v. Hopkins, 1 Schoales & L. 413, 429, 433, p. 62, 2781.
Bond v. Kent, 2 Vern. 281, p. 2513.
Bond v. Little, 10 Ga. 395, 400, p. 364, 385, 452.
Bond v. Montgomery, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119, p. 674, 1721.
Bond v. Smith, 4 Hun, 48, p. 2552.
Bondfoot v. Montefiore, L. R. 2 Q. B. 511, p. 1625.
Bondholders of York etc. R. R., In re, 50 Me. 552, 564, p. 556.
Bonesteel v. Bonesteel, 28 Wis. 245, 250, p. 588.
Boney v. Hollingsworth, 23 Ala. 690, p. 1779.
Bonham v. Bonham, 33 N. J. Eq. 476, p. 2224, 2225.
Bonifant v. Greenfield, Cro. El. 80, p. 2045.
Bonithon v. Hockmore, 1 Vern. 316, p. 2431.
Bonner v. Bonner, 17 Beav. 86, p. 2173.
Bonner v. Grigsby, 84 Tex. 330, 19 S. W. 511, 31 Am. St. Rep. 48, p. 1332.
Bonner v. Little, 38 Ark. 397, p. 2762.
Bonner v. Ware, 10 Ohio, 465, p. 1054.
Bonnett v. Sadler, 14 Ves. 526, p. 1619.
Bonney v. Seely, 2 Wend. 481, p. 2793.
Bonser v. Kinnear, 2 Giff. 195, p. 1924.
Book v. Justice, 58 Fed. 830, p. 502.
Booker v. Allen, 2 Russ. & M. 270, p. 899, 902, 904, 930, 933.
Booker v. Armstrong, 93 Mo. 49, 4 S. W. 727, p. 2057.
Booker v. Booker, (Ill.) 70 N. E. 709, p. 1100, 1133, 1161.
Booker v. Booker's Adm'r, 32 Ala. 473, p. 2189.
Booker v. Carlile, 14 Bush, 154, p. 1828.
Booker v. Wingo, 29 S. C. 116, 7 S. E. 49, p. 666, 1712, 1715.
Bookhout, Matter of, 21 Barb. 348, 349, p. 570.
Boon v. Barnes, 23 Miss. 136, p. 1323, 1327.
Boon v. Pierpont, 28 N. J. Eq. 7, p. 1124.
Boone v. Chiles, 10 Pet. 177, p. 210, 267, 695, 1188, 1190, 1346, 1393.
Boone v. Citizens' Sav. Bank, 84 N. Y. 83, 38 Am. Dec. 498, p. 1837, 1838.
Boone v. Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276, p. 655, 2455.
Boone v. Miller, 86 Tex. 80, 81, 23 S. W. 574, p. 1227.
Boone v. Mo. Iron Co., 17 How. 340, p. 2775.
Boone Co. Nat. Bk. v. Latimer, 67 Fed. 27, p. 2022.
Boorman v. Wisconsin etc. Co., 36 Wis. 207, p. 2474.
Boos v. Ewing, 17 Ohio, 500, 49 Am. Dec. 478, p. 2573.
Boos v. Morgan, 130 Ind. 305, 30 Am. St. Rep. 237, 30 N. E. 141, p. 1278, 1402, 1404, 1409, 1411.
Booten v. Sheffer, 21 Gratt. 474, p. 1666, 1670, 2774.
Booth v. Alcock, L. R. 8 Ch. 663, p. 2673.
Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. 238, p. 1960, 1969.
Booth v. Barnum, 9 Conn. 286, 23 Am. Dec. 339, p. 1098, 1126.
Booth v. Booth, 1 Beav. 125, p. 2095.
Booth v. Carter, L. R. 3 Ex. 757, p. 1939.
Booth v. Clark, 17 How. 322, 331, p. 2653.
Booth v. Conn. Mut. L. Ins. Co., 43 Mich. 299, p. 2412.
Booth v. Eighmie, 60 N. Y. 238, 19 Am. Rep. 171, p. 2463.

Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225, p. 651, 2381.
Booth v. Kitchen, 7 Hun, 255, p. 1635.
Booth v. Lenox, (Fla.) 34 South. 566, p. 1993.
Booth v. Leycester, 3 Mylne & C. 459, p. 2718.
Booth v. Oakland Bk. of Savings, 122 Cal. 19, 54 Pac. 370, p. 1867.
Booth v. Pollard, 4 Younge & C. 61, p. 2765.
Booth v. Robinson, 55 Md. 419, p. 2114, 2121, 2125.
Booth v. Stamper, 6 Ga. 172, p. 2709.
Booth v. Steam Packet Co., 63 Md. 39, p. 2429.
Booth v. Wiley, 102 Ill. 84, 114, p. 2754.
Booth v. Wilkinson, 78 Wis. 652, 23 Am. St. Rep. 443, 47 N. W. 1128, p. 2058.
Booth & Co. v. Davis, 127 Fed. 875, p. 1691.
Boothby v. Boothby, 1 Macn. & G. 604, 15 Beav. 212, p. 1742.
Boothby v. Commercial Bank, 30 Me. 361, 363, p. 552.
Boozer v. Teague, 27 S. C. 348, 3 S. E. 551, p. 1995.
Boqut v. Coburn, 27 Barb. 230, p. 2437.
Bor v. Bor, 3 Brown Parl. C., Tomlins's ed., 167, p. 782, 784, 792, 857.
Bor v. Bor, 2 Brown Parl. C., Tomlins's ed., 473, p. 846.
Borah v. Archers, 7 Dana, 176, p. 2740, 2742.
Borden v. Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23, p. 2581.
Borden v. Hutchinson, (N. J.) 49 Atl. 1088, p. 1435, 1440.
Borden v. Jenks, 140 Mass. 565, 54 Am. Rep. 507, 5 N. E. 623, p. 2227.
Border State Sav. Inst. v. Wilcox, 63 Md. 525, p. 1023.
Borell v. Dann, 2 Hare, 440, 450, p. 1666, 1667.
Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. 342, 348, 1 McCrary, 50, 51, 1 Fed. 274, p. 507, 508, 510, 511.
Borgess Investment Co. v. Vette, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567, p. 1227, 1300.
Bork v. Martin, 132 N. Y. 280, 28 Am. St. Rep. 570, 30 N. E. 584, p. 1906.
Borland v. Nichols, 12 Pa. St. 38, 51 Am. Dec. 576, p. 825.
Borland v. Thornton, 12 Cal. 440, p. 697, 1450, 1788.
Borley v. McDonald, 69 Vt. 309, 38 Atl. 60, p. 737.
Borneman v. Sidlinger, 15 Me. 429, 33 Am. Dec. 626, p. 2233, 2234, 2236.
Borough of Woodbridge v. Borough of Carlstadt, 60 N. J. Eq. 1, 46 Atl. 540, p. 1199.
Borrowscale v. Tuttle, 5 Allen, 377, p. 1064.
Borst v. Nalle, 28 Gratt. 423, p. 1900.
Bosanquett v. Dashwood, Cas. t. Talb. 38, 40, 41, p. 1705, 1707, 1708, 1711, 1718.
Bosher v. Richmond etc. Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879, p. 416, 445, 1641, 1642.
Boskowitz v. Davis, 12 Nev. 446, p. 653, 1993.
Bosley v. N. M. Co., 123 N. Y. 555, 25 N. E. 990, p. 1567.
Bossard v. White, 9 Rich. Eq. 483, p. 1113.
Bossick Min. Co. v. Davis, 11 Colo. 130, 17 Pac. 294, p. 1390.
Bossingham v. Syck, 118 Iowa, 192, 91 N. W. 1047, p. 1564.
Bostick v. Young, 116 N. C. 766, 21 S. E. 552, p. 1097.
Bostock v. Floyer, L. R. 1 Eq. 26, p. 2059, 2089.
Bostock v. North Staffordshire Ry., 5 De Gex & S. 584, p. 2684.
Boston v. Robbins, 126 Mass. 384, p. 2045.
Boston & Fairhaven Iron Works v. Montague, 108 Mass. 248, p. 539.
Boston & Me. R. R. v. Bartlett, 10 Gray, 384, p. 536.
Boston & Me. R. R. Co. v. Sullivan, 177 Mass. 230, 58 N. E. 689, p. 382, 450.
Boston & Montana C. C. & S. M. Co. v. Montana Ore P. Co., 188 U. S. 632, 23 Sup. Ct. 434, p. 368, 386, 503.
Boston Blower Co. v. Carmen Lumber Co., 94 Va. 94, 26 S. E. 390, p. 341.

Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310, p. 212, 545, 2696.
Boston Mfg. Co. v. Burgin, 114 Mass. 340, p. 2750.
Boston Music Hall Ass'n v. Cory, 129 Mass. 435, p. 1222.
Boston Safe Deposit Co. v. Mixter, 146 Mass. 100, 15 N. E. 141, p. 2050.
Bostwick, Matter of, 4 Johns. Ch. 100, p. 2618.
Bostwick v. McEvoy, 55 Cal. 496, p. 684.
Bostwick v. Powers, 12 Iowa, 456, p. 1100.
Bostwick v. Stiles, 35 Conn. 195, p. 1466.
Bosvil v. Brander, 1 P. Wms. 459, p. 645.
Boswell v. Dillon, Dru. 291, p. 1884, 1886.
Boswell v. Goodwin, 31 Conn. 74, 81 Am. Dec. 169, p. 2383, 2388, 2389.
Bosworth v. Allen, 168 N. Y. 157, 164, 85 Am. St. Rep. 667, 61 N. E. 163, 55 L. R. A. 751, p. 2047, 2051, 2110.
Boteler v. Spelman, Finch, 96, p. 2737.
Bothamley v. Sherson, L. R. 20 Eq. 304, p. 2208, 2214.
Botsford v. McLean, 42 Barb. 445, 45 Barb. 478, p. 2627, 2725.
Bott v. Smith, 21 Beav. 511, 516, p. 1793, 1796.
Bottomly v. Lord Fairfax, Precedents in Ch. 336, p. 1849.
Bottorf v. Lewis, (Iowa) 95 N. W. 262, p. 1490.
Botts v. Gooch, 97 Mo. 88, 11 S. W. 42, 10 Am. St. Rep. 286, p. 2142.
Boucicault v. Fox, 5 Blatchf. 87, p. 2689.
Bouck v. Wilbur, 4 Johns. Ch. 405, p. 1549.
Boughman v. Boughman, 69 Ohio St. 273, 69 N. E. 430, p. 1899.
Boughton v. Boughton, 2 Ves. Sr. 12, p. 796, 800, 804, 846.
Boughton v. Knight, L. R. 3 P. & M. 64, p. 1726.
Boughton v. Phillips, 6 Paige, 433, p. 2705.
Boulden v. Lanahan, 29 Md. 200, p. 1065.
Boulden v. Wood, 96 Md. 332, 53 Atl. 911, p. 1510, 1542.
Boulder Val. Ditch Min. & Mill Co. v. Farnham, 21 Mont. 1, 29 Pac. 277, p. 1443, 1445.
Bouldin v. Phelps, 12 Sawy. 315, 30 Fed. 547, 561, p. 495.
Bouligny v. Fortier, 17 La. Ann. 121, p. 2419.
Bouling v. Cook, 39 Iowa, 200, p. 1300.
Boulnois v. Peake, L. R. 13 Ch. Div. 513, p. 1695, 2690.
Boulton v. Beard, 3 De Gex, M. & G. 608, p. 2048.
Boulton v. Scott's Adm'rs, 3 N. J. Eq. 231, 236, 241, p. 2708.
Bourne v. Bourne, 2 Hare, 35, p. 2309, 2313.
Bourne v. Maybin, 3 Woods, 724, Fed. Cas. No. 1,700, p. 2130.
Bourquin v. Bourquin, (Ga.) 47 S. E. 639, p. 2056, 2101.
Boursot v. Savage, L. R. 2 Eq. 134, 142, p. 1152, 1154, 1172, 1177, 1178, 2016.
Boutelle v. Smith, 116 Mass. 111, p. 542, 1688.
Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800, p. 1228.
Bouton v. City of Brooklyn, 15 Barb. 375, 387, 392–394, p. 403, 433, 434, 454.
Bouton v. Smith, 113 Ill. 481, p. 325.
Boutts v. Ellis, 4 De Gex, M. & G. 249, p. 2232, 2235, 2237, 2238, 2246.
Bouverie v. Prentice, 1 Brown Ch. 200, p. 363, 379, 394, 395, 428, 455, 2738.
Bovey v. Smith, 1 Vern. 144, p. 1197.
Bovill v. Cowan, L. R. 5 Ch. 495, p. 284, 287.
Bovill v. Moore, 2 Coop. Ch. Cas. 56, p. 260, 284.
Bovill v. Smith, L. R. 2 Eq. 459, p. 272.
Bowden v. Parrish, 86 Va. 67, 19 Am. St. Rep. 873, 9 S. E. 616, p. 1105, 1115.
Bowden v. Perdue, 59 Ala. 409, p. 2257.
Bowden v. Pierce, 73 Cal. 459, 14 Pac. 302, 15 Pac. 64, p. 1757.
Bowditch v. Andrew, 8 Allen, 339, p. 1850, 1851.

Bowditch v. Banuelos, 1 Gray, 220, 228, p. 535, 538.
Bowditch v. Gardner, 113 Mass. 315, p. 2750.
Bowen v. Aubrey, 22 Cal. 566, 569, p. 585.
Bowen v. Beck, 94 N. Y. 86, 46 Am. Rep. 124, p. 2405.
Bowen v. Bowen, 20 Conn. 126, 127, p. 717.
Bowen v. Bowen, 34 Ohio St. 164, p. 825.
Bowen v. Chase, 94 U. S. 812, 818, p. 1885, 1886.
Bowen v. Evans, 2 H. L. Cas. 259, p. 1607.
Bowen v. Evans, 1 Jones & L. 178, 263, 264, p. 1310, 1315, 1316, 1369, 1376, 1384.
Bowen v. Gerhold, (Ind. App.) 70 N. E. 546, p. 2433.
Bowen v. Gilbert, 122 Iowa, 448, 98 N. W. 273, p. 2423, 2424.
Bowen v. Hoskins, 45 Miss. 183, 7 Am. Rep. 728, p. 2794.
Bowen v. Kirwan, Lloyd & G. 47, p. 1673.
Bowen v. Kurtz, 37 Iowa, 239, p. 2406.
Bowen v. Mathesin, 14 Allen, 499, p. 1688.
Bowen v. Montgomery, 48 Ala. 353, p. 2065.
Bowen v. Prout, 52 Ill. 354, p. 1323, 1325.
Bowen v. Richardson, 133 Mass. 296, p. 2080.
Bower v. Cooper, 2 Hare, 408, p. 1666.
Bower v. Hadden etc. Co., 30 N. J. Eq. 171, p. 2562.
Bower's Appeal, 68 Pa. St. 126, p. 2197.
Bowers v. Evans, 71 Wis. 133, 36 N. W. 629, p. 1912, 1914, 2023.
Bowers v. Johnson, 49 N. Y. 432, p. 2419.
Bowers v. Johnson, 10 Smedes & M. 169, p. 1625.
Bowers v. Oyster, 3 Penr. & W. 239, p. 2539.
Bowers v. Smith, 10 Paige, 193, 194, 200, p. 212, 580, 2283, 2299, 2301.
Bowers v. Tallmadge, 16 How. Pr. 325, p. 2716.
Bowers v. Virden, 56 Miss. 595, p. 1771.
Bowes v. Hoeg, 15 Fla. 403, 408, p. 214.
Bowes v. Law, L. R. 9 Eq. 636, p. 2698, 2676.
Bowker v. Pierce, 130 Mass. 262, p. 2066, 2068, 2077, 2098.
Bowlby v. Thunder, 105 Pa. St. 173, p. 1927, 1929.
Bowler v. Curler, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. 226, p. 2041.
Bowles v. Beach, 22 N. J. L. 680, 53 Am. Dec. 263, p. 2406.
Bowles v. Round, 5 Ves. 508, p. 1015, 1596.
Bowles v. Stewart, 1 Schoales & L. 209, 222, 224, p. 265, 1609, 1613, 1654, 1785.
Bowles v. Trapp, 139 Ind. 55, 38 N. E. 406, p. 2192.
Bowling v. Cook, 39 Iowa, 200, p. 1300.
Bowling v. Crook, 104 Ala. 130, 16 South. 131, p. 382.
Bowling v. Scales, 2 Tenn. Ch. 63, p. 2658.
Bowling v. Taylor, 40 Fed. 404, p. 1690.
Bowman v. Anderson, 82 Iowa, 210, 47 N. W. 1087, 31 Am. St. Rep. 473, p. 1022, 1033, 1048, 1079.
Bowman v. Bates, 2 Bibb, 47, 4 Am. Dec. 677, p. 1609, 1615.
Bowman v. Besley, (Iowa) 97 N. W. 60, p. 1516.
Bowman v. Bittenbender, 4 Watts, 290, p. 1523.
Bowman v. Caruthers, 40 Ind. 90, p. 1560, 1567.
Bowman v. Cunningham, 78 Ill. 48, p. 2768, 2769, 2770.
Bowman v. Faw, 5 Lea, 472, p. 2502, 2518.
Bowman v. First Nat. Bank, 9 Wash. 614, 43 Am. St. Rep. 870, 38 Pac. 211, p. 1914.
Bowman v. Griffith, 35 Nebr. 361, 53 N. W. 140, p. 1355.
Bowman v. Hicks, 80 Va. 806, p. 1266.
Bowman v. Long, 26 Ga. 142, 147, p. 1828, 1893.
Bowman v. Patrick, 36 Fed. 138, p. 1781.
Bowman v. Phillips, 41 Kan. 364, 21 Pac. 230, 13 Am. St. Rep. 292, 3 L. R. A. 631, p. 1701.

Bowman v. Pinkham, 71 Me. 295, p. 2048, 2068, 2070.
Bowman v. Yeat, 1 Ch. Cas. 145, p. 2738.
Bown, In re, 27 Ch. D. 411, p. 2159.
Bowry v. Bennet, 1 Camp. 348, p. 1720.
Bowser v. Colby, 1 Hare, 109, 128, 130–132, p. 717, 752, 758.
Bowser v. Maclean, 2 De Gex, F. & J. 415, p. 2695.
Bowyer v. Griffin, L. R. 9 Eq. 340, p. 2098.
Bowyer v. Woodman, L. R. 3 Eq. 313, p. 2331.
Box v. Barrett, L. R. 3 Eq. 244, p. 783, 785, 792, 1544.
Box v. Lanier, (Tenn.) 79 S. W. 1042, p. 2574.
Boxall v. Boxall, 27 Ch. Div. 220, p. 2173.
Boxford Sec. Relig. Soc. v. Harriman, 125 Mass. 321, p. 1933, 1945, 1953, 1978.
Boxheimer v. Gunn, 24 Mich. 372, p. 2401.
Boxter v. Bush, 29 Vt. 465, 469, 70 Am. Dec. 429, p. 2576.
Boyce, In re, 4 De Gex, J. & S. 205, p. 2109.
Boyce v. Allen, 105 Iowa, 249, 74 N. W. 948, p. 216.
Boyce v. Shiver, 3 S. C. 515, p. 1105, 1111.
Boyce v. Smith, 9 Gratt. 704, 60 Am. Dec. 313, p. 1727.
Boyce v. Waller, 2 B. Mon. 91, p. 1384.
Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215, 9 L. ed. 127, p. 223, 460, 513, 515, 517, 2707.
Boyd, Ex parte, 105 U. S. 647, 657, 26 L. ed. 1200, p. 252, 291, 501.
Boyd v. Anderson, 102 Ind. 217, 1 N. E. 724, p. 1268, 1272.
Boyd v. Beaudin, 54 Wis. 193, 11 N. W. 521, p. 2462.
Boyd v. Beck, 29 Ala. 703, p. 1104, 1144, p. 1314.
Boyd v. Belton, 1 Jones & L. 730, p. 1387.
Boyd v. Brinckin, 55 Cal. 427, p. 2017.
Boyd v. Chesapeake & O. Canal Co., 17 Md. 195, 79 Am. Dec. 646, p. 1156.
Boyd v. De la Montagnie, 73 N. Y. 498, 29 Am. Rep. 197, p. 673, 1718.
Boyd v. Dowie, 65 Barb. 237, 242, p. 570.
Boyd v. Dunlap, 1 Johns. Ch. 478, p. 1744.
Boyd v. Emmons, 103 Ky. 393, 45 S. W. 364, p. 1070, 1072.
Boyd v. England, 56 Ga. 598, p. 1837, 1881, 1893.
Boyd v. Hankinson, 34 C. C. A. 197, 92 Fed. 49, p. 2039.
Boyd v. Hanson, 41 Fed. 174, p. 1676.
Boyd v. Hawkins, 2 Dev. Eq. 195, p. 1785.
Boyd v. Hunter, 44 Ala. 705, 719, p. 225, 350.
Boyd v. Jackson, 82 Ind. 525, p. 2512.
Boyd v. McLean, 1 Johns. Ch. 582, p. 1993, 2000, 2030.
Boyd v. Mundorf, 30 N. J. Eq. 545, p. 1107, 1135, 1363.
Boyd v. Munro, 32 S. C. 249, 10 S. E. 963, p. 1912.
Boyd v. Petrie, L. R. 3 Ch. 818, p. 289.
Boyd v. Schlessinger, 59 N. Y. 301, 305, p. 2758, 2779.
Boyd v. Schneider, (C. C. A.) 131 Fed. 223, reversing 124 Fed. 239, p. 360, 415, 423.
Boyd v. Swing, 38 Miss. 182, p. 568.
Boyd v. Thornton, 13 Smedes & M. 338, p. 2749.
Boyd v. Turpin, 94 N. C. 137, 55 Am. Rep. 597, p. 1447.
Boyden v. Partridge, 2 Gray, 190, p. 539, 540.
Boyer v. Austin, 75 Mo. 81, p. 2501, 2512.
Boyer v. Libbey, 88 Ind. 235, p. 1994, 1995, 2005.
Boyer v. Chandler, 160 Ill. 394, 43 N. E. 803, 32 L. R. A. 113, p. 1039.
Boyer v. East, 161 N. Y. 580, 76 Am. St. Rep. 290, 56 N. E. 114, p. 1774.
Boyer v. Sims, 61 Kan. 593, 60 Pac. 309, p. 2046.
Boyertown Nat. Bank v. Hartman, 147 Pa. St. 558, 23 Atl. 842, 30 Am. St. Rep. 759, p. 1516.
Boyes, In re, L. R. 26 Ch. Div. 531, p. 2037.
Boykin v. Ancrum, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698, p. 1395.

Boykin v. Ciples, 2 Hill Eq. 200, 29 Am. Dec. 67, p. 2139.
Boykin v. Jones, 67 Ark. 571, 57 S. W. 17, p. 1080.
Boykin v. Pace's Ex'r, 64 Ala. 68, p. 1877, 1912.
Boyle v. Bettivs etc. Co., L. R. 2 Ch. Div. 726, p. 2660.
Boyle v. Boyle, 152 Pa. St. 108, 34 Am. St. Rep. 629, 25 Atl. 494, p. 1927.
Boyle v. Turner, 6 Pet. 658, p. 512.
Boyle v. Zacharie & Turner, 6 Pet. 648, 8 L. ed. 532, p. 493.
Boylen v. Leonard, 2 Allen, 407, p. 2553.
Boylston v. Rankin, 114 Ala. 408, 21 South. 995, 62 Am. St. Rep. 111, p. 1444.
Boynton v. Boynton, 1 Brown Ch. 445, p. 817, 848.
Boynton v. Champlin, 42 Ill. 57, p. 2499.
Boynton v. Hazelboom, 14 Allen, 107, 92 Am. Dec. 738, p. 1590, 1606.
Boynton v. Hubbard, 7 Mass. 112, 119, p. 1678, 1697, 1742, 1744, 1745.
Boynton v. Ingalls, 70 Me. 461, p. 2272.
Boynton v. Miller, 144 Mo. 681, 46 S. W. 754, p. 1993.
Boynton v. Payrow, 67 Me. 587, p. 550, 2463.
Boynton v. Rees, 8 Pick. 329, 19 Am. Dec. 326, p. 1346.
Boyntun v. Boyntun, 1 Cox, 106, p. 2164.
Boys v. Williams, 2 Russ. & M. 689, p. 2209.
Boyse, In re, L. R. 15 Ch. Div. 591, p. 2703.
Boyse v. Rossborough, 6 H. L. Cas. 2, p. 1729, 1731.
Boyse v. Rossborough, Kay, 71, 3 De Gex, M. & G. 817, p. 2303.
Boyton v. Haggart, 120 Fed. 819, (C. C. A.) p. 1132.
Bozeman v. Ivey, 49 Ala. 75, p. 2526, 2534.
Bozon v. Farlow, 1 Mer. 459, p. 2773.
Brabrook v. Five Cent. Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222, p. 1872.
Brace v. Duchess of Marlborough, 2 P. Wms. 491, p. 190, 692, 1290, 1374, 2466.
Brace v. Harrington, 2 Atk. 235, p. 265.
Brace v. Van Elps, 13 S. Dak. 452, 83 N. W. 572, p. 1838.
Brace v. Wehnert, 25 Beav. 348, p. 2765.
Bracebridge v. Buckley, 2 Price, 200, 215, 218, 221, p. 717, 752, 753, 758, 759.
Brachtendorf v. Kehm, 72 Ill. App. 228, p. 1065.
Bracken v. Miller, 4 Watts & S. 102, p. 1107, 1166, 1346.
Brackenbury v. Brackenbury, 2 Jacob & W. 391, p. 1835.
Brackenridge v. Holland, 2 Blackf. 377, 20 Am. Dec. 123, p. 2268.
Brackett v. Blake, 7 Met. 335, 41 Am. Dec. 442, p. 2552.
Brackett v. Sears, 15 Mich. 244, p. 2383.
Brackett v. Wait, 6 Vt. 411, p. 1148.
Brackett v. Waite, 4 Vt. 389, p. 1800.
Bradburne v. Amand, 2 Carth. 87, p. 630, 644.
Bradbury v. Bardin, 35 Conn. 577, p. 1590.
Bradbury v. Birchmore, 117 Mass. 569, 580–582, p. 2103.
Bradbury v. Davenport, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 92, p. 2362.
Bradbury v. Davis, 5 Colo. 265, p. 1339.
Bradbury v. White, 4 Greenl. 391, p. 1513, 1517, 1520.
Bradfield v. Hale, 67 Ohio St. 316, 65 N. E. 1008, p. 2351.
Bradford v. Bradford, 54 N. H. 463, p. 528, 2725.
Bradford v. Brinley, 145 Mass. 81, 13 N. E. 1, p. 2218.
Bradford v. Greenway, 17 Ala. 797, 805, 52 Am. Dec. 203, p. 2153, 2190.
Bradford v. Harper, 25 Ala. 337, p. 2498, 2526.
Bradford v. Johnson, 44 Tex. 381, p. 2198.
Bradford v. Kents, 43 Pa. St. 474, 484, p. 848, 850, 855.
Bradford v. Marvin, 2 Fla. 463, p. 2499.
Bradford v. Mayor of Anniston, 92 Ala. 349, 8 South. 683, 25 Am. St. Rep. 60, p. 1159.

Bradford v. Monks, 132 Mass. 405, p. 2060.
Bradford v. Union Bank, 13 How. 55, 57, 66, p. 1515, 1520, 1541.
Bradford Banking Co. v. Briggs, 12 App. Cas. (H. L.) 29, reversing 31 Ch. Div. 19, and restoring 29 Ch. Div. 149, p. 2385.
Bradish v. Gee, Amb. 229, p. 2333.
Bradish v. Gibbs, 3 Johns. Ch. 523, 540, 550, p. 960, 1469, 2139.
Bradish v. Lucken, 38 Minn. 186, 36 N. W. 454, p. 433.
Bradley v. Aldrich, 40 N. Y. 504, 100 Am. Dec. 528, p. 355.
Bradley v. Angell, 3 N. Y. 475, 478, p. 1234.
Bradley v. Berns, 51 N. J. Eq. 437, 26 Atl. 908, p. 2561.
Bradley v. Bosley, 1 Barb. Ch. 125, p. 224.
Bradley v. Bradley, 165 N. Y. 183, 58 N. E. 887, p. 357, 416.
Bradley v. Bryan, 43 N. J. Eq. 396, 13 Atl. 806, p. 1281.
Bradley v. Burwell, 3 Denio, 61, p. 683, 2609.
Bradley v. Chase, 22 Me. 511, p. 1785.
Bradley v. Coolbaugh, 91 Ill. 148, p. 1701.
Bradley v. Fuller, 23 Pick. 1, 9, p. 2349.
Bradley v. George, 2 Allen, 392, p. 2444.
Bradley v. Hunt, 5 Gill & J. 54, 23 Am. Dec. 597, p. 2233, 2237.
Bradley v. Merrill, 88 Me. 319, 34 Atl. 160, p. 982, 1341, 2430, 2470.
Bradley v. Norton, 33 Conn. 157, 87 Am. Dec. 200, p. 2690.
Bradley v. Richardson, 23 Vt. 720, p. 2709.
Bradley v. Riches, L. R. 9 Ch. Div. 189, 195, 196, p. 1016, 1017, 1172, 1261, 1292.
Bradley v. Root, 5 Paige, 632, p. 1237, 1257.
Bradley v. Snyder, 14 Ill. 263, 58 Am. Dec. 564, p. 1021, 1036.
Bradley v. Walker, 138 N. Y. 291, 33 N. E. 1079, p. 987, 1095, 1115.
Bradly v. Westcott, 13 Ves. 445, 451, p. 2156.
Bradshaw, in re, [1902] 1 Ch. 436, p. 796.
Bradshaw v. Bradshaw, 1 Jacob & W. 647, p. 2618.
Bradshaw v. Huish, L. R. 43 Ch. Div. 262, p. 877.
Bradtfelt v. Cooke, 27 Oreg. 194, 40 Pac. 1, 50 Am. St. Rep. 701, p. 1789.
Brady v. Finn, 162 Mass. 260, 38 N. E. 506, p. 1596.
Brady v. Huber, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161, p. 664, 1712.
Brady v. Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737, p. 2473.
Brady v. Parker, 4 Ired. Eq. 430, p. 1523.
Brady v. Waldron, 2 Johns. Ch. 148, p. 2682.
Brady v. Weeks, 3 Barb. 157, p. 2684.
Brady's Appeal, 66 Pa. St. 277, p. 1729.
Bragg v. Beers, 71 Ala. 151, p. 2255, 2258.
Bragg v. Geddes, 93 Ill. 39, p. 1989.
Bragg v. Lamport, 96 Fed. 630, 38 C. C. A. 467, p. 1030.
Bragg v. Paulk, 42 Me. 502, p. 1338, 1341, 1901, 1902.
Braght v. Lennon, 83 N. C. 183, p. 2794.
Braham v. Beachim, L. R. 7 Ch. Div. 848, p. 2690.
Brainard v. Buck, 184 U. S. 99, 22 Sup. Ct. Rep. 458, 46 L. ed. 449, p. 1994.
Brainard v. Cooper, 10 N. Y. 356, p. 2424.
Brainard v. Cowdrey, 16 Conn. 1, 498, p. 2224.
Brainard v. Holsaple, 4 G. Greene, 485, p. 2729.
Brainerd v. Cowdrey, 16 Conn. 1, p. 2208.
Braithwaite v. Britain, 1 Keen, 206, 219, p. 683, 2606.
Brake v. Ballou, 19 Kan. 397, p. 2770.
Braker v. Devereaux, 8 Paige, 513, 518, p. 1894, 2740.
Braham v. Stiles, 2 Pick. 460, 13 Am. Dec. 445, p. 1845.
Braham v. Wilkinson, 3 Barb. 151, p. 1024.
Bramblett v. Henderson, 19 Ky. Law Rep. 692, 41 S. W. 575, p. 1155.
Brame v. McGee, 46 Ala. 170, p. 2189.

Bramhall v. Ferris, 14 N. Y. 41, 67 Am. Dec. 113, p. 1840, 1845, 1897, 2186.
Bramley v. Alt, 3 Ves. 620, p. 1693, 1694.
Bramwell v. Lacy, L. R. 10 Ch. Div. 691, p. 2673.
Branch v. Dawson, 36 Minn. 193, 30 N. W. 545, p. 1867.
Branch v. De Blanc, (Tex. Civ. App.) 62 S. W. 134, p. 1900.
Branch v. Griffin, 99 N. C. 173, 5 S. E. 393, 398, p. 1127, 1344.
Branch v. Mitchell, 24 Ark. 431, 439, p. 2753, 2754.
Branch Bank v. Steele, 10 Ala. 915, p. 1156.
Brandlyn v. Ord, 1 Atk. 571, p. 1346.
Brandon v. Brandon, 46 Miss. 222, 231, p. 149.
Brandon v. Cabiness, 10 Ala. 155, p. 1065.
Brandon v. Carter, 119 Mo. 572, 581, 41 Am. St. Rep. 673, 675, 24 S. W. 1035, p. 462.
Brandon v. Forest Co., 59 Pa. St. 187, p. 1509, 1594.
Brandon v. Green, 7 Humph. 130, p. 2702.
Brandon v. Medley, 1 Jones Eq. 313, p. 1502, 1508.
Brandon v. Robinson, 18 Ves. 429, p. 1839, 1841, 2157.
Brandriff v. Harrison Co., 50 Iowa, 164, p. 416.
Brands v. De Witt, 44 N. J. Eq. 545, 6 Am. St. Rep. 909, 10 Atl. 181, 14 Atl. 894, p. 2574.
Brandt v. Mickle, 28 Md. 436, p. 2144.
Brandt v. Wheaton, 52 Cal. 430, p. 2748.
Branham v. Ricoid, 42 Ind. 181, p. 1603.
Branland v. Bradley, 2 Smale & G. 339, p. 1738.
Branstitter v. Mann, 6 Idaho, 580, 57 Pac. 433, p. 1994.
Brant v. Brant, 40 Mo. 266, p. 827.
Brant v. Virginia Coal Co., 93 U. S. 326, 335, p. 1431 1434, 1438.
Brantley v. West, 27 Ala. 542, p. 1224, 1226, 1517.
Brashear v. Macey, 3 J. J. Marsh. 89, p. 2682, 2740.
Brashier v. Gratz, 6 Wheat. 528, p. 2778.
Brassell v. McLemore, 50 Ala. 476, p. 2778.
Brasted v. Sutton, 30 N. J. Eq. 462, p. 2659.
Bratt v. Bratt, 21 Md. 578, p. 2500.
Bratton v. Rogers, 62 Miss. 281, p. 1034, 1048.
Bratton's Appeal, 8 Pa. St. 164, p. 1107.
Brawley v. Catron, 8 Leigh, 522, p. 2509.
Braxton v. State, 25 Ind. 32, p. 683, 2608.
Bray v. Lamb, 2 Dev. Eq. 372, 25 Am. Dec. 718, p. 825.
Bray v. Stevens, L. R. 12 Ch. Div. 162, p. 2490.
Brazel v. Fair, 26 S. C. 370, 2 S. E. 293, p. 2024, 2082.
Breadalbane v. Chandos, 2 Mylne & C. 711, p. 1543.
Brealey v. Collins, Younge, 317, p. 1590, 1591.
Breathwit v. Rogers, 32 Ark. 758, p. 1701, 1703.
Breck v. Cole, 4 Sand. 79, p. 1791.
Breck v. Ringler, 59 Hun, 623, 13 N. Y. Supp. 501, p. 1737.
Breckenridge v. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71, p. 1725.
Breckinridge v. Tayler, 5 Dana, 110, p. 2795.
Breckenridges v. Todd, 19 Ky. (3 T. B. Mon.) 52, 16 Am. Dec. 83, p. 1100, 1116.
Brecknock Can Co. v. Pritchard, 6 Term Rep. 750, p. 1460.
Bredell v. Alexander, 8 Mo. App. 110, p. 2750.
Bredenberg v. Landrum, 32 S. C. 215, 10 S. E. 956, p. 2339, 2361.
Breed v. City of Lynn, 126 Mass. 367, p. 541, 542.
Breed v. Conley, 14 Iowa, 269, 81 Am. Dec. 485, p. 1100.
Breed v. National Bank of Auburn, 68 N. Y. Supp. 68, 57 App. Div. 468; affirmed, 171 N. Y. 648, 63 N. E. 1115, p. 655, 1305.
Breeden v. Grigg, 8 Baxt. 163, p. 2704.
Breeden v. Lee, 2 Hughes, 488, Fed. Cas. No. 1,828, p. 497.

Breeding v. Grantland, 135 Ala. 497, 33 South. 544, p. 2257.
Breeding v. Stamper, 18 B. Mon. 175, p. 1434.
Breen v. Lennon, 10 App. Div. 36, 41 N. Y. Supp. 705, p. 1086.
Breeze v. Brooks, 71 Cal. 169, 182, 9 Pac. 670, p. 1434.
Bremer v. Case, 60 Tex. 151, p. 1333, 1355.
Brenan v. Preston, 2 De Gex, M. & G. 813, p. 2657, 2670, 2671.
Brendel v. Charch, 82 Fed. 262, p. 508, 511, 2204.
Brendle v. German Ref. Cong., 33 Pa. St. 415, 418, p. 1954, 1977.
Brennan v. Clark, 29 Nebr. 385, 45 N. W. 472, p. 728, 731, 733, 740.
Brennan v. Emery-Bird-Thayer Dry Goods Co., 99 Fed. 971, p. 1164.
Brennan v. Moran, 6 Ir. Ch. 126, p. 890.
Brennan v. Winkler, 37 S. C. 457, 16 S. E. 190, p. 1953, 1977, 1978.
Brenner v. Bigelow, 8 Kan. 496, p. 2749.
Brereton v. Gamul, 2 Atk. 241, p. 259.
Breslin v. Fries-Breslin Co., (N. J. Eq.) 58 Atl. 313, p. 1452.
Bresniham v. Sheehan, 125 Mass. 11, (1878) p. 539, 546.
Bressler v. Kent, 61 Ill. 426, 14 Am. Rep. 67, p. 2155.
Breton v. Woollven, 17 Ch. Div. 418, p. 1873.
Breton's Estate, In re, 17 Ch. Div. 416, p. 1865.
Brett v. Cooney, 75 Conn. 338, 53 Atl. 729, p. 1604.
Brett v. Forcer, 3 Atk. 403, p. 2172.
Brettle, In re, 2 De Gex, J. & S. 79, p. 2158.
Brevink v. Christiaanse, (Nebr.) 95 N. W. 652, p. 2425.
Brewer v. Asher, 8 Okl. 231, 56 Pac. 714, p. 237.
Brewer v. Boston Theatre, 104 Mass. 378, p. 2011, 2125.
Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582, p. 604, 615, 1460, 2774.
Brewer v. Houston, 58 Cal. 345, p. 2748.
Brewer v. Hyndman, 18 N. H. 9, 11, 17, p. 527.
Brewer v. Keeler, 42 Ark. 289, p. 1647.
Brewer v. Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 679, p. 1688, 2596, 2598.
Brewer v. Maurer, 38 Ohio St. 543, 43 Am. Rep. 436, p. 2406.
Brewer v. Staples, 3 Sand. Ch. 579, p. 2401, 2402.
Brewer v. Swirles, 2 Smale & G. 219, p. 2087, 2150.
Brewer's Settlement, In re, [1896] 2 Ch. 503, p. 1843.
Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323, p. 1095.
Brewster v. Clamfit, 33 Ark. 72, p. 2383.
Brewster v. Edgerly, 13 N. H. 275, p. 740.
Brewster v. McCall, 15 Conn. 274, p. 1972.
Brewster v. Sims, 42 Cal. 139, 147, p. 1247, 1253, 1382.
Brewster v. Striker, 2 N. Y. 19, p. 1918.
Briant v. Reed, 14 N. J. Eq. 271, p. 2637, 2640, 2647, 2648.
Briarfield Iron Works Co. v. Foster, 54 Ala. 622, p. 2658.
Brice v. Brice, 5 Barb. 533, 549, p. 1044, 1730.
Brice v. Brice, 2 Molloy, 21, p. 850, 854.
Brice v. Stokes, 11 Ves. 319, 324, 2 Lead. Cas. Eq., 4th Am. ed., 1738, 1748–1790, 1791–1805, p. 2091, 2093, 2094, 2095, 2097.
Brice v. Taylor, 51 Ark. 80, 9 S. W. 854, p. 2258.
Brickley v. Commercial Bank of Columbia, 43 S. C. 528, 21 S. E. 886, p. 204.
Bridenbecker v. Lowell, 32 Barb. 9, 10, p. 701, 958, 1761, 2024.
Bridge v. Beadon, L. R. 3 Eq. 664, 667, p. 992, 1211, 1214.
Bridge v. Bridge, 16 Beav. 315, 327, p. 1872, 1879.
Bridge v. Wheeler, 152 Mass. 343, 25 N. E. 612, p. 1218.
Bridgeford v. Adams, 45 Ark. 136, p. 1331.
Bridgeford v. Barbour, 80 Ky. 529, p. 1332.
Bridgeman v. Green, Wilm. 58, p. 1649.

Bridgen v. Gill, 16 Mass. 522, p. 1845.
Bridgens v. West, (Tex. Civ. App.) 80 S. W. 417, p. 2034.
Bridgeport Electric & Ice Co. v. Meader, 72 Fed. 115, 18 C. C. A. 451, p. 2474.
Bridger's Case, L. R. 9 Eq. 74, p. 1435.
Bridges v. Ballard, 62 Miss. 237, p. 2396.
Bridges v. Bidwell, 20 Nebr. 185, 29 N. W. 302, p. 1833.
Bridges v. Hutchins, 11 Ired. 68, p. 904, 906.
Bridges v. Longman, 24 Beav. 27, p. 755, 756, 1466.
Bridges v. Robinson, 2 Tenn. Ch. 720, p. 2670.
Bridges v. Wilkins, 3 Jones Eq. 342, p. 2159.
Bridges v. Wood, 4 Dana, 610, p. 2144.
Bridgewater Iron Co. v. Lissberger, 116 U. S. 8, 6 Sup. Ct. 241, p. 1221.
Bridgewater Roller Mills Co. v. Receivers of Baltimore B. & L. Ass'n, 124 Fed. 718, p. 1345, 2453.
Bridgewater Roller Mills Co. v. Strough, 98 Va. 721, 2 Va. Sup. Ct. Rep. 593, 37 S. E. 290, p. 1106, 1130, 2452.
Bridgman v. Gill, 24 Beav. 302, p. 2097.
Bridgman v. Green, 2 Ves. Sr. 627, p. 1673.
Brien v. Harriman, 1 Tenn. Ch. 467, p. 2663.
Brigel v. Creed, 65 Ohio St. 40, 60 N. E. 991, p. 2467.
Brigge v. Smith, 5 R. I. 213, p. 696.
Briggs v. Chamberlain, 11 Hare, 69, p. 2331.
Briggs v. Davis, 20 N. Y. 15, 75 Am. Dec. 363, p. 2016.
Briggs v. Dorr, 19 Johns. 95, p. 157, 2549.
Briggs v. French, 1 Sum. 504, p. 520, 2632, 2633.
Briggs v. French, 2 Sum. 251, p. 1268.
Briggs v. Hannowald, 35 Mich. 474, p. 2417.
Briggs v. Johnson, 71 Me. 235, p. 1641, 2755, 2756.
Briggs v. Jones, L. R. 10 Eq. 92, p. 1110, 1195, 1296, 2539.
Briggs v. Law, 4 Johns. Ch. 22, p. 2676.
Briggs v. Neal, 56 C. C. A. 572, 120 Fed. 225, p. 2428.
Briggs v. Oliver, 68 N. Y. 336, p. 2462.
Briggs v. Palmer, 20 Barb. 392, 20 N. Y. 15, 21 N. Y. 574, p. 1054, 1897.
Briggs v. Penny, 3 Macn. & G. 546, 554, 556, p. 1908, 1924, 1928, 1929.
Briggs v. Planters' Bank, Freem. (Miss.) 574, p. 2787.
Briggs v. Rice, 130 Mass. 50, p. 1646, 1647.
Briggs v. Smith, 5 R. I. 213, p. 1450, 1788.
Briggs v. Stroud, 58 Fed. 717, 720, p. 511.
Briggs v. Taylor, 28 Vt. 180, p. 1007.
Briggs v. Vanderbilt, 19 Barb. 222, 239, p. 1477.
Brigham v. Peter Bent Brigham Hospital, 126 Fed. 796, p. 1797, 1960.
Brigham v. Thompson, 12 Tex. Civ. App. 562, 34 S. W. 358, p. 1373.
Brigham v. Tillinghast, 13 N. Y. 215, p. 1858.
Bright v. Allan, 203 Pa. St. 394, 93 Am. St. Rep. 769, 53 Atl. 251, p. 1438.
Bright v. Boyd, 1 Story, 478, 494, Fed. Cas. No. 1,875, 2 Story, 605, p. 191, 1195, 1294, 2431, 2481, 2482.
Bright v. Buckman, 39 Fed. 243, p. 1007, 1026, 1125, 1363.
Bright v. King, 20 Ky. Law Rep. 186, 45 S. W. 508, p. 2022.
Bright v. Larcher, 4 De Gex & J. 605, p. 2486.
Bright v. Larcher, 3 De Gex & J. 148, p. 2491.
Bright v. Legerton, 6 Jur., N. S., 1179, p. 1453.
Bright v. Legerton, 2 De Gex, F. & J 606, p. 2096.
Bright v. Newland, 4 Sneed, 440, 442, p. 229, 462, 465.
Bright v. North, 2 Phill. Ch. 216, 220, p. 2101.
Bright v. Rowland, 3 How. (Miss.) 398, p. 717, 753.

Bright's Trusts, In re, 21 Beav. 430, p. 990.
Brill v. Tuttle, 15 Hun, 289, p. 2567.
Brill v. Tuttle, 81 N. Y. 454, 457, 547, 37 Am. Rep. 515, p. 2562, 2567.
Brinckerhoff v. Bostwick, 88 N. Y. 52, 105 N. Y. 567, 12 N. E. 58, p. 2122, 2125, 2127, 2183.
Brinckerhoff v. Lansing, 4 Johns. Ch. 65, 8 Am. Dec. 538, p. 1294, 1439.
Brinckerhoff v. Lawrence, 2 Sand. Ch. 400, p. 2242.
Brinckerhoff v. Roosevelt, 131 Fed. 955, p. 2126.
Brindley v. Lawton, 53 N. J. Eq. (8 Dick.) 259, 31 Atl. 394, p. 667, 1702, 1712.
Brine v. Ferrier, 7 Sim. 549, p. 889.
Bringholff v. Munzenmaier, 20 Iowa, 513, p. 1100.
Brinkerhoff v. Brinkerhoff, 23 N. J. Eq. 477, 483, p. 1447.
Brinkerhoff v. Brown, 4 Johns. Ch. 671, p. 148, 2789.
Brinkerhoff v. Brown, 6 Johns. Ch. 139, 151, 156, p. 411, 429, 453.
Brinkerhoff v. Marvin, 5 Johns. Ch. 320, p. 2387, 2388.
Brinkerhoff v. Vansciven, 4 N. J. Eq. 251, p. 2501, 2511.
Brinkman v. Jones, 44 Wis. 498, 517, 519, 521, 523, p. 977, 978, 979, 982, 993, 1142, 1143, 1149, 2362, 2364.
Brinkman v. Sunken, 174 Mo. 709, 74 S. W. 963, p. 2000.
Brinkmeyer v. Browneller, 55 Ind. 487, p. 2387, 2390.
Brinkmeyer v. Helbling, 57 Ind. 435, p. 2387, 2390.
Brinton v. Scull, 55 N. J. Eq. 747, 35 Atl. 843, p. 1107, 1115.
Brinton v. Seevers, 12 Iowa, 389, p. 1100, 1114.
Brisbane v. Adams, 3 N. Y. 129, p. 1692.
Brisben's Appeal, 70 Pa. St. 405, p. 2494.
Brisco v. Minah Consol. Min. Co., 82 Fed. 952, p. 988, 2497, 2510, 2519.
Briscoe v. Ashby, 24 Gratt. 454, p. 1322, 1373.
Briscoe v. Briscoe, 1 Jones & L. 334, 7 I. R. Eq. 123, p. 853, 854.
Briscoe v. Bronaugh, 1 Tex. 326, 46 Am. Dec. 108, p. 2502.
Briscoe v. Callahan, 7 Mo. 134, p. 2512.
Briscoe v. Power, 47 Ill. 447, p. 2440, 2451, 2455.
Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689, 90 Cal. 323, 27 Pac. 186, p. 1561, 1781, 2039, 2041.
Bristol v. Bristol, 53 Conn. 242, 5 Atl. 687, p. 1952, 1972.
Bristol Sav. Bank v. Stiger, 86 Iowa, 344, 53 N. W. 265, p. 2413.
Bristor v. Bristor, 101 Ind. 47, p. 2147.
Bristor v. Tasker, 135 Pa. St. 110, 20 Am. St. Rep. 853, 19 Atl. 851, p. 1831.
Bristow v. Bristow, 5 Beav. 289, p. 888.
Bristow v. Warde, 2 Ves. 336, p. 783, 794.
Bristow v. Whitmore, 9 H. L. Cas. 391, 418, p. 1229, 1264.
British etc. Co., In re, L. R. 14 Ch. Div. 335, p. 2068, 2069.
British Emp. Ship Co. v. Somes, 3 Kay & J. 433, p. 248, 256, 259.
British Museum v. White, 2 Sim. & St. 594, 596, p. 176, 1933, 1945.
Brittain v. Crowther, 54 Fed. 295, 4 C. C. A. 341, 12 U. S. App. 148, p. 983.
Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58, p. 1243.
Brittlebank v. Goodwin, L. R. 5 Eq. 545, p. 2088.
Britton v. Updike, 3 N. J. Eq. 125, p. 2447.
Britton's Appeal, 45 Pa. St. 172, p. 1107, 1138, 1148, 1274.
Broad, Ex parte, 13 Q. B. D. 740, p. 1916.
Broad v. Murray, 44 Cal. 229, p. 841.
Broad v. Selfe, 9 Jur., N. S., 885, p. 2371.
Broadbent v. Barlow, 3 De Gex, F. & J. 570–581, p. 1005, 1006, 1010.
Broadbent v. Barrow, 20 Ch. Div. 676, p. 2216.
Broadbent v. Imperial Gas Co., 7 De Gex, M. & G. 436, 461, 462, 7 H. L. Cas. 600, p. 2684, 2687.
Broadbent v. State, 7 Md. 416, p. 263.

Broadhurst v. Balguy, 1 Younge & C. 16, p. 2095.
Broadis v. Broadis, 86 Fed. 951, p. 224, 339.
Broadman v. Hayne, 29 Iowa, 339, p. 1230.
Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633, p. 765.
Broadnax v. Groom, 64 N. C. 244, 246, 247, p. 407.
Broadrup v. Woodman, 27 Ohio St. 553, p. 1904.
Broadway Bank v. McElrath, 13 N. J. Eq. 24, p. 1222.
Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504, p. 1844.
Broadwell v. King, 3 B. Mon. 449, p. 2521.
Brobst v. Brock, 10 Wall. 519, p. 2352.
Brobston v. Penniman, 97 Ga. 527, 25 S. E. 350, p. 1156.
Brock v. Barnes, 49 Barb. 521, p. 1739, 1751, 1767, 1770.
Brock v. Berry, 132 Ala. 95, 90 Am. St. Rep. 896, 31 South. 517, p. 351.
Brock v. Headen, 13 Ala. 370, p. 1132.
Brock v. Hidy, 13 Ohio St. 305, 306, 310, p. 2776, 2778.
Brocklesby v. Temperance Permanent Building Society, [1895] App. Cas. 173, affirming [1893] 3 Ch. 130, p. 1196, 1296.
Brockmeyer v. National Bank, 40 Kan. 744, 21 Pac. 300, p. 2564.
Brockmeyer v. Washington Nat. Bk., 40 Kan. 376, 19 Pac. 855, p. 1914.
Brockway v. Harrington, 82 Iowa, 23, 47 N. W. 1013, p. 1665.
Brockway v. Jewett, 16 Barb. 590, 592, p. 570.
Brockway v. Wells, 1 Paige, 617, p. 2477.
Brockway Mfg. Co., In re, 89 Me. 121, 35 Atl. 1012, 56 Am. St. Rep. 401, p. 2014.
Broder v. Conklin, 77 Cal. 331, 19 Pac. 513, p. 1771, 2041.
Broder v. Conklin, 121 Cal. 282, 53 Pac. 699, p. 1754, 1755, 2086.
Broder v. Saillard, L. R. 2 Ch. Div. 692, p. 2687.
Broderick v. Broderick, 1 P. Wms. 239, p. 1609, 1613, 1785.
Broderick v. Broderick, 28 W. Va. 378, p. 2292.
Broderick's Will, In re, 21 Wall. 503, 504, 22 L. ed. 599, p. 148, 181, 494, 497, 498, 509, 512, 515, 517, 1635, 2294.
Brodhead v. Shoemaker, 44 Fed. 518, 11 L. R. A. 569, p. 510.
Brodie v. Barry, 2 Ves. & B. 127, p. 790, 791, 798, 800, 802, 804, 805, 806, 846.
Brodnax v. Groom, 64 N. C. 244, 246, 247, p. 407.
Brogden v. Walker, 2 Har. & J. 285, p. 1729.
Broiestedt v. South Side R. R., 55 N. Y. 220, 222, p. 231, 355.
Brokaw v. Brokaw, 41 N. J. Eq. 215, 4 Atl. 66, p. 2561.
Brokaw v. Hudson, 27 N. J. Eq. 135, p. 881.
Brolasky v. Gally's Ex'rs, 51 Pa. St. 509, p. 2306, 2315.
Bromley v. Brumton, L. R. 6 Eq. 275, p. 2238, 2770.
Bromley v. Holland, 7 Ves. 3, 16, 18, 19–21, p. 211, 227, 460, 461, 464, 465, 1464, 2728.
Bromley v. Holland, 5 Ves. 610, 618, p. 2728.
Bromley v. Jefferies, 2 Vern. 415, p. 2769.
Bromley v. Smith, 26 Beav. 644, p. 1742.
Bronson Electric Co. v. Rheubottom, 122 Mich. 608, 81 N. W. 563, p. 1245, 1328.
Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797, p. 494.
Bronson v. Wanzer, 86 Mo. 408, p. 2501.
Brook v. Badley, L. R. 3 Ch. 672, 674, p. 2318.
Brook v. Badley, L. R. 4 Eq. 106, 3 Ch. 672, p. 2488.
Brook v. Brook, 3 Smale & G. 280, p. 1890.
Brook v. Chappell, 34 Wis. 405, p. 2293.
Brooke, In re, L. R. 3 Ch. Div. 630, p. 2490.
Brooke v. Berry, 2 Gill, 83, p. 1671.
Brooke v. Brooke, 25 Beav. 342, p. 2146.

Brooke v. Galley, 2 Atk. 34, 35, p. 1744.
Brooke v. Garrod, 3 Kay & J. 608, 2 De Gex & J. 62, p. 2778.
Brooke v. Lord Mostyn, 2 De Gex, J. & S. 373, p. 1501.
Brooke and Fremlin's Contract, In re, [1898] 1 Ch. 647, p. 2138.
Brooke's Appeal, 64 Pa. St. 127, p. 1107.
Brookes v. Boucher, 8 Jur., N. S., 639, p. 283.
Brookfield v. Williams, 2 N. J. Eq. 341, p. 2742.
Brookings v. White, 49 Me. 479, p. 2193.
Brookings Land & Trust Co. v. Bertness, (S. Dak.) 96 N. W. 97, p. 1764.
Brooklyn etc. R. R. v. Strong, 75 N. Y. 591, p. 2121.
Brookman v. Hales, 2 Ves. & B. 45, p. 1986.
Brookman v. Metcalf, 4 Rob. (N. Y.) 568, p. 1562.
Brookover v. Hurst, 1 Met. 665, p. 2347.
Brooks, In re, [1894] 1 Ch. 43, p. 1826.
Brooks v. Benham, 70 Conn. 92, 38 Atl. 908, 39 Atl. 1112, 66 Am. St. Rep. 87, p. 2454.
Brooks v. Bigelow, 142 Mass. 6, 6 N. E. 766, p. 1913.
Brooks v. Brooks, 12 S. C. 422, p. 2232, 2236, 2247.
Brooks v. Byam, 1 Story, 296-301, p. 270, 283.
Brooks v. Calderwood, 34 Cal. 563, 45 Cal. 519, p. 2748.
Brooks v. City of Wichita, 114 Fed. 297, 52 C. C. A. 209, p. 739.
Brooks v. Cooper, 50 N. J. Eq. 761, 26 Atl. 978, 35 Am. St. Rep. 793, 21 L. R. A. 617, p. 670, 1713.
Brooks v. Curtis, 4 Lans. 283, p. 1452.
Brooks v. Greathed, 1 Jacob & W. 176, p. 2658.
Brooks v. Hatch, 6 Leigh, 534, p. 2567.
Brooks v. Jackson, 125 Mass. 307, p. 2099.
Brooks v. Kearns, 86 Ill. 547, p. 2754, 2756.
Brooks v. Laurent, (C. C. A.) 98 Fed. 647, p. 1447.
Brooks v. Lester, 36 Md. 65, p. 2383.
Brooks v. Marbury, 11 Wheat. 78, p. 1855.
Brooks v. Martin, 2 Wall. 70, 81, p. 671, 1713.
Brooks v. Owen, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492, p. 2403.
Brooks v. Record, 47 Ill. 30, p. 1256.
Brooks v. Shelton, 54 Miss. 353, p. 1992.
Brooks v. Stolley, 3 McLean, 523, 527, 529, p. 225, 321, 326, 348.
Brooks v. Stuart, 1 Beav. 512, p. 635.
Brooks v. Todd, 79 Ga. 692, 4 S. E. 156, p. 1707.
Brooks v. Whitson, 7 Smedes & M. 513, p. 2709.
Brooks v. Young, 60 Tex. 32, p. 2503, 2521.
Brooksbank, In re, 34 Ch. Div. 160, p. 794.
Brooks' Estate, In re, 140 Pa. St. 84, 21 Atl. 240, p. 1846.
Brookville Nat. Bank v. Kimble, 76 Ind. 195, p. 2143, 2145.
Broome v. Beers, 6 Conn. 198, p. 1295.
Broome v. Davis, 87 Ga. 584, 13 S. E. 749, p. 1038.
Broome v. Monck, 10 Ves. 609, p. 783.
Brophy v. Bellamy, L. R. 8 Ch. 798, p. 2050.
Brophy Min. Co. v. Brophy & Dale Min. Co., 15 Nev. 101, p. 2381.
Brose v. Doe, 2 Ind. 666, p. 1145.
Brosseau v. Lowry, (Ill.) 70 N. E. 901, p. 1410.
Brotherhood's Case, 31 Beav. 365, p. 1453.
Brothers v. Bank of Kaukauna, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932, p. 1156, 1170, 1725.
Brothers v. Brothers, 7 Ired. Eq. 150, p. 1754.
Brothers v. Cartwright, 2 Jones Eq. 113, 64 Am. Dec. 563, p. 2316.
Brotherton v. Anderson, 27 Tex. Civ. App. 587, 66 S. W. 682, p. 1052.
Brotherton v. Livingston, 3 Watts & S. 334, p. 1112, 1124.
Brotten v. Bateman, 2 Dev. Eq. 115, 22 Am. Dec. 732, p. 2284.
Brotzman's Appeal, 119 Pa. St. 645, 13 Atl. 483, p. 675, 2286.
Broughton v. Brand, 94 Mo. 169, 7 S. W. 119, p. 1993.

Broughton v. Broughton, 5 De Gex, M. & G. 160, p. 2098.
Broughton v. Coffer, 18 Gratt. 184, p. 1507, 1525.
Broughton v. Hutt, 3 De Gex & J. 501, p. 1477, 1478, 1488, 1494, 1499, 1520.
Broughton v. Wimberly, 65 Ala. 549, p. 2794.
Broumel v. White, 87 Md. 521, 39 Atl. 1047, p. 647.
Broussard v. Dull, 3 Tex. Civ. App. 59, 21 S. W. 937, p. 1103, 1120.
Brouwer v. Jones, 23 Barb. 153, p. 1200.
Browder v. Phinney, 30 Wash. 74, 70 Pac. 264, p. 94, 230, 231.
Browell v. Reed, 1 Hare, 434, p. 2658.
Brower v. Goodyer, 88 Ind. 572, p. 1621.
Brower v. Peabody, 13 N. Y. 121, p. 1385.
Brower v. Witmeyer, 121 Ind. 83, 22 N. E. 975, p. 2499.
Brown, In re, [1895] 2 Ch. 666, p. 2626.
Brown, In re, 2 Story, 502, 517, Fed. Cas. No. 1,985, p. 2570.
Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655, p. 1207.
Brown v. Balen, 33 N. J. Eq. 469, p. 2726.
Brown v. Bamford, 1 Phill. Ch. 620, p. 2157.
Brown v. Bank of Mississippi, 31 Miss. 454, p. 2789.
Brown v. Bankers' etc. Tel. Co., 30 Md. 39, p 1161, 1164.
Brown v. Banner Coal & Oil Co., 97 Ill. 214, 37 Am. Rep. 105, p. 1339.
Brown v. Beauchamp, 5 T. B. Mon. 413, 17 Am. Dec. 81, p. 1703.
Brown v. Bigné, 21 Oreg. 260, 28 Pac. 11, 28 Am. St. Rep. 752, 14 L. R. A. 745, p. 1703.
Brown v. Blydenburgh, 7 N. Y. 141, 57 Am. Dec. 506, p. 1305.
Brown v. Bowen, 30 N. Y. 519, 541, 86 Am. Dec. 406, p. 1427, 1440.
Brown v. Brabb, 67 Mich. 17, 34 N. W. 403, 11 Am. St. Rep. 549, p. 1332.
Brown v. Brown, 18 Conn. 410, 46 Am. Dec. 328, p. 2236.
Brown v. Brown, 66 Conn. 493, 34 Atl. 490, p. 664, 2574.
Brown v. Brown, 1 Dick. 62, p. 2763.
Brown v. Brown, 62 Kan. 666, 64 Pac. 599, p. 1994, 1998.
Brown v. Brown, 1 Keen, 275, p. 2225, 2226.
Brown v. Brown, L. R. 2 Eq. 481, p. 786, 845, 847.
Brown v. Brown, 12 Md. 87, p. 1902.
Brown v. Brown, 42 Minn. 270, 44 N. W. 250, p. 781, 857.
Brown v. Brown, 55 N. H. 106, p. 812, 820, 828.
Brown v. Brown, 4 Rob. (N. Y.) 488, 700, 701, p. 231, 355, 586.
Brown v. Brown, 61 Tex. 45, p. 1649.
Brown v. Brown, 1 Vern. 156, p. 1652.
Brown v. Brown, 79 Va. 648, p. 2227.
Brown v. Buck, 75 Mich. 274, 13 Am. St. Rep. 438, 42 N. W. 827, 5 L. R. A. 226, p. 568.
Brown v. Budd, 2 Ind. 442, p. 1113.
Brown v. Bulkley, 14 N. J. Eq. 451, p. 1770.
Brown v. Burbank, 64 Cal. 99, 27 Pac. 940, p. 1775.
Brown v. Burke, 22 Ga. 574, p. 1806.
Brown v. Butler, 87 Va. 621, 13 S. E. 71, p. 1269.
Brown v. Byam, 65 Iowa, 374, 21 N. W. 684, p. 2500, 2514.
Brown v. Caldwell, 1 Speers Eq. 322, p. 821.
Brown v. Carey, 149 Pa. St. 134, 23 Atl. 1103, p. 1038.
Brown v. Cassamajor, 4 Ves. 498, p. 1921.
Brown v. Catlettsburg, 11 Bush, 435, p. 2678.
Brown v. Cave, 23 S. C. 251, p. 1995.
Brown v. Chicago & N. W. R'y Co., (Iowa) 82 N. W. 1003, p. 765.
Brown v. Clark, 3 Ves. 166, p. 646, 2174.
Brown v. Clifford, 7 Lans. 46, p. 2380.
Brown v. Cody, 115 Ind. 488, 18 N. E. 9, p. 1347.
Brown v. Cohn, 95 Wis. 90, 69 N. W. 71, 60 Am. St. Rep. 83, p. 1062, 1089, 1344.
Brown v. Coldwell, 1 Spears Eq. 322, 325, p. 828.
Brown v. Cole, 14 Sim. 427, p. 2434.
Brown v. Collins, 25 Ch. Div. 56, 60, p. 2613.

Brown v. Combs, 29 N. J. L. 36, p. 1908, 1909.
Brown v. Concord, 56 N. H. 375, p. 530, 531, 2678.
Brown v. Concord, 33 N. H. 285, p. 1954, 1975.
Brown v. Coriell, 50 N. J. Eq. 753, 26 Atl. 915, 35 Am. St. Rep. 789, 21 L. R. A. 321, p. 2436.
Brown v. Cory, 9 Kan. App. 702, 59 Pac. 1097, p. 1726.
Brown v. County of Buena Vista, 95 U. S. 157, 160, p. 1789.
Brown v. Cowell, 116 Mass. 461, p. 1753.
Brown v. Crafts, 98 Me. 40, 56 Atl. 213, p. 1877.
Brown v. Cram, 1 N. H. 169, p. 2350.
Brown v. Cranberry Iron & Coal M. Co., 72 Fed. 96, 18 C. C. A. 444, 25 U. S. App. 679, p. 1168.
Brown v. Crane, 47 Ga. 483, p. 2005.
Brown v. Dawson, Prec. Ch. 240, p. 872.
Brown v. Dean, 3 Wend. 208, p. 1123.
Brown v. Desmond, 100 Mass. 267, p. 155, 2633, 2761.
Brown v. De Tastet, Jacob 284, p. 2027.
Brown v. Dewey, 2 Barb. 28, p. 2372.
Brown v. Dudbridge, 2 Brown Ch. 321, 322, p. 262.
Brown v. Duluth, M. & N. R'y Co., 53 Fed. 889, p. 2129.
Brown v. East, 5 Mon. 405, 407, p. 2536.
Brown v. Eaton, 21 Minn. 409, 411, p. 2776.
Brown v. Edsall, 9 N. J. Eq. 256, 257, p. 224, 332, 333.
Brown v. Elmendorf, (Tex. Civ. App.) 25 S. W. 145, p. 1347.
Brown v. Ennis, 69 Ark. 123, 61 S. W. 379, 86 Am. St. Rep. 171, p. 2515.
Brown v. Evans, 6 Allen, 333, 336, p. 535, 536.
Brown v. Farmers Supply Depot Co., 23 Oreg. 541, 32 Pac. 548, p. 2476.
Brown v. Ferrell, 83 Ky. 417, p. 2500.
Brown v. Foote, 2 Tenn. Ch. 253, 255, p. 2141, 2155, 2160, 2161.
Brown v. French, 80 Fed. 166, 169, p. 497.
Brown v. French, 125 Mass. 410, 28 Am. Rep. 254, p. 2068.
Brown v. Gaffney, 28 Ill. 149, 157, p. 1021, 2372.
Brown v. Gellatly, L. R. 2 Ch. 751, p. 2068, 2321.
Brown v. Gilman, 4 Wheat. 255, 290, 4 L. ed. 564, p. 2513.
Brown v. Goodwin, 75 N. Y. 409, p. 1072, 1088, 2757.
Brown v. Goolsby, 34 Miss. 437, p. 234.
Brown v. Grimes, 60 Ala. 647, p. 2216.
Brown v. Haff, 5 Paige, 235, 28 Am. Dec. 425, p. 2760.
Brown v. Hall, 14 R. I. 249, 51 Am. Rep. 375, p. 1731.
Brown v. Harris, 25 Barb. 134, p. 1845.
Brown v. Heathcote, 1 Atk. 160, 162, p. 1332, 2470.
Brown v. Henderson, (Tex. Civ. App.) 31 S. W. 315, p. 1103.
Brown v. Heyes, 33 Ga. Supp. 136, p. 2775.
Brown v. Higgs, 8 Ves. 561, 569, 570, 574, 5 Ves. 495, 4 Ves. 708, p. 687, 1461, 1469, 1836, 1889.
Brown v. Holden, 120 Iowa, 191, 94 N. W. 482, p. 1566.
Brown v. Home Sav. Bank, 5 Mo. App. 1, p. 2653, 2660.
Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547, p. 660, 661.
Brown v. Johnson, 17 Ala. 232, p. 2144.
Brown v. Jones, 1 Atk. 188, p. 1986.
Brown v. Kelsey, 2 Cush. 243, p. 1958, 1979.
Brown v. Kennedy, 33 Beav. 133, 4 De Gex, J. & S. 217, p. 1738, 1751, 1767, 1769, 1772, 2729.
Brown v. Knapp, 79 N. Y. 136, 140, p. 2485, 2488.
Brown v. Kough, 29 Ch. Div. 848, p. 2478.
Brown v. Kuhn, 40 Ohio St. 468, p. 1194.
Brown v. Lambert's Adm'r, 33 Gratt. 256, p. 2089.
Brown v. Lamphear, 35 Vt. 252, p. 1516.
Brown v. Lapham, 3 Cush. 551, 554, p. 1402, 1409, 1411, 2441.

Brown v. Lazarus, 5 Tex. Civ. App. 81, 25 S. W. 71, p. 1103, 1120.
Brown v. Leach, 107 Mass. 364, p. 1591.
Brown v. Lunt, 37 Me. 423, p. 1114.
Brown v. Lynch, 1 Paige, 147, p. 1659, 2032.
Brown v. McDonald, 130 Fed. 964, p. 252, 260.
Brown v. McGill, 87 Md. 161, 67 Am. St. Rep. 334, 39 Atl. 613, 39 L. R. A. 806, p. 1844, 2157.
Brown v. Manter, 22 N. H. 468, p. 1147.
Brown v. Maulsby, 17 Ind. 10, p. 727.
Brown v. Mercantile Trust Co., 87 Md. 377, 40 Atl. 256, p. 1765.
Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404, p. 1609, 1613, 1618.
Brown v. Moore, 3 Head, 671, p. 2238.
Brown v. Neilson, 61 Nebr. 765, 87 Am. St. Rep. 525, 86 N. W. 498, 54 L. R. A. 328, p. 2576.
Brown v. Norman, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663, p. 1627, 1649.
Brown v. Pancoast, 34 N. J. Eq. 321, p. 1946, 1958, 1975.
Brown v. Parry, 2 Dick. 685, p. 827.
Brown v. Peck, 1 Eden, 140, p. 1681.
Brown v. Pierce, 7 Wall. 205, p. 1270.
Brown v. Pitney, 39 Ill. 468, p. 823.
Brown v. Pocock, 2 Russ. & M. 210, p. 1841.
Brown v. Pocock, 6 Sim. 257, p. 1800.
Brown v. Porter, 2 Mich. N. P. 12, p. 2500, 2511.
Brown v. Post, 1 Hun, 303, p. 1762, 1763.
Brown v. Ray, 18 N. H. 102, 45 Am. Dec. 361, p. 2796.
Brown v. Richter, 25 App. Div. 239, 49 N. Y. Supp. 368, p. 1838.
Brown v. Roland, (Tex. Civ. App.) 648, 33 S. W. 273, p. 1027, 1047.
Brown v. Runals, 14 Wis. 693, p. 2463.
Brown v. Russell, 105 Ind. 46, 4 N. E. 428, p. 2462.
Brown v. Schintz, 202 Ill. 509, 67 N. E. 172, p. 2570.
Brown v. Simons, 44 N. H. 475, 45 N. H. 211, p. 1054, 2447, 2452, 2455.
Brown v. Simpson, 4 Kan. 76, p. 1100, 1115, 2503.
Brown v. Smith, L. R. 10 Ch. Div. 377, p. 2618.
Brown v. Snell, 46 Me. 490, 496, p. 549, 550.
Brown v. South Boston Savings Bank, 148 Mass. 300, 19 N. E. 382, p. 2428.
Brown v. Solary, 37 Fla. 102, 19 South. 161, p. 340.
Brown v. Stead, 5 Sim. 535, p. 1400.
Brown v. Stewart, 1 Md. Ch. 87, p. 2348.
Brown v. Stillman, 43 Minn. 126, 45 N. W. 2, p. 2414.
Brown v. Swann, 10 Pet. 497, p. 323, 325.
Brown v. Tanner, L. R. 2 Eq. 806, 3 Ch. 597, p. 2584.
Brown v. Texas Cactus Hedge Co., 64 Tex. 396, p. 1323.
Brown v. Thomson, 31 S. C. 436, 10 S. E. 95, 17 Am. St. Rep. 40, p. 1447, 2201.
Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308, p. 420.
Brown v. Vanlier, 7 Humph. 239, p. 2502.
Brown v. Vermuden, 1 Chan. Cas. 272, p. 362, 455.
Brown v. Volkening, 64 N. Y. 76, 82, 83, p. 977, 979, 982, 1007, 1023, 1037, 1042, 1142, 1147.
Brown v. Wales, L. R. 15 Eq. 142, 147, p. 262, 271, 272, 273.
Brown v. Ward, 119 Iowa, 604, 93 N. W. 587, p. 1490.
Brown v. Ward, 103 N. C. 178, 9 S. E. 300, p. 811.
Brown v. Weatherby, 12 Sim. 6, 11, p. 683, 2606.
Brown v. Welch, 18 Ill. 343, 68 Am. Dec. 549, p. 1202, 1324, 1356.
Brown v. Wells, 44 Ga. 573, 575, p. 997, 1144.
Brown v. White, (Ind. App.) 67 N. E. 273, p. 2005.
Brown v. Williamson's Ex'rs, 36 Pa. St. 338, p. 1840, 1846.
Brown v. Wilson, 56 Ga. 534, p. 2702.
Brown v. Wood, 6 Rich. Eq. 155, p. 1315, 1393.

Browne, Ex parte, L. R. 16 Ch. Div. 497, p. 2660, 2662.
Browne v. Blake, 1 Molloy, 382, p. 1396.
Browne v. Cavendish, 1 Jones & L. 606, p. 1855.
Browne v. Cross, 14 Beav. 105, p. 2096.
Browne v. Hammond, Johns. 210, p. 2231.
Browne v. Hope, L. R. 14 Eq. 343, p. 2228.
Browne v. Lynde, 91 N. Y. 92, p. 2451.
Browne v. Moore, 3 Bligh, 178, p. 285.
Browne v. Savage, 4 Drew. 635, 640, p. 1213, 1214, 1634.
Browne's Will, In re, 27 Beav. 324, Ames' Cas. on Trusts, 458, p. 2055.
Browning v. Morris, 2 Cowp. 790, p. 1718, 1721.
Brown Iron Co. v. Norwood, (Tex. Civ. App.) 69 S. W. 253, p. 739.
Brown's Appeal, 66 Pa. St. 155, p. 229.
Brown's Trusts, In re, L. R. 5 Eq. 88, p. 1211.
Brownsword v. Edwards, 2 Ves. Sr. 243, 246, 247, p. 262, 264, 1651.
Brox v. Rider, 67 N. Y. Supp. 772, 56 App. Div. 388, p. 1074.
Broyles v. Arnold, 11 Heisk. 484, p. 1769.
Broyles v. Nowlin, 3 Baxt. 191, p. 1452, 2030, 2032.
Brua's Appeal, 55 Pa. St. 294, p. 1676.
Bruce v. Bruce, 11 Heisk. 760, p. 2288.
Bruce v. Bruce, L. R. 11 Eq. 371, p. 1468.
Bruce v. Davenport, 36 Barb. 349, p. 1764.
Bruce v. Davenport, 3 Keyes, 472, p. 1788.
Bruce v. Kelly, 5 Hun, 229, 232, p. 230, 1639, 1646.
Bruce v. Slemp, 82 Va. 352, p. 907.
Bruce v. Tilson, 25 N. Y. 194, 197, 203, p. 2535, 2777.
Bruck v. Tucker, 42 Cal. 346, 352, 353, p. 91, 662, 2715, 2722, 2767.
Bruen v. Bruen, 2 Vern. 439, p. 917.
Bruen v. Gillet, 115 N. Y. 10, 21 N. E. 676, 12 Am. St. Rep. 764, 4 L. R. A. 529, p. 2095.
Bruere v. Cook, 63 N. J. Eq. 624, 52 Atl. 1001, p. 1941, 1956, 1958, 1975.
Bruff v. Mali, 36 N. Y. 200, p. 1567.
Brugger v. State Invest. Ins. Co., 5 Saw. 304, p. 2726.
Bruker v. Kelsey, 72 Ind. 51, p. 1640.
Brummet v. Weaver, 2 Oreg. 168, p. 2197.
Brummond v. Krause, 8 N. Dak. 573, 80 N. W. 686, p. 1730.
Brundage v. Biggs, 25 Ohio St. 652, 656, p. 1064, 1075, 1080.
Brundage v. Brundage, 65 Barb. 397, p. 181.
Brundage v. Home Sav. & Loan Ass'n, 11 Wash. 277, 39 Pac. 666, p. 2361.
Brunini v. Pera, 54 Miss. 649, p. 577, 2276.
Brunner v. Warner, (Tenn. Ch. App.) 52 S. W. 668, p. 638, 642.
Brunskill v. Caird, L. R. 16 Eq. 493, p. 2048.
Bruschke v. Wright, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813, p. 1191.
Brush v. Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510, p. 1549, 1653.
Brush v. Halloway, 2 J. J. Marsh. 180, p. 1044.
Brush v. Kinsley, 14 Ohio, 20, p. 2502, 2520.
Brush v. Manhattan R'y Co., (C. P. N. Y.) 13 N. Y. Supp. 908, p. 1450, 1789.
Brush v. Peterson, 54 Iowa, 243, 6 N. W. 287, p. 2376.
Brush v. Ware, 15 Pet. 93, 111, 114, p. 1050, 1054, 1159.
Bryan, In re, L. R. 14 Ch. Div. 516, p. 2168, 2169.
Bryan v. Bradley, 16 Conn. 474, 483, p. 1828.
Bryan v. Brasius, 162 U. S. 415, 16 Sup. Ct. 803, 40 L. ed. 1022 (affirming 3 Ariz. 433, 31 Pac. 519), p. 2354.
Bryan v. Butts, 27 Barb. 503, p. 2360.
Bryan v. Dunean, 11 Ga. 67, p. 1758.
Bryan v. Hickson, 40 Ga. 405, p. 2264.
Bryan v. Hitchcock, 43 Mo. 527, p. 1588.
Bryan v. Howland, 98 Ill. 625, p. 1920.

Bryan v. Kales, 162 U. S. 411, 16 Sup. Ct. 803, 40 L. ed. 1020 (affirming 3 Ariz. 423, 31 Pac. 517), p. 2354.
Bryan v. Knickerbacker, 1 Barb. Ch. 409, p. 1845.
Bryan v. Masterson, 4 J. J. Marsh. 225, p. 1494.
Bryan v. McCann, (W. Va.) 47 S. E. 143, p. 351, 2054, 2056.
Bryan v. Ramirez, 8 Cal. 461, 68 Am. Dec. 340, p. 1019.
Bryan v. Read, 1 Dev. & B. Eq. 78, p. 2775.
Bryan v. M'Naughton, 38 Kan. 98, 16 Pac. 57, p. 1764, 2032.
Bryan v. Saltenstall, 3 J. J. Marsh. 672, p. 2647.
Bryant v. Booze, 55 Ga. 438, p. 1144, 2772.
Bryant v. Bull, L. R. 10 Ch. Div. 153, p. 2661.
Bryant v. Carson River L. Co., 3 Nev. 313, 93 Am. Dec. 403, p. 2461.
Bryant v. Damon, 6 Gray, 564, p. 2394, 2397.
Bryant v. Hill, 9 Dana, 67, p. 1703.
Bryant v. Hunter, 3 Wash. C. C. 48, p. 879.
Bryant v. Mansfield, 22 Me. 360, p. 1482.
Bryant v. Stephens, 58 Ala. 636, p. 2475, 2498, 2509.
Bryant v. Thompson, 59 Hun, 627, 14 N. Y. Supp. 386, p. 2283, 2299.
Bryant v. Vix, 83 Ill. 11, p. 1227.
Brydges v. Brydges, 3 Ves. 120, 125a, 126, p. 168, 1396, 1397, 1398, 1837.
Brydon v. Campbell, 40 Md. 331, p. 1119.
Bryson v. Close, 60 Iowa, 357, 14 N. W. 350, p. 2424.
Bryson v. Whitehead, 1 Sim. & St. 74, p. 1688, 1691.
Bubb v. Yelverton, L. R. 10 Eq. 465, p. 2682.
Bubier v. Bubier, 24 Me. 42, 47, p. 548, 551, 2762.
Buchan v. Sumner, 2 Barb. Ch. 165, 207, 47 Am. Dec. 305, p. 1269.
Buchanan v. Balkum, 60 N. H. 406, p. 1051, 1056, 1058.
Buchanan v. Griggs, 20 Nebr. 165, 29 N. W. 297, p. 353.
Buchanan v. Griggs, 18 Nebr. 121, 24 N. W. 452, p. 1470.
Buchanan v. Hamilton, 5 Ves. 722, p. 2108.
Buchanan v. Harrison, 1 Johns. & H. 662, p. 2326.
Buchanan v. International Bank, 78 Ill. 500, p. 1127.
Buchanan v. Lloyd, 88 Md. 642, 41 Atl. 1075, p. 1106.
Buchanan v. Lorman, 3 Gill, 51, 77, p. 2775.
Buchanan v. Matlock, 8 Humph. 390, 47 Am. Dec. 622, p. 1636.
Buchanan v. Moore, 13 Serg. & R. 304, 15 Am. Dec. 601, p. 1388.
Buchanan v. Turner, 2 Md. 1, 5, p. 2153, 2193.
Buchanan's Estate, In re, 8 Cal. 507, 510, p. 809, 841.
Bucher v. Bucher, 86 Ill. 377, p. 1765.
Buck, In re, [1896] 2 Ch. 727, p. 1963.
Buck v. Dowley, 16 Gray, 555, 557, p. 535, 536. 538.
Buck v. Foster, 146 Ind. 530, 46 N. E. 920, 62 Am. St. Rep. 427, p. 1347.
Buck v. Paine, 50 Miss. 648, 655, p. 974, 977, 982, 1018, 1146.
Buck v. Payne, 52 Miss. 271, p. 2350.
Buck v. Ross, 68 Conn. 29, 35 Atl. 763, 57 Am. St. Rep. 60, p. 2014.
Buck v. Swazey, 35 Me. 41, 56 Am. Dec. 681, p. 2563.
Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 84, p. 2772.
Buck v. Ward, 97 Va. 209, 33 S. E. 513, p. 161, 216, 1638.
Buck v. Wroten, 24 Gratt. 250, p. 2144.
Buckalew v. Blanton, 7 Cold. 214, p. 2143.
Buckell v. Blenkhorn, 5 Hare, 131, p. 1654.
Buckeridge v. Ingram, 2 Ves. 652, p. 803, 805.
Buckingham v. Hanna, 2 Ohio St. 551, p. 1134.
Buckingham v. Morrison, 136 Ill. 437, 27 N. E. 65, p. 2099.
Buckland v. Papillion, L. R. 2 Ch. 67, p. 2761.
Buckland v. Pocknell, 13 Sim. 406, p. 2512.
Buckland v. Rice, 40 Ohio St. 526, p. 1695.

Buckle v. Mitchell, 18 Ves. 100, 111, p. 1204, 1805.
Bucklen v. Hasterlik, 155 Ill. 423, 40 N. E. 561, p. 760, 765.
Buckley v. Buckley, 11 Barb. 43, 77, p. 2493, 2494.
Buckley v. Daley, 45 Miss. 338, 345, p. 2349.
Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490, p. 1509, 1510.
Buckmaster v. Buckmaster, 33 Ch. Div. 482, p. 2621.
Buckmaster v. Harrop, 7 Ves. 341, 346, p. 2601.
Buck Mt. etc. Co. v. Lehigh etc. Co., 50 Pa. St. 91, 99, 88 Am. Dec. 534, p. 2683.
Buckner v. Calcote, 28 Miss. 432, p. 1648.
Buckner v. Davis, 19 Ky. Law Rep. 1349, 43 S. W. 445, p. 1101, 1116.
Buckner v. Ferguson, 44 Miss. 677, p. 245, 250, 255, 260.
Buckworth v. Buckworth, 1 Cox, 80, p. 2618.
Budd v. Busti, 1 Harr. (Del.) 69, p. 2503.
Budd v. Long, 13 Fla. 288, p. 2753, 2757.
Budd v. Van Orden, 33 N. J. Eq. 143, p. 2369, 2380.
Buden v. Dore, 2 Ves. 445, p. 262.
Budge v. Gummow, L. R. 7 Ch. 719, p. 2068, 2073, 2090.
Budington v. Munson, 33 Conn. 481, p. 1657.
Buehler v. McCormick, 169 Ill. 269, 48 N. E. 287, p. 1227.
Buel v. Selz, 5 Ill. App. 116, p. 2800.
Bueter v. Bueter, 1 S. Dak. 94, 45 N. W. 208, 8 L. R. A. 562, p. 2177.
Buffalo Chemical Works v. Bank of Commerce, 79 Hun, 93, 29 N. Y. Supp. 663, p. 380.
Buffalo City Bank v. Codd, 25 N. Y. 163–169, p. 1721.
Buffalo, N. Y. & E. R. R. v. Lampson, 47 Barb. 533, p. 2756.
Buffett v. Troy and Boston R. R. Co., 40 N. Y. 168, p. 1721.
Buffington v. Gerrish, 15 Mass. 156, 8 Am. Dec. 97, p. 1327.
Buford v. Caldwell, 3 Mo. 477, p. 1583.
Buford v. Holley, 28 Fed. 680, p. 506.
Buford v. Louisville etc. R. R. Co., 82 Ky. 286, p. 1730.
Bugbee v. Sargent, 23 Me. 269, p. 553.
Bugbee v. Sargent, 27 Me. 338, p. 553.
Buggins v. Yates, 9 Mod. 122, p. 1929.
Buie v. Pollock, 55 Miss. 309, p. 2276.
Building Ass'n v. Ashmead, 7 Phila. 272, p. 2671.
Building Ass'n v. Wilson, 41 Md. 506, 514, p. 1106.
Building & Loan Ass'n v. Jones, 32 S. C. 308, 10 S. E. 1079, p. 2201.
Buist v. Dawes, 3 Rich. Eq. 281, p. 787.
Bulkley v. Wilford, 2 Clark & F. 102, p. 1654, 2032.
Bulkley v. Wilford, 8 Bligh, N. S., 111, p. 2035.
Bull v. Bull, 8 Conn. 47, 20 Am. Dec. 86, p. 1927, 1972.
Bull v. Church, 5 Hill, 206, 207, 2 Denio, 430, 43 Am. Dec. 754, p. 809, 811, 820, 828, 829, 832, 852.
Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235, p. 2200.
Bull v. Cromie, 81 Ky. 646, p. 2051.
Bull v. Kentucky Nat. Bank, 90 Ky. 452, 14 S. W. 425, 12 L. R. A. 37, p. 1844.
Bull v. Mitchell, 47 Nebr. 647, 66 N. W. 632, p. 1227.
Bull v. Odell, 19 App. Div. 605, 46 N. Y. Supp. 306, p. 1839.
Bull v. Read, 13 Gratt. 78, 79, 86, 87, p. 407, 416.
Bull v. Sink, 8 Kan. App. 860, 57 Pac. 853, p. 1298.
Bull v. Sykes, 7 Wis. 449, p. 2477.
Bull v. Tuttle, 81 N. Y. 454, 457, 37 Am. Rep. 315, p. 2560.
Bull v. Valley Falls Co., 8 R. I. 42, p. 2686.
Bull v. Vardy, 1 Ves. 270, p. 1467.
Bullard, In re, 96 N. Y. 499, 48 Am. Rep. 646, p. 827.
Bullard v. Chandler, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104, p. 1943, 1956, 1979.
Bullard v. Leach, 27 Vt. 491, p. 1402.
Bullard v. Randall, 1 Gray, 605, 61 Am. Dec. 433, p. 2563.
Bullard v. Town of Shirley, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110, p. 1966, 1979.

Bullenkamp v. Bullenkamp, 54 N. Y. Supp. 482, p. 1907.
Buller v. Plunkett, 1 Johns. & H. 441, p. 1211.
Buller v. Sidell, 43 Fed. 116, p. 496.
Bullion B. & C. Min. Co. v. Eureka Hill Min. Co., 5 Utah, 3, 11 Pac. 515, p. 354.
Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149, p. 1576.
Bullivant v. Attorney-General, [1901] App. Cas. (H. L.) 196, p. 278.
Bullock, In re, 60 L. J. Ch. 341, p. 1841, 1842, 1843.
Bullock v. Adams's Ex'rs, 20 N. J. Eq. 367, 371, p. 2779.
Bullock v. Battenhousen, 108 Ill. 28, p. 2385.
Bullock v. Boyd, 2 A. K. Marsh. 322, p. 324.
Bullock v. Boyd, 2 Edw. Ch. 293, p. 2801.
Bullock v. Bullock, 2 Dev. Eq. 307, p. 2300.
Bullock v. Dommitt, 6 Term Rep. 650, p. 1460.
Bullock v. Downes, 9 H. L. Cas. 1, p. 1488, 1501, 1787.
Bullock v. Menzies, 4 Ves. 798, p. 2144, 2175.
Bullock v. Sprowls, 93 Tex. 188, 54 S. W. 657, 661, 77 Am. St. Rep. 849, 47 L. R. A. 326, p. 1335.
Bullowa v. Orgo, 57 N. J. Eq. 428, 41 Atl. 494, p. 2541.
Bullpin v. Clarke, 17 Ves. 365, p. 2185.
Bulow v. Witte, 3 S. C. 308, p. 2620.
Bulstrode v. Letchmore, 3 Freem. 5, 1 Cas. Ch. 277, p. 277.
Bumgardner v. Allen, 6 Munf. 439, p. 2404.
Bumpas v. Zachary, (Tex. Civ. App.) 34 S. W. 672, p. 1030.
Bumpass v. Reams, 1 Sneed, 595, p. 221, 2706.
Bumpus v. Platner, 1 Johns. Ch. 213, 219, p. 1345, 1346.
Bunbury v. Bunbury, 2 Beav. 173, p. 278.
Bunce v. Gallagher, 5 Blatch. 481, 487, p. 513, 517, 2754, 2756.
Bunce v. West, 62 Iowa, 81, 17 N. W. 179, p. 2435.
Bunch v. Hunt, 3 Desaus Eq. 273, 5 Am. Dec. 551, p. 1072.
Bundy v. Bundy, 38 N. Y. 410, p. 2110.
Bundy v. Cocke, 128 U. S. 188, 9 Sup. Ct. 242, 32 L. ed. 396, p. 2135, 2136, 2190.
Bunker v. Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282, p. 2374.
Bunker v. Locke, 15 Wis. 635, p. 2682.
Bunker v. Miles, 30 Me. 431, 50 Am. Dec. 632, p. 1764.
Bunn v. Markham, 7 Taunt. 224, p. 2236, 2242, 2244.
Bunn v. Schnellbacher, 163 Ill. 328, 45 N. E. 227 (affirming 59 Ill. App. 222), p. 1329.
Bunn v. Winthrop, 1 Johns. Ch. 329, 337, p. 1872.
Bunnel v. Carter, 14 Utah, 100, 46 Pac. 755, p. 2408.
Bunnell v. Bunnell, 23 Ky. L. Rep. 800, 64 S. W. 420, p. 662.
Buntin v. French, 16 N. H. 592, p. 2503.
Bunting v. Ricks, 2 Dev. & B. Eq. 130, 32 Am. Dec. 699, p. 981, 991.
Bunton v. Smith, 40 N. H. 352, p. 524.
Burbank v. Burbank, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748, p. 1979.
Burbank v. Roots, 4 Colo. App. 197, 35 Pac. 275, p. 2405, 2408.
Burbank v. Warwick, 52 Iowa, 493, 3 N. W. 519, p. 2419.
Burbank v. Whitney, 24 Pick. 146, 35 Am. Dec. 312, p. 1966, 1967, 1979.
Burch v. Breckinridge, 16 B. Mon. 482, 63 Am. Dec. 553, p. 2153, 2192.
Burch v. Burch, 52 Ind. 136, p. 2486, 2489.
Burch v. Burch, 82 Ky. 622, p. 2480.
Burch v. Carter, 44 Ala. 115, 117, p. 1050, 1057, 1144.
Burch v. Newbury, 10 N. Y. 374, 387, p. 570.
Burchard v. Fair Haven, 48 Vt. 327, p. 1372.
Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696, p. 1113.
Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758, p. 697, 1450, 1788, 2586.
Burdeno v. Amperse, 14 Mich. 91, 90 Am. Dec. 225, p. 2193.

Burdett v. Clay, 8 B. Mon. 287, p. 2387, 2417.
Burdett v. May, 100 Mo. 13, 12 S. W. 1056, p. 1647, 2000.
Burdett v. Porter, 63 Vt. 296, 21 Atl. 955, 25 Am. St. Rep. 763, p. 208, 1159.
Burdge v. Underwood, 6 Cal. 45, p. 2686.
Burdick v. Garrick, L. R. 5 Ch. 233, 241, p. 2068, 2088.
Burdick v. Jackson, 7 Hun, 488, p. 2470.
Burdick v. McVanner, 2 Denio, 170, p. 2461.
Burdon v. Barkus, 3 Giff. 412, 4 De Gex, F. & J. 42, p. 2028.
Burdon v. Dean, 2 Ves. 607, p. 646, 2170.
Burdon Cent. Sugar Refin. Co. v. Ferris Sugar Mfg. Co., 78 Fed. 417, 422, p. 499.
Burford v. Lenthall, 2 Atk. 551, p. 1967.
Burford v. Rosenfield, 37 Tex. 42, p. 2502.
Burger v. Greif, 55 Md. 518, p. 2451.
Burges v. Lamb, 16 Ves. 174, 185, p. 2682.
Burges v. Mawbey, 10 Ves. 319, 327, p. 921.
Burgess v. Burgess, 3 De Gex, M. & G. 896, p. 2690.
Burgess v. Greene, 64 Ala. 509, p. 2498, 2515, 2516.
Burgess v. Millican, 50 Tex. 397, p. 2502, 2513.
Burgess v. Shepherd, 97 Me. 522, 55 Atl. 415, p. 2272, 2300.
Burgess v. Wheate, 1 W. Black. 123, 129, 152, 1 Eden, 177, 184, 195, 210, 223, 256, p. 65, 168, 604, 605, 621, 1197, 1837, 1848, 2436.
Burgess's Case, L. R. 15 Ch. Div. 507, p. 1574.
Burgher v. Rice, 3 Ind. 125, p. 2554.
Burgin v. Giberson, 26 N. J. Eq. 72, p. 1516.
Burgoyne v. Hatton, Barn. Ch. 237, p. 1057.
Burgoyne v. Ohio Life Ins. etc. Co., 5 Ohio St. 586, 587, p. 684, 2608.
Burham v. Onderdonk, 41 N. Y. 425, p. 2750.
Burham v. S. F. Fuse Mfg. Co., 76 Cal. 26, 17 Pac. 339, p. 764.
Burhans v. Burhans, 2 Barb. Ch. 398, p. 2740.
Burhans v. Hutcheson, 25 Kan. 625, 37 Am. Rep. 274, p. 2420.
Burke v. Adams, 80 Mo. 504, 50 Am. Rep. 510, p. 1448.
Burke v. Cassin, 45 Cal. 467, 13 Am. Rep. 204, p. 2691.
Burke v. Johnson, 37 Kan. 337, 15 Pac. 204, 1 Am. St. Rep. 252, p. 1268.
Burke v. Roper, 79 Ala. 138, p. 1972.
Burke v. Seely, 46 Mo. 334, p. 662, 2768, 2772.
Burke v. Smyth, 3 Jones & L. 193, p. 2761.
Burke v. United States, 13 Ct. of Cl. 231, p. 2555.
Burke v. Valentine, 52 Barb. 412, p. 1895.
Burke v. Wheat, 22 Kan. 722, p. 2710.
Burkhalter v. Ector, 25 Ga. 55, p. 1104.
Burkholder v. Ludlam, 30 Gratt. 255, 32 Am. Rep. 668, p. 1275.
Burkle v. Levy, 70 Cal. 250, 11 Pac. 643, p. 1647, 2200.
Burks v. Burks, 7 Baxt. 353, p. 1992, 2024, 2030.
Burlace v. Cooke, Freem. Ch. 24, p. 1315, 1367.
Burleson v. McDermott, 57 Ark. 229, 21 S. W. 222, p. 1068.
Burley v. Evelyn, 16 Sim. 290, p. 179.
Burling v. King, 66 Barb. 633, p. 619, 634, 2590, 2768, 2775.
Burling v. Newlands, 112 Cal. 476, 44 Pac. 810, p. 1908.
Burlington & Mo. River R. R. v. Comm'rs of York County, 7 Nebr. 487, p. 2768.
Burlington Tp. v. Cross, 15 Kan. 74, p. 2729.
Burn v. Burn, 3 Ves. 573, 582, p. 1268.
Burn v. Carvalho, 4 Mylne & C. 690, 702, p. 195, 2561, 2565, 2721.
Burnes v. Burnes, 132 Fed. 485, 494, p. 1500.
Burnes v. Scott, 117 U. S. 582, 587, 6 Sup. Ct. 868, p. 495.
Burnet v. Corp. of Cincinnati, 3 Ohio, 73, 17 Am. Dec. 582, p. 2757.

Burnett v. Crandall, 63 Mo. 410, p. 2563.
Burnett v. Gustafson, 54 Iowa, 86, 37 Am. Rep. 190, p. 2017, 2019.
Burnett v. Hawpe's Ex'r, 25 Gratt. 481, p. 2199.
Burnett v. Phalon, 3 Keyes, 594, p. 2690.
Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. ed. 596, p. 2418.
Burnham v. Burnham, (Wis.) 97 N. W. 176, p. 1732.
Burnham v. Chandler, 15 Tex. 441, p. 1113.
Burnham v. Comfort, 108 N. Y. 535, 2 Am. St. Rep. 462, 15 N. E. 710, p. 891.
Burnham v. Doolittle, 14 Nebr. 214, 15 N. W. 606, p. 2360.
Burnham v. Kempton, 44 N. H. 78, 79, 90, 92, p. 308, 529, 530, 2684.
Burnley v. Thomas, 63 Mo. 390, 392, p. 2144, 2194.
Burns v. Lynde, 6 Allen, 305, p. 2756.
Burns v. Pennell, 2 H. L. Cas. 497, p. 1625.
Burns v. Ross, 71 Tex. 516, 9 S. W. 468, p. 1994, 2006.
Burns v. Smith, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742, p. 2250, 2253, 2279.
Burns v. Taylor, 23 Ala. 255, p. 2498, 2515.
Burnside v. Terry, 45 Ga. 621, p. 2358.
Burnside v. Wayman, 49 Mo. 356, p. 2475.
Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327, p. 2405, 2407.
Burr v. Hutchinson, 61 Me. 514, p. 2726.
Burr v. Sherwood, 3 Bradf. 85, p. 2172.
Burr v. Sim, 1 Whart. 252, 29 Am. Dec. 48, p. 2306, 2325, 2327.
Burr v. Smith, 7 Vt. 241, 29 Am. Dec. 154, p. 1978.
Burr v. Todd, 41 Pa. St. 206, p. 742, 743.
Burr v. Toomer, 103 Ga. 159, 29 S. E. 692, p. 1024.
Burrall v. Bushwick R. R., 75 N. Y. 211, p. 2784.
Burrell v. Baskerfield, 11 Beav. 525, p. 2310, 2321.
Burrell v. Bull, 3 Sand. Ch. 15, p. 1764.
Burrell v. Earl of Egremont, 7 Beav. 205, p. 1407, 1411.
Burrell v. Nicholson, 3 Barn. & Adol. 649, 1 Mylne & K. 680, p. 258, 282, 284.
Burridge v. Bradyl, 1 P. Wms. 127, p. 2227.
Burrill v. Boardman, 43 N. Y. 254, 263, 3 Am. Rep. 694, p. 177, 1968.
Burritt v. Silliman, 13 N. Y. 93, 64 Am. Dec. 532, p. 2045.
Burrough v. Ely, (W. Va.) 46 S. E. 371, p. 2467.
Burrough v. Moss, 10 Barn. & C. 558, p. 1246.
Burrough v. Philcox, 5 Mylne & C. 72, p. 1889.
Burroughs v. Cutter, 98 Me. 178, 56 Atl. 649, p. 380.
Burroughs v. De Couts, 70 Cal. 361, 371, 11 Pac. 734, p. 854, 855.
Burroughs v. Tostevan, 75 N. Y. 567, p. 2544.
Burrow v. Henson, 2 Sneed, 658, p. 2370.
Burrow v. Ragland, 6 Humph. 481, p. 1635.
Burrowes v. Gore, 6 H. L. Cas. 907, Ames' Cas. on Trusts, 48, note 1, p. 1879.
Burrowes v. Lock, 10 Ves. 470, 474, 475, 476, p. 992, 1387, 1584, 1586, 1633, 1666, 1669.
Burrowes v. Molloy, 2 Jones & L. 521, p. 2434.
Burrows v. Hovland, 40 Nebr. 464, 58 N. W. 947, p. 1102, 2477.
Burrows v. McWhann, 1 Desaus. Eq. 409, p. 2795.
Burrows v. Walls, 5 De Gex, M. & G. 233, p. 2061, 2090, 2095, 2096.
Burrus v. Roulhac's Adm'x, 2 Bush, 39, p. 2500, 2514.
Burr's Ex'rs v. Smith, 7 Vt. 241, 29 Am. Dec. 154, p. 1954, 1967.
Burson v. Blackley, 67 Tex. 5, 2 S. W. 668, p. 2455.
Burt v. Cassety, 12 Ala. 734, 739, p. 1044, 1274.
Burt v. Gamble, 98 Mich. 402, 57 N. W. 261, p. 1074.
Burt v. Herron, 66 Pa. St. 400, p. 1927.

Burt v. Moore, 62 Kan. 536, 64 Pac. 57, p. 1299.
Burt v. Quisenberry, 132 Ill. 385, 24 N. E. 622, p. 1729, 1739.
Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142, p. 2499.
Burton v. Adkins, 2 Del. Ch. 125, p. 2778, 2780.
Burton v. Barbour, 3 McAr. 212, 36 Am. Rep. 104, p. 2663.
Burton v. Baxter, 7 Blackf. 297, p. 2417.
Burton v. Black, 32 Ga. 53, p. 2635, 2637, 2642.
Burton v. Gleason, 56 Ill. 25, p. 2753, 2756.
Burton v. Gray, L. R. 8 Ch. 932, p. 2539.
Burton v. Hynson, 14 Ark. 32, p. 228.
Burton v. Knight, 2 Vern. 514, p. 1652, 1653.
Burton v. Le Roy, 5 Saw. 510, p. 2748.
Burton v. Lies, 21 Cal. 87, 91, p. 809, 841.
Burton v. Mount, 2 De Gex & S. 383, p. 2322.
Burton v. Perry, 146 Ill. 71, 34 N. E. 60, p. 1163.
Burton v. Shotwell, 13 Bush, 271, p. 2772.
Burton v. Sturgeon, L. R. 2 Ch. Div. 318, p. 2162.
Burton v. Wiley, 26 Vt. 430, p. 2703.
Burton v. Wookey, 6 Madd. 367, p. 1782, 2028.
Burton's Appeal, 93 Pa. St. 214, p. 1244.
Burtis v. Bradford, 122 Mass. 129, 131, p. 539.
Burwell v. Burwell, (Va.) 49 S. E. 68, p. 1765, 1779.
Burwell v. Burwell's Guardian, 78 Va. 574, p. 2080.
Burwell v. Mandeville, 2 How. 560, 11 L. ed. 378, p. 2104.
Burwell's Adm'rs v. Fauber, 21 Gratt. 446, p. 1050, 1149, 2796.
Bury v. Oppenheim, 26 Beav. 594, p. 1778.
Busbee v. Lewis, 85 N. C. 332, p. 2754, 2756.
Busbee v. Macy, 85 N. C. 329, p. 2755, 2756.
Busby v. Littlefield, 31 N. H. 193, 199, 33 N. H. 76, p. 528.
Busch v. Carter, 44 Ala. 115, 117, p. 1066.
Buse v. Page, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95, p. 2373.
Busenbarke v. Ramey, 53 Ind. 499, p. 1328.
Buser v. Shepard, 107 Ind. 417, 8 N. E. 280, p. 1060, 2435, 2437.
Busey v. Reese, 38 Md. 264, p. 1106.
Bush, In re, [1896] 2 Ch. 727, p. 1936.
Bush v. Bush, 5 Del. Ch. 144, p. 1849.
Bush v. Bush, 33 Kan. 556, 6 Pac. 794, p. 1271, 1511.
Bush v. Bush, 3 Strob. Eq. 131, p. 1393.
Bush v. Garner, 73 Ala. 162, p. 2474.
Bush v. Golden, 17 Conn. 594, p. 148, 1027, 1127, 1136, 1144, 1356.
Bush v. Hicks, 60 N. Y. 298, p. 2726, 2752.
Bush v. Lathrop, 22 N. Y. 535, 538, p. 1225, 1236, 1237, 1243, 1248, 1249, 1256, 1257.
Bush v. Lindsey, 44 Cal. 121, 125, p. 2256, 2262.
Bush v. Marshall, 6 How. 284, 12 L. ed. 440, p. 2504.
Bush v. Rogan, 65 Ga. 320, 38 Am. Rep. 785, p. 664.
Bush v. Sherman, 80 Ill. 160, p. 1754, 1756, 2086.
Bush v. Ware, 15 Pet. 93, 112, p. 1007.
Bushell v. Bushell, 1 Schoales & L. 98, p. 1093.
Bushell v. Bushell, 1 Schoales & L. 90, 103, p. 1108, 1109.
Bushfield v. Meyer, 10 Ohio St. 334, p. 2394.
Bushnell v. Avery, 121 Mass. 148, p. 539.
Bushnell v. Harford, 4 Johns. Ch. 301, p. 310, 2707.
Bushnell v. Robeson, 62 Iowa, 540, 17 N. W. 888, p. 468.
Bushong v. Taylor, 82 Mo. 660, p. 2104.
Bush's Appeal, 33 Pa. St. 85, p. 1831, 2161.
Bussy v. McKie, 2 McCord Eq. 23, 16 Am. Dec. 628, p. 2300.
Buswell v. Lincks, 8 Daly, 518, p. 2789.
Butchart v. Dresser, 4 De Gex, M. & G. 542, p. 2656.

Butcher v. Butcher, 14 Beav. 222, p. 2141.
Butcher v. Kemp, 5 Madd. 61, p. 836, 837.
Butcher v. Stapely, 1 Vern. 363, p. 993.
Butcher v. Stultz, 60 Ind. 170, p. 2380.
Butcher v. Yocum, 61 Pa. St. 168, 171, 100 Am. Dec. 625, p. 985, 997, 1148.
Butler, In re, 2 Hughes, 247, p. 697.
Butler v. Bank of Mazeppa, 94 Wis. 351, 68 N. W. 998, p. 1303.
Butler v. Burleson, 16 Vt. 176, p. 2675.
Butler v. Butler, 41 App. Div. 477, 58 N. Y. Supp. 1094, p. 1838.
Butler v. Butler, 164 Ill. 171, 45 N. E. 426, p. 2018.
Butler v. Butler, L. R. 5 Ch. Div. 554, 7 Ch. Div. 116, p. 2090.
Butler v. Butler, 4 Litt. 201, p. 2177.
Butler v. Butler, 46 Wis. 430, 1 N. W. 70, p. 2381.
Butler v. Butler's Adm'r, 8 W. Va. 677, p. 2793.
Butler v. Carpenter, 163 Mo. 597, 63 S. W. 823, p. 1907.
Butler v. Carter, L. R. 5 Eq. 276, p. 2056, 2097.
Butler v. Carvin, 33 Wash. 621, 74 Pac. 813, p. 2380.
Butler v. Collins, 12 Cal. 457, p. 1577.
Butler v. Cumpston, L. R. 7 Eq. 16, p. 2185.
Butler v. Douglas, 3 Fed. 612, p. 1314.
Butler v. Dunham, 27 Ill. 474, p. 407.
Butler v. Freeman, Amb. 301, 303, p. 2612, 2654.
Butler v. Harrison L. & M. Co., 139 Mo. 467, 41 S. W. 234, 61 Am. St. Rep. 464, p. 2013.
Butler v. Haskell, 4 Desaus. Eq. 651, p. 1665, 1668, 1743, 1785.
Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108, p. 1775, 2041.
Butler v. Lawson, 72 Mo. 227, p. 2278.
Butler v. McLean, 122 N. C. 357, 29 S. E. 416, p. 1996.
Butler v. Maury, 10 Humph. 420, p. 1275.
Butler v. Morse, 66 N. H. 429, 23 Atl. 90, p. 1155.
Butler v. Mulvihill, 1 Bligh, 137, p. 1733.
Butler v. New York etc. R. R., 22 N. Y. 110, 112, p. 2552.
Butler v. Powis, 2 Coll. C. C. 156, p. 749.
Butler v. Prentiss, 158 N. Y. 49, 52 N. E. 652, p. 1747, 1789.
Butler v. Rutledge, 2 Cold. 4, p. 2756.
Butler v. Seward, 10 Allen, 466, p. 1409, 1410.
Butler v. Slocomb, 33 La. Ann. 170, 39 Am. Rep. 265, p. 1228.
Butler v. Stevens, 26 Me. 484, p. 980, 994, 1036, 1101, 1146.
Butler v. Taylor, 5 Gray, 455, p. 2426.
Butler v. Viele, 44 Barb. 166, p. 1358.
Butler v. Williams, 5 Heisk. 241, p. 2526.
Butler v. Young, 1 Flipp. 277, Fed. Cas. No. 2,245, p. 495.
Butman v. Hussey, 30 Me. 263, p. 1510.
Butman v. James, 34 Minn. 547, 27 N. W. 66, p. 1096.
Butman v. Porter, 100 Mass. 337, p. 2768, 2769.
Butman v. Whipple, (R. I.) 57 Atl. 379, p. 1757.
Butricke v. Broadhurst, 3 Brown Ch. 88, 90, 1 Ves. 171, 172, p. 848, 850, 855, 859.
Buttanshan v. Martin, Johns. 89, p. 2160.
Butterfield v. Cowing, 112 N. Y. 486, 20 N. E. 369, p. 2097.
Butterfield v. Okie, 36 N. J. Eq. 482, p. 2501, 2516.
Butterfield v. Walsh, 21 Iowa, 99, 89 Am. Dec. 557, p. 1277.
Butterworth v. Bailey, 15 Ves. 358, p. 271.
Buttlar v. Buttlar, 57 N. J. Eq. 645, 42 Atl. 755, 73 Am. St. Rep. 648, p. 1679.
Button v. Schroyer, 5 Wis. 598, p. 2477, 2534.
Buttrick v. Holden, 13 Met. 355, 357, p. 973, 977, 979, 985, 990, 994, 1018, 1146.
Butts v. Broughton, 72 Ala. 294, p. 2437, 2475.
Butts v. Trice, 69 Ga. 74, p. 826.
Butts v. Wood, 37 N. Y. 317, p. 182, 2085, 2118.
Buxton v. James, 5 De Gex & S. 80, 84, p. 696. 1449.

Buxton v. Lister, 3 Atk. 383, p. 2760, 2762, 2764, 2767.
Buxton v. Sargent, 7 N. Dak. 503, 75 N. W. 811, p. 1080.
Buzard v. Houston, 119 U. S. 347, 351, 355, 7 Sup. Ct. 249, 30 L. ed. 451, p. 218, 324, 514, 1637, 1640, 1643.
Byam v. Byam, 19 Beav. 58, p. 2142.
Byam v. Munton, 1 Russ. & M. 503, p. 2327.
Byam v. Sutton, 19 Beav. 556, p. 1400.
Byars v. Stubbs, 85 Ala. 254, 256, 4 South. 755, p. 1619.
Bybee v. Summers, 4 Oreg. 354, p. 1070.
Byde v. Byde, 1 Cox, 49, p. 875.
Byde v. Byde, 2 Eden, 19, 1 Cox, 44, p. 917.
Byde v. Masterman, Craig & P. 265, p. 284.
Byers v. Engles, 16 Ark. 543, p. 1099, 1149, 1279.
Byers v. Fowler, 12 Ark. 218, 54 Am. Dec. 271, p. 1392.
Byers v. McAuley, 149 U. S. 616–623, 13 Sup. Ct. 908–911, p. 510.
Byers v. McCartney, 62 Iowa, 339, 17 N. W. 571, p. 1959, 1974.
Byers v. McEniry, 117 Iowa, 499, 91 N. W. 797, p. 1900.
Byers v. Orensstein, 42 Minn. 386, 44 N. W. 129, p. 1096.
Byers v. Rollins, 13 Colo. 22, 21 Pac. 894, p. 2110, 2121.
Byers v. Surget, 19 How. 303, p. 1652, 1666, 1668, 1672.
Byers v. Wackman, 16 Ohio St. 440, p. 1999.
Byington v. Fountain, 61 Iowa, 512, 14 N. W. 220, 16 N. W. 534, p. 1410.
Byington v. Moore, 62 Iowa, 470, 17 N. W. 644, p. 1771, 2032.
Byles v. Tome, 39 Md. 461, p. 1106, 1299.
Byne v. Blackburn, 26 Beav. 41, p. 1919, 1921.
Bynum v. Gold, 106 Ala. 427, 17 South. 667, p. 1037, 1049, 1356.
Bynum v. Hill, 71 N. C. 319, p. 2492.
Bynum v. Preston, 69 Tex. 287, 6 S. W. 428, 5 Am. St. Rep. 49, p. 2503.
Byrd v. Badger, 1 McAll. 443, 444, 445, Fed. Cas. No. 2,266, p. 494, 499, 501, 515.
Byrd v. Byrd, 95 Tenn. 364, 32 S. W. 198, 49 Am. St. Rep. 932, p. 1639.
Byrd v. Hughes, 84 Ill. 174, 25 Am. Rep. 442, p. 1762.
Byrn v. Godfrey, 4 Ves. 6, 10, p. 882, 1654.
Byrne v. Byrne, 3 Serg. & R. 54, 8 Am. Dec. 641, p. 872, 873, 874, 875.
Byrne v. Edmonds, 23 Gratt. 200, p. 1550.
Byrne v. Hinds, 16 Minn. 521, p. 2749.
Byrns v. Woodward, 10 Lea, 444, p. 2526.
Byxbie v. Wood, 24 N. Y. 607, 611, p. 2552.

C.

Cabanne v. Lisa, 1 Mo. 682, p. 564, 568.
Cabeen v. Breckenridge, 48 Ill. 91, 93, p. 1019, 1021, 1024, 1036, 1142, 1145.
Cabiness v. Mahon, 2 McCord, 273, p. 1148.
Cable v. Ellis, 120 Ill. 136, 11 N. E. 188, p. 2482.
Cable v. Minneapolis Stock Yards & P. Co., 47 Minn. 417, 50 N. W. 528, p. 1096, 1125.
Cable v. United States Life Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, p. 514, 1640.
Cable's Appeal, 91 Pa. St. 327, p. 2488, 2489.
Cabot v. Armstrong, 100 Ga. 438, 28 S. E. 123, p. 1273.
Cabot v. Christie, 42 Vt. 121, 126, 1 Am. Rep. 313, p. 1582, 1584.
Cabot v. Haskins, 3 Pick. 83, p. 1501.
Cade v. Jennings, 88 Ga. 791, 15 S. E. 292, p. 2529.
Cadigan v. Brown, 120 Mass. 493, 495, p. 397, 541, 542, 2687.
Cadman v. Horner, 18 Ves. 10, p. 1605, 1606.
Cadman v. Peter, 118 U. S. 73, 6 Sup. Ct. 597, 30 L. ed. 78, p. 2380.
Cadogan v. Kennett, Cowp. 432, 434, p. 1791, 1793.
Cadwallader v. Granville etc. Soc., 11 Ohio, 292, p. 2788.
Cadwallader v. West, 48 Mo. 483, p. 1672, 1780.
Cady v. Potter, 55 Barb. 463, p. 2635, 2640, 2647, 2651.

Cady v. Purser, 131 Cal. 552, 82 Am. St. Rep. 391, 63 Pac. 844, p. 1096, 1116, 1118.
Cæsar v. Rubinson, 174 N. Y. 492, 67 N. E. 58, p. 736.
Cafe v. Bent, 5 Hare, 24, 36, p. 2205, 2322.
Cagger v. Lansing, 43 N. Y. 550, p. 2782.
Cagney v. O'Brien, 83 Ill. 72, p. 2037, 2208.
Cahill v. Applegarth, (Md.) 56 Atl. 794, p. 1578.
Cahoon v. Bank of Utica, 7 N. Y. 486, p. 231, 355.
Cahoon v. Robinson, 6 Cal. 225, p. 2499.
Cain v. Cox, 23 W. Va. 594, p. 983, 1899, 1903.
Caines v. Lessee of Grant, 5 Binn. 119, 120, p. 680.
Cairncross v. Lorimer, 7 Jur., N. S., 149, p. 1435.
Cairns v. Colburn, 104 Mass. 274, p. 1989.
Cairns v. O'Bleness, 40 Wis. 469, p. 682, 2607.
Cairo & Fulton R. R. v. Titus, 27 N. J. Eq. 102, p. 1470, 1642.
Cairo & St. L. R. R. v. Holbrook, 92 Ill. 297, p. 1642.
Cake v. Peet, 49 Conn. 591, p. 1490.
Cake v. Shull, 45 N. J. Eq. 208, 16 Atl. 434, p. 2380.
Cake's Appeal, 23 Pa. St. (11 Harris) 186, 62 Am. Dec. 328, p. 1281.
Calanchini v. Branstetter, 96 Cal. 612, 31 Pac. 575, p. 1034.
Calcraft v. Guest, [1898] 1 Q. B. 759, 67 L. J. (Q. B.) 505, 48 L. T., N. S., 283, 46 Wkly. Rep. 420, p. 277, 281.
Calcraft v. Roebuck, 1 Ves. 221, 226, p. 1653.
Caldecott v. Caldecott, 1 Younge & C. Ch. 312, p. 2321.
Calder v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163, p. 1116, 1132, 1134, 1279, 1363.
Calder v. Moran, 49 Mich. 14, 12 N. W. 892, p. 1906.
Calderwood v. Brooks, 45 Cal. 519, p. 2751.
Caldwell v. Alsop, 48 Kan. 571, 29 Pac. 1150, 17 L. R. A. 782, p. 2399.
Caldwell v. Ball, 1 Term Rep. 205, 214, p. 694, 1184.
Caldwell v. Bartlett, 3 Duer, 341, p. 1385.
Caldwell v. Bowen, 4 Sneed, 415, p. 1861.
Caldwell v. Bryan's Ex'rs, 20 Tex. Civ. App. 168, 49 S. W. 240, p. 1279, 1996.
Caldwell v. Carrington, 9 Pet. 86, p. 155, 2633.
Caldwell v. Depew, 40 Minn. 528, 42 N. W. 479, p. 1486.
Caldwell v. Frain, 32 Tex. 310, p. 2522, 2525.
Caldwell v. Hartupee, 70 Pa. St. 74, p. 2561.
Caldwell v. Renfrew, 33 Vt. 213, p. 2152, 2236.
Caldwell v. Richard, 1 B. Mon. 228, p. 875.
Caldwell v. Sigourney, 19 Conn. 37, p. 1761.
Caldwell v. Taggart, 4 Pet. 190, p. 1753.
Calhoun v. Lumpkin, 60 Tex. 185, 188, p. 2364, 2379.
Calhoun v. Millard, 121 N. Y. 69, 77, 24 N. E. 27, 8 L. R. A. 248, p. 1450, 1647.
Calhoun v. Richardson, 30 Conn. 210, p. 1438.
California v. McGlynn, 20 Cal. 233, 266, p. 1635.
California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591, p. 494.
California Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 75 Pac. 320, p. 1333.
Cal. Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511, p. 1690.
Cal. Oil & Gas Co. v. Miller, 96 Fed. 12, p. 503.
California Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511, p. 737.
Calisher v. Forbes, L. R. 7 Ch. 109, p. 1211, 2382, 2554.
Calkins v. Atkinsen, 2 Lans. 12, p. 2662.
Calkins v. Bump, 120 Mich. 335, 79 N. W. 491, p. 2070.
Calkins v. Calkins, 3 Barb. 305, p. 2360.
Calkins v. Lockwood, 16 Conn. 276, 41 Am. Dec. 143, p. 2576.

Call v. Hastings, 3 Cal. 179, p. 1095, 1111.
Callaghan v. Callaghan, 8 Clark & F. 374, 401, p. 1518, 1666, 1673.
Callahan v. Donnolly, 45 Cal. 152, 13 Am. Rep. 172, p. 1688.
Callanan v. Edwards, 32 N. Y. 483, 486, p. 1225.
Callaway v. Hubner, (Md.) 58 Atl. 362, p. 2065.
Callender v. Edmison, 8 S. Dak. 81, 65 N. W. 425, p. 2408.
Calley v. Richards, 19 Beav. 401, p. 282.
Calloway v. Calloway, 19 Ky. Law Rep. 870, 39 S. W. 241, p. 2078.
Calloway v. People's Bank, 54 Ga. 572, p. 2787.
Calloway v. Witherspoon, 5 Ired. Eq. 128, p. 1733.
Calmady v. Calmady, 11 Vin. Abr. 181, pl. 21, p. 2164.
Calmell v. Borroum, 13 Tex. Civ. App. 452, 35 S. W. 942, p. 1342.
Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486, p. 1639.
Calverly v. Williams, 1 Ves. 210, p. 1515, 1518.
Calvert v. Johnston, 3 Kay & J. 556, p. 2148.
Calvert v. Roche, 59 Tex. 463, p. 1269, 1273.
Calvin v. Bowman, 10 Iowa, 529, p. 1100.
Calvin v. Free, 66 Kan. 466, 71 Pac. 823, p. 2232.
Calvo v. Davies, 73 N. Y. 211, 215, 29 Am. Rep. 130, 8 Hun, 222, p. 2407, 2408.
Cambridge Valley Bank v. Delano, 48 N. Y. 326, 336, 339, p. 1007, 1054, 1147.
Camden v. Hiteshew, 23 W. Va. 236, p. 2199.
Camden v. Vail, 23 Cal. 633, p. 2513, 2514.
Camden & Amboy R. R. v. Stewart, 18 N. J. Eq. 489, p. 2706.
Camden Fire Ins. Co. v. Reed, (N. J. Eq.) 38 Atl. 667, p. 2403.
Camden Iron Works v. City of Camden, 64 N. J. Eq. 723, 52 Atl. 477, p. 663.
Camden Mut. Ins. Co. v. Jones, 23 N. J. Eq. 171, p. 855.
Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165, p. 2560.
Cameron v. Cameron, 82 Ala. 392, 3 South. 148, p. 2257, 2296.
Cameron v. Mason, 7 Ired. Eq. 180, p. 2504.
Cameron v. Nelson, 57 Nebr. 381, 77 N. W. 771, p. 1905.
Cameron v. Ward, 8 Ga. 245, p. 2005, 2037.
Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669, p. 2794.
Camp v. Bruce, 96 Va. 521, 31 S. E. 901, 70 Am. St. Rep. 873, 43 L. R. A. 146, p. 669, 1692, 1701, 1713.
Camp v. Carpenter, 52 Mich. 375, 18 N. W. 113, p. 1371.
Camp v. Crocker's Adm'r, 54 Conn. 21, 5 Atl. 604, p. 1972.
Camp v. Gifford, 67 Barb. 434, p. 2502.
Camp v. Pollock, 45 Nebr. 771, 64 N. W. 231, p. 748.
Camp v. Smith, 98 Ind. 409, p. 1993, 2005.
Camp v. Southern Bkg. & Fr. Co., 97 Ga. 582, 25 S. E. 362, p. 1161.
Camp v. Ward, 69 Vt. 286, 60 Am. St. Rep. 929, 37 Atl. 747, p. 262.
Campau v. Detroit Driving Club, (Mich.) 98 N. W. 267, p. 676, 688.
Campau v. Van Dyke, 15 Mich. 371, p. 1647.
Campbell, In re, [1893] 3 Ch. 468, p. 2069.
Campbell v. Allen, 61 Mo. 581, p. 2750.
Campbell v. Bainbridge, L. R. 6 Eq. 269, p. 2141, 2161.
Campbell v. Baldwin, 2 Humph. 2418, p. 2502.
Campbell v. Bank of Charleston, 3 S. C. 384, p. 2288.
Campbell v. Brackenridge, 8 Blackf. 471, p. 1145, 1291.
Campbell v. Bouskell, 27 Beav. 325, p. 1544, 1545.
Campbell v. Bowles's Adm'r, 30 Gratt. 652, p. 2143.
Campbell v. Brownrigg, 1 Phill. Ch. 301, p. 2216.
Campbell v. Campbell, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167, p. 1727.

Campbell v. Campbell, 2 Jones Eq. 364, p. 2046.
Campbell v. Campbell, L. R. 1 Eq. 383, p. 899, 900, 917, 919.
Campbell v. Campbell, 21 Mich. 438, p. 653.
Campbell v. Campbell, 70 Wis. 311, 35 N. W. 743, p. 2005.
Campbell v. Clough, 71 N. H. 181, 51 Atl. 668, p. 1958, 1975.
Campbell v. Compagnie Générale, L. R. 2 Ch. Div. 181, p. 2662.
Campbell v. Crowley, (Tex. Civ. App.) 56 S. W. 373, p. 1175, 1176.
Campbell v. Day, 16 Vt. 558, p. 1212, 1224, 1229.
Campbell v. Dearborn, 109 Mass. 130, 12 Am. Rep. 671, p. 2369, 2380.
Campbell v. Durham, 86 Ala. 299, 5 South. 507, p. 1518.
Campbell v. Earl of Dalhousie, L. R. 1 H. L. S. 462, p. 295.
Campbell v. First Nat. Bank, 22 Colo. 177, 43 Pac. 1007, p. 1168, 1274.
Campbell v. Fish, 8 Daly, 162, p. 2662.
Campbell v. Foster, 35 N. Y. 361, p. 1897.
Campbell v. Foster Home Ass'n, 163 Pa. St. 609, 30 Atl. 222, p. 2426.
Campbell v. French, 3 Ves. 321, 323, p. 2172.
Campbell v. Graham, 1 Russ. & M. 453, p. 2218.
Campbell v. Hatchett, 55 Ala. 548, p. 2726.
Campbell v. Henry, 45 Misc. 326, p. 2514.
Campbell v. Hicks, 19 Ohio St. 433, p. 2779.
Campbell v. Hooper, 3 Smale & G. 153, p. 1726.
Campbell v. Ingilby, 21 Beav. 567, 582, p. 845, 854.
Campbell v. J. E. Grant Co., (Tex. Civ. App.) 82 S. W. 794, p. 2563.
Campbell v. Johnston, 4 Dana, 177, 178, 182, p. 1859, 1861, 2448.
Campbell v. Johnston, 1 Sand. Ch. 148, p. 1753.
Campbell v. Keys, 130 Mich. 127, 8 Detroit Leg. N. 1164, 89 N. W. 720, p. 1279.
Campbell v. Knights, 24 Me. 332, p. 1405, 1410.
Campbell v. Leach, Amb. 740, p. 1468, 1469.
Campbell v. Lord Radnor, 1 Brown Ch. 271, p. 889.
Campbell v. M'Cahan, 41 Ill. 45, p. 2757.
Campbell v. McClenachan, 6 Serg. & R. 171, p. 1507.
Campbell v. McLain, 51 Pa. St. 200, p. 1755.
Campbell v. Merchants & Farmers' Mut. Fire Ins. Co., 37 N. H. 35, 72 Am. Dec. 324, p. 1158.
Campbell v. Mesier, 4 Johns. Ch. 334, 8 Am. Dec. 570, 6 Johns. Ch. 21, p. 2794.
Campbell v. Metcalf, 20 R. I. 352, 39 Atl. 190, p. 1087.
Campbell v. Mullett, 2 Swanst. 551, 574, 575, p. 683, 2011.
Campbell v. Murphy, 2 Jones Eq. 357, p. 2736.
Campbell v. Murray, 62 Ga. 86, p. 1705.
Campbell v. Nichols, 33 N. J. L. 81, p. 1445.
Campbell v. Rankin, 28 Ark. 401, 406, p. 2498, 2522, 2527, 2529.
Campbell v. Roach, 45 Ala. 667, p. 1050, 1053, 1143, 2521.
Campbell v. Rust, 85 Va. 653, 8 S. E. 664, p. 216.
Campbell v. Sankey, 114 Iowa, 69, 86 N. W. 48, p. 821.
Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, p. 383, 451, 2687.
Campbell v. Sheldon, 13 Pick. 8, p. 534, 537, 544.
Campbell v. Sidwell, 61 Ohio St. 179, 55 N. E. 609, p. 688, 691, 692, 693.
Campbell v. Sloan, 62 Pa. St. 481, p. 1651.
Campbell v. Smith, 71 N. Y. 26, 27 Am. Rep. 5, p. 2413.
Campbell v. Spencer, 2 Binn. 133, p. 1671.
Campbell v. Taggart, 10 Phila. 443, p. 2678.
Campbell v. Texas etc. R. R. Co., 2 Woods, 263, p. 1373.
Campbell v. Vedder, 3 Keyes, 174, 1 Abb. App. 295, p. 1299, 1303, 1305, 1402, 1403, 1404.
Campbell v. Walker, 5 Ves. 678, 682, 13 Ves. 601, p. 1754, 1757.

Campbell v. Wallace, 10 Gray, 162, 163, p. 535, 538.
Campbell v. Woodworth, 24 N. Y. 304, 33 Barb. 425, p. 1858.
Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co., 50 Nebr. 283, 69 N. W. 774, 61 Am. St. Rep. 573, p. 2013.
Campbell's Appeal, 29 Pa. St. 401, 72 Am. Dec. 641, p. 1195, 1294.
Campbell's Appeal, 80 Pa. St. 298, p. 181, 573, 581, 2286.
Campbell's Case, 2 Bland, 209, 20 Am. Dec. 360, p. 1067.
Campbell's Estate, 7 Pa. St. 100, 47 Am. Dec. 503, p. 635.
Campbell's Policies, In re, L. R. 6 Ch. Div. 686, p. 2141.
Campion v. Cotton, 17 Ves. 264, 273, p. 2164.
Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39, p. 2237.
Canal Bank v. Hudson, 111 U. S. 66, 4 Sup. Ct. 303, 28 L. ed. 354, p. 2481, 2489.
Canal Co. v. Clark, 13 Wall. 311, p. 2690.
Canal Co. v. Gordon, 6 Wall. 561, 568, p. 497, 512, 516.
Canby v. McLear, 13 Bank. Reg. 22, p. 2168, 2169, 2172.
Canda Mfg. Co. v. Inhabitants of Woodbridge Tp., 58 N. J. Law (29 Vroom) 134, 32 Atl. 66, p. 1164.
Cane v. Lord Allen, 2 Dow. 289, 294, p. 1761, 1763, 1769.
Canedy v. Marcy, 13 Gray, 373–377, p. 1459, 1516.
Canfield v. Bostwick, 21 Conn. 550, p. 2493.
Canfield v. Canfield, 118 Fed. 1, p. 2276.
Canfield v. Morgan, Hopk. Ch. 224, p. 2650.
Canfield v. Shear, 49 Mich. 313, 13 N. W. 605, p. 2404.
Cann v. Cann, 1 P. Wms. 567, p. 297.
Cann v. Cann, 1 P. Wms. 722, 723, 727, p. 1483, 1499, 1508, 1784.
Cann v. Cann, 33 Weekly Rep. 40, Ames' Cas. on Trusts, 481, p. 2058.
Cannaday v. Shepard, 2 Jones Eq. 224, p. 2771.
Cannan v. Bryce, 3 Barn. & Ald. 179, p. 1720.
Cannel v. Buckle, 2 P. Wms. 243, p. 2602, 2762.
Cannon v. Copeland, 43 Ala. 252, p. 2482.
Cannon v. Deming, 3 S. D. 421, 53 N. W. 863, p. 1098, 1115.
Cannon v. Gilmer, 135 Ala. 302, 33 South. 659, p. 1782.
Cannon v. Kreipe, 14 Kan. 324, p. 2787.
Cannon v. McDaniel, 46 Tex. 303, p. 2289.
Cannon v. McNab, 48 Ala. 99, p. 67, 228, 250, 259, 466.
Cannon v. Trask, L. R. 20 Eq. 669, p. 2677.
Canterbury Aq. Co. v. Ensworth, 22 Conn. 608, p. 1513.
Cantley v. Morgan, 51 W. Va. 304, 41 S. E. 201, p. 1436.
Cantrell v. Dyer, 6 Tex. Civ. App. 551, 25 S. W. 1098, p. 1342, 1343, 1344.
Cantrell v. Ford, (Tenn. Ch. App.) 46 S. W. 581, p. 1102, 1224.
Canty v. Latterner, 31 Minn. 239, 17 N. W. 385, p. 2585.
Canty v. Sanderford, 37 Ala. 91, p. 2189.
Cape Fear Lumber Co. v. Evans, (S. C.) 48 S. E. 108, p. 2424.
Cape Fear Lumber Co. v. Matheson, (S. C.) 48 S. E. 111, p. 1510.
Capehart v. Biggs, 77 N. C. 261, p. 2677.
Capehart v. Mhoon, 5 Jones Eq. 178, p. 1476, 1510.
Capek v. Kropik, 129 Ill. 509, 21 N. E. 836, p. 1998.
Capel v. Butler, 2 Sim. & St. 457, p. 304, 2796.
Capel v. Girdler, 9 Ves. 509, p. 1396.
Capell v. Moses, 36 S. C. 559, 15 S. E. 711, p. 213.
Capers v. McCaa, 41 Miss. 479, p. 2277.
Capital Nat. Bk. v. Coldwater Nat. Bk., 49 Nebr. 786, 59 Am. St. Rep. 572, 69 N. W. 115, p. 1914, 2020, 2023.
Capital etc. Bank, Ltd. v. Rhodes, [1903] 1 Ch. 631, p. 1398.

Capitol Ins. Co. v. Bank of Pleasanton, 50 Kan, 449, 31 Pac. 1069, p. 1158.
Caplen's Estate, In re, 45 L. J. Rep. 280, p. 1879.
Carberry v. West Virginia & P. R. Co., 44 W. Va. 260, 28 S. E. 694, p. 213.
Card v. Jaffray, 2 Schoales & L. 374, 379, p. 191, 2470.
Cardale v. Watkins, 5 Madd. 18, p. 262.
Carden v. Lane, 48 Ark. 219, 316, 2 S. W. 709, 3 Am. St. Rep. 228, p. 1276, 1666.
Card Fabrique Co. v. Stanage, 50 Ohio St. 417, 34 N. E. 410, p. 2197.
Cardigan v. Brown, 120 Mass. 493, 495, p. 451, 453.
Cardigan v. Cruzon-Howe, L. R. 9 Eq. 358, p. 1985, 1986.
Cardwell v. Sprigg, 7 Dana, 36, p. 1703.
Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, p. 1688.
Carew's Case, 7 DeGex, M. & G. 43, p. 1622.
Carew's Estate, In re, 26 Beav. 187, p. 1692.
Carey v. Bertie, 2 Vern. 339, p. 766.
Carey v. Boyle, 53 Wis. 574, 11 N. W. 47, 56 Wis. 145, 14 N. W. 32, p. 2503, 2509.
Carey v. Carey, 2 Schoales & L. 173, p. 1752.
Carey v. Coffee-Stemming Mach. Co., (Va.) 20 S. E. 778, p. 416, 445.
Carey v. Griffin, 36 Misc. Rep. 469, 73 N. Y. Supp. 766, p. 1994.
Carey v. Mackey, 82 Me. 516, 20 Atl. 84, 17 Am. St. Rep. 500, 9 L. R. A. 113, p. 736.
Carey v. Smith, 11 Ga. 539, 547, p. 668, 1696.
Cargill v. Bower, L. R. 10 Ch. Div. 502, 514, p. 1574, 1594, 2094, 2116.
Carhart v. Harshaw, 45 Wis. 340, 30 Am. Rep. 752, p. 1802.
Carhart's Appeal, 78 Pa. St. 100, 119, p. 1872.
Carleton v. Lombardi, 81 Tex. 357, 16 S. W. 1081, p. 1342.
Carley v. Fox, 38 Mich. 387, p. 24'2.
Carley v. Gitchell, 105 Mich. 38, 62 N. W. 1003, 55 Am. St. Rep. 428, p. 1696.
Carley v. Lewis, 24 Ind. 23, p. 1494.
Carley v. Tod, 83 Hun, 53, 31 N. Y. Supp. 635, p. 1731.
Carlisle v. Cooper, 21 N. J. Eq. 576, 579, 580, 583–585, 587, p. 149, 225, 382, 451, 2684, 2686.
Carlisle v. Jumper, 81 Ky. 282, p. 1261.
Carlisle v. Rich, 8 N. H. 44, 50, p. 1804.
Carlisle v. South East. R'y, 1 Macn. & G. 689, p. 2677.
Carlisle v. Tindall, 49 Miss. 229, p. 2749.
Carlisle v. United States, 16 Wall. 147, 151, p. 1696.
Carll v. Butman, 7 Me. 102, 105, p. 1412, 2443.
Carlton v. Buckner, 28 Ark. 66, p. 2519.
Carlton v. City of Salem, 103 Mass. 141, p. 535, 544.
Carlton v. Newman, 77 Me. 408, 1 Atl. 194, p. 401, 407, 408, 430, 444, 445, 446, 454.
Carlyon v. Truscott, L. R. 20 Eq. 348, p. 2048.
Carman v. Johnson, 20 Mo. 108, 61 Am. Dec. 593, p. 2714.
Carmichael v. Adams, 91 Ind. 526, p. 330.
Carmichael v. Browder, 3 How. (Miss.) 252, p. 326, 573, 582, 2251, 2277.
Carmicheal v. Foster, 69 Ga. 372, p. 1198.
Carne v. Long, 2 De Gex, F. & J. 75, p. 1935, 1945.
Carney v. Byron, 19 R. I. 283, 36 Atl. 5, p. 1850.
Carney v. Hadley, 32 Fla. 344, 14 South. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233, p. 382, 450.
Caro v. Pensacola City Co., 19 Fla. 766, p. 385.
Carolus v. Koch, 72 Mo. 645, p. 2710.
Carothers v. Sims, 194 Pa. St. 386, 45 Atl. 47, p. 1323.
Carpenter v. Anderson, (Tex. Civ. App.) 77 S. W. 291, p. 1324.
Carpenter v. Bowen, 42 Miss. 28, 49, p. 2350.

Carpenter v. Carpenter, 25 N. J. Eq. 194, p. 1447, 1802.
Carpenter v. Carpenter, 6 R. I. 542, p. 2352.
Carpenter v. Carpenter, 12 R. I. 544, 34 Am. Rep. 716, p. 2056, 2057, 2066.
Carpenter v. Catlin, 44 Barb. 75, p. 767.
Carpenter v. Cook, 132 Cal. 621, 84 Am. St. Rep. 62, 118, 64 Pac. 997, p. 1835, 1836, 1895.
Carpenter v. Cushman, 105 Mass. 417, 419, p. 1906.
Carpenter v. Dexter, 8 Wall. 513, p. 1115.
Carpenter v. German-Am. Ins. Co., 135 N. Y. 298, 31 N. E. 1015, p. 1157.
Carpenter v. Gleason, 58 Vt. 244, 4 Atl. 706, p. 1406.
Carpenter v. Grisham, 59 Mo. 247, p. 2695.
Carpenter v. Gwynn, 35 Barb. 395, p. 2694.
Carpenter v. Heriot, 1 Eden, 338, p. 1778.
Carpenter v. Keating, 10 Abb. Pr. N. S. 223, 228, p. 2716.
Carpenter v. Koons, 20 Pa. St. 222, p. 2447, 2451.
Carpenter v. Leonard, 5 Minn. 155, p. 2194.
Carpenter v. Longan, 16 Wall. 271, 273, 21 L. ed. 313, p. 1227, 2416, 2418, 2419.
Carpenter v. Mann, 17 Wis. 160, p. 369.
Carpenter v. Miller's Ex'r, 3 W. Va. 174, 100 Am. Dec. 744, p. 1972.
Carpenter v. Mitchell, 50 Ill. 470, p. 2155.
Carpenter v. Mitchell, 54 Ill. 126, p. 192, 1099, 2519, 2522, 2525, 2526, 2527.
Carpenter v. Mut. etc. Ins. Co., 4 Sand. Ch. 408, p. 2764.
Carpenter v. Oakland, 30 Cal. 439, 442, p. 2714.
Carpenter v. Osborn, 102 N. Y. 552, 7 N. E. 823, p. 224, 351.
Carpenter v. Roberts, 56 How. Pr. 216, p. 2125.
Carpenter v. Roe, 10 N. Y. 227, p. 1799, 1804.
Carpenter v. Snelling, 97 Mass. 452, p. 2373.
Carpenter v. Spooner, 2 Sand. 717, p. 2614.
Carpenter v. Westcott, 4 R. I. 225, p. 717, 753.
Carpenter v. Wilverschied, 5 Minn. 170, p. 2194.
Carpentier v. Brenham, 40 Cal. 221, p. 2354, 2424.
Carpentier v. Hart, 5 Cal. 406, p. 1651.
Carpmael v. Powis, 10 Beav. 36, 39, p. 1509.
Carr v. Askew, 94 N. C. 194, p. 2080.
Carr v. Branch, 85 Va. 597, 8 S. E. 476, p. 2305, 2312, 2330, 2331.
Carr v. Breese, 81 N. Y. 584, 588, 590, 591, p. 1798, 1802, 1803, 1804.
Carr v. Brennan, 136 Ill. 108, 47 N. E. 721, 57 Am. St. Rep. 119, p. 1022, 1026.
Carr v. Caldwell, 10 Cal. 380, 70 Am. Dec. 740, p. 1284.
Carr v. Carr, 52 N. Y. 251, p. 2380, 2381.
Carr v. Eastabrooke, 3 Ves. 561, p. 876.
Carr v. Eastabrooke, 4 Ves. 146, p. 2172.
Carr v. Ellison, 2 Brown Ch. 56, p. 2331.
Carr v. Hobbs, 11 Md. 285, p. 2500.
Carr v. Holbrook, 1 Mo. 240, p. 2522.
Carr v. Holliday, 5 Ired. Eq. 167, p. 1726.
Carr v. Ireland, 4 Md. Ch. 251, p. 2315.
Carr v. Lewis Coal Co., 96 Mo. 157, 9 Am. St. Rep. 328, 8 S. W. 907, p. 1079.
Carr v. Living, 28 Beav. 644, p. 1919, 1921.
Carr v. London & N. W. R'y, L. R. 10 Com. P. 307, 316, 317, p. 1423, 1442.
Carr v. Lyle, 126 Mich. 655, 8 Detroit Leg. N. 185, 86 N. W. 145, p. 2275.
Carr v. Maltby, 165 N. Y. 557, 59 N. E. 291, p. 1019, 1030.
Carr v. Passaic etc. Co., 22 N. J. Eq. 85, 19 N. J. Eq. 424, p. 2769.
Carr v. Rising, 62 Ill. 14, p. 2373, 2376.
Carr v. Shackelford, 68 Ala. 241, p. 2256.

Carr v. Silloway, 105 Mass. 543, 549, p. 149, 222, 223, 457, 543.
Carr v. Silloway, 111 Mass. 24, p. 2233, 2241, 2247.
Carr v. Thompson, 67 Mo. 472, p. 2522, 2523, 2526.
Carr v. Wallace, 7 Watts, 394, 400, p. 1195, 1386.
Carran v. O'Calligan, (C. C. A.) 125 Fed. 657, p. 509.
Carraway v. Carraway, 27 S. C. 576, 5 S. E. 157, p. 1271.
Carrick v. Errington, 2 P. Wms. 361, p. 1986.
Carrico v. Farmers' etc. Bank, 33 Md. 235, p. 2500, 2514.
Carrier v. Heather, 62 Mich. 441, 29 N. W. 38, p. 2032.
Carrier v. United Paper Co., 73 Hun, 287, 26 N. Y. Supp. 414, p. 2414.
Carrington's Heirs v. Brents, 1 McLean, 167, p. 520, 2633.
Carrington v. Holabird, 17 Conn. 530, 19 Conn. 87, p. 2709.
Carritt v. Bradly, [1901] 2 K. B. 550, p. 2371.
Carritt v. Real & Personal Advance Co., L. R. 42 Ch. Div. 263, p. 1297.
Carroll v. Ballance, 26 Ill. 9, 79 Am. Dec. 354, p. 2347.
Carroll v. Brown, 28 Gratt. 791, p. 2756.
Carroll v. Carroll, 20 Tex. 731, 744, p. 821.
Carroll v. Hickes, 10 Phila. 308, p. 2675.
Carroll v. Hayward, 124 Mass. 120, p. 983.
Carroll v. Johnston, 2 Jones Eq. 120, 123, p. 1291, 1349.
Carroll v. Lee, 3 Gill & J. 504, 22 Am. Dec. 350, p. 2140, 2144.
Carroll v. Manchester etc. R. R., 111 Mass. 1, p. 1441, 1444.
Carroll v. Renich, 7 Smedes & M. 798, p. 1886, 1887.
Carroll v. Richardson, 87 Ala. 605, 6 South. 342, p. 2258, 2299, 2302.
Carroll v. Tomlinson, 192 Ill. 399, 61, N. E. 484, 85 Am. St. Rep. 344, p. 2373, 2376.
Carroll v. Van Rensselaer, Harr. (Mich.) 225, p. 2500.
Carroll v. Wilson, 22 Ark. 32, p. 345, 2782.
Carroll County v. Smith, 111 U. S. 556, 562, 4 Sup. Ct. 539, p. 1079.
Carr's Trusts, In re, L. R. 12 Eq. 609, p. 2168, 2171.
Carruth v. Carruth, 148 Mass. 431, 19 N. E. 369, p. 2109.
Carruthers, Ex parte, 3 De Gex & S. 570, p. 195, 2562.
Carson v. Carson, 1 Ired. Eq. 329, p. 1926.
Carson v. Eickhoff, 148 Ind. 596, 47 N. E. 1067, p. 1106.
Carson v. Fears, 91 Ga. 482, 17 S. E. 342, p. 1077.
Carson v. Fogg, (Wash.) 76 Pac. 112, p. 1771.
Carson v. Law, 2 Rich. Eq. 296, p. 1692.
Carson v. Marshall, 37 N. J. Eq. 213, p. 1754.
Carson's Adm'r v. Phelps, 40 Md. 97, p. 1106.
Carstair v. Bates, 3 Camp. 301, Ames' Cas. on Trusts, 12, p. 1916.
Carswell v. Spencer, 44 Ala. 204, p. 2257.
Cartan v. David, 18 Nev. 310, 4 Pac. 61, p. 2200.
Carter v. Allan, 21 Gratt. 241, p. 1314, 1373.
Carter v. Alling, 43 Fed. 208, p. 1691.
Carter v. Bailey, 64 Me. 458, 18 Am. Rep. 273, p. 554, 2798.
Carter v. Balfour, 18 Ala. 814, p. 1954.
Carter v. Balfour's Adm'r, 19 Ala. 814, p. 1968, 1972.
Carter v. Bennett, 4 Fla. 283, p. 2419.
Carter v. Boehm, 1 Smith Lead. Cas. 843, 2 Am. Lead. Cas. 926, p. 1621.
Carter v. Bowles, 2 Russ. & M. 301, p. 902.
Carter v. Carter, 3 Kay & J. 617, 636, 637, 642, p. 1289, 1296, 1365, 1375, 1377.
Carter v. Carter, Mos. 365, p. 1469.
Carter v. Carter, 5 Tex. 93, 100, p. 571, 589.
Carter v. Carter, 82 Va. 624, p. 1738.
Carter v. Challen. 83 Ala. 135, 3 South. 313, p. 1021.
Carter v. Champion, 8 Conn. 548, 549, 554, 21 Am. Dec. 685, p. 1098, 1114, 1438.

Carter v. City of Portland, 4 Oreg. 339, 350, p. 974, 977, 982, 1148.
Carter v. Grimshaw, 49 N. H. 100, p. 1803.
Carter v. Hallahan, 61 Ga. 314, p. 2380.
Carter v. Hampton's Adm'rs, 77 Va. 631, p. 2291.
Carter v. Jordan, 15 Ga. 76, p. 262.
Carter v. Leonard, (Nebr.) 91 N. W. 574, p. 1051.
Carter v. Montgomery, 2 Tenn. Ch. 216, p. 2000.
Carter v. Neal, 24 Ga. 346, 71 Am. Dec. 136, p. 2454.
Carter v. Palmer, 8 Clark & F. 657, 707, 11 Bligh, N. S., 397, p. 1761, 1765, 1772.
Carter v. Sims, 2 Heisk. 166, p. 2534.
Carter v. Strom, 41 Minn. 522, 43 N. W. 394, p. 744.
Carter v. Taggart, 1 De Gex, M. & G. 286, 5 De Gex & S. 49, p. 646, 2170, 2174.
Carter v. Taylor, 3 Head, 30, p. 1403, 2367, 2424, 2741, 2756.
Carter v. Tice, 120 Ill. 277, 11 N. E. 529, p. 1774, 1777, 1778.
Carter v. United Ins. Co., 1 Johns. Ch. 463, p. 469, 2557.
Carter v. Wake, L. R. 4 Ch. Div. 605, p. 2463, 2542.
Carter v. Williams, L. R. 9 Eq. 678, p. 1690.
Carter v. Wolfe, 13 Gratt. 301, p. 1971.
Carter & Co. v. Kaufman, (S. C.) 45 S. E. 1017, p. 739.
Carter's Ex'r v. Carter, 5 Munf. 108, p. 2742.
Cartmel v. Rench, 2 J. J. Marsh. 118, p. 2271.
Cartwright v. Cartwright, [1903] 2 Ch. 306, p. 920.
Cartwright v. Green, 8 Ves. 405, 408, p. 276.
Cartwright v. Hollis, 5 Tex. 152, p. 2198.
Cartwright v. McFadden, 24 Kan. 662, p. 2749.
Cartwright's Case, 114 Mass. 230, p. 2663.
Carty v. Connolly, 91 Cal. 15, 27 Pac. 599, p. 1673.
Caruthers v. Hall, 10 Mich. 40, p. 2451.
Caruthers v. Humphrey, 12 Mich. 270, p. 2359.
Caruthers v. McNeill, 97 Ill. 256, p. 2489.
Carvalho v. Burn, 4 Barn. & Adol. 382, 1 Ad. & E. 883, p. 2565, 2721.
Carver v. Bowles, 2 Russ. & M. 301, p. 796, 904.
Carver v. Brady, 104 N. C. 220, 10 S. E. 565, p. 1705.
Carver v. Eads, 65 Ala. 190, p. 2498, 2509, 2516.
Carver v. Pinto Leite, L. R. 7 Ch. 90, p. 273, 283.
Carver v. Todd, 48 N. J. Eq. 102, 21 Atl. 943, 27 Am. St. Rep. 466, p. 2037.
Carveth v. Winegar, (Mich.) 94 N. W. 381, p. 2378.
Cary v. Abbot, 7 Ves. 490, 495, p. 1937, 1939, 1962.
Cary v. Askew, 1 Cox, 241, p. 800, 804.
Cary v. Bertie, 2 Vern. 333, 342, 343, p. 2612, 2622.
Cary v. Cary, 2 Schoales & L. 173, 189, p. 1774, 1925.
Cary v. Folsom, 14 Ohio, 365, p. 2448.
Cary v. Hotailing, 1 Hill, 311, 37 Am. Dec. 323, p. 1621.
Cary v. Warner, 63 Me. 571, p. 1395.
Cary v. White, 52 N. Y. 138, 142, reversing 7 Lans. 1, p. 1324, 1327, 1330, 1336, 1354.
Casad v. Hughes, 27 Ind. 141, p. 1234.
Casborne v. Barsham, 2 Beav. 76, p. 1738, 1778.
Casborne v. Scarfe, 1 Atk. 603, p. 186, 633, 2338.
Casco National Bank v. Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705, p. 1164, 1165.
Case v. Abeel, 1 Paige, 392, p. 2082.
Case v. Boughton, 11 Wend. 106, 109, p. 2461.
Case v. Case, 26 Mich. 484, p. 1668, 2729.
Case v. Codding, 38 Cal. 191, p. 1992, 1995.
Case v. Dennison, 9 R. I. 88, 11 Am. Rep. 222, p. 2233, 2237, 2241, 2247.
Case v. Erwin, 18 Mich. 434, p. 1050, 1146.

Case v. Fant, 53 Fed. 41, 3 C. C. A. 418, 10 U. S. App. 415, p. 1406.
Case v. Fishback, 10 B. Mon. 40, 41, p. 229, 462, 464.
Case v. Gerrish, 15 Pick. 49, 50, p. 1790, 2041.
Case v. James, 3 De Gex, F. & J. 256, 264, p. 692, 1650, 2056, 2090, 2095.
Case v. Minot, 158 Mass. 577, 22 L. R. A. 536, 33 N. E. 700, p. 343.
Case v. Phelps, 39 N. Y. 164, p. 1802.
Case Threshing-Machine Co. v. Mitchell, 74 Mich. 679, 42 N. W. 151, p. 2446.
Casey v. Casey, 14 Ill. 412, p. 1772.
Cashin v. Craddock, L. R. 2 Ch. Div. 140, p. 249, 253, 261.
Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283, p. 2568.
Cashman v. Henry, 75 N. Y. 103, 31 Am. Rep. 437, p. 2201.
Casler v. Shipman, 35 N. Y. 533, p. 643.
Caspari v. First German Church, 12 Mo. App. 293, p. 1780.
Casperson v. Casperson, 65 N. J. L. 402, 47 Atl. 428, p. 220.
Cass v. Rudele, 2 Vern. 280, p. 2774.
Cass County v. Gillett, 100 U. S. 585, p. 1079.
Cassel, Ex parte, 3 Watts, 408, 440, p. 1977.
Cassell v. Jones, 6 Watts & S. 452, p. 559.
Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160, p. 2371, 2372.
Casserleigh v. Wood, 119 Fed. 309 (C. C. A.), p. 669, 1703, 1712.
Cassetty v. Capps, 3 Tenn. Ch. 524, p. 2653, 2657.
Cassidy v. Belfast Banking Co., 22 L. R. Ir. 68, p. 2237.
Cassidy v. Cook, 99 Ill. 385, 389, p. 1862.
Cassimus v. Scottish Union & Nat'l Ins. Co., 135 Ala. 256, 33 South. 163, p. 1166.
Castellan v. Hobson, L. R. 10 Eq. 47, p. 2101.
Castell & Brown, In re, [1898] 1 Ch. 315, 67 Law J. (Ch.) 169, 78 Law T. (N. S.) 109, 46 Wkly. Rep. 248, p. 1196, 1261, 1296.
Castle v. Bader, 23 Cal. 76, p. 2791.
Castle v. Castle, 1 De Gex & J. 352, p. 1921.
Castle v. Fox, L. R. 11 Eq. 542, 551, p. 2212.
Castle v. Gillett, L. R. 16 Eq. 530, p. 2490.
Castle v. Persons, 54 C. C. A. 133, 117 Fed. 835, p. 2239, 2244.
Caston v. Caston, 2 Rich. Eq. 1, p. 830, 855.
Castro v. Richardson, 18 Cal. 478, p. 2263.
Caswell v. Caswell, 28 Me. 232, 236, p. 551, 552, 2272.
Caswell v. Gibbs, 33 Mich. 331, p. 2675, 2773.
Caswell v. West, 3 Thomp. & C. 383, p. 94, 231, 355, 592, 1524.
Catalani v. Catalani, 124 Ind. 54, 24 N. E. 375, 19 Am. St. Rep. 73, p. 2039.
Cate v. Cate, 87 Tenn. 41, 9 S. W. 231, p. 2502, 2519.
Cater v. Eveleigh, 4 Desaus. Eq. 19, 6 Am. Dec. 596, p. 2188, 2198.
Cates v. Allen, 149 U. S. 451, 457, 13 Sup. Ct. 883, 977, 37 L. ed. 804, p. 505, 506, 507.
Cates v. Baxter, 97 Tenn. 443, 37 S. W. 219, p. 1223.
Cates v. Loftus's Heirs, 4 T. B. Mon. 439, p. 2749.
Cathcart v. Nelson's Adm'rs, 70 Vt. 317, 40 Atl. 826, p. 1910.
Cathcart v. Robinson, 5 Pet. 263, 264, 276, p. 1494, 1517, 1666, 1672, 2771.
Cathcart's Appeal, 12 Pa. St. 416, p. 2558.
Catherwood v. Watson, 65 Ind. 576, p. 1993, 2005, 2006.
Catlett v. Bacon, 33 Misc. 269, p. 2781.
Catlett v. Storr, 70 Tex. 485, 7 S. W. 844, p. 1859.
Catley v. Sampson, 33 Beav. 551, p. 2436.
Catlin v. Valentine, 9 Paige, 575, 38 Am. Dec. 567, p. 2684.
Catlin v. Wheeler, 49 Wis. 507, p. 2294.
Catoe v. Catoe, 32 S. C. 595, 10 S. E. 1078, p. 1997, 1999.
Caton v. Caton, L. R. 1 Ch. 137, 147, p. 2781.

Caton v. Caton, L. R. 2 H. L. 127, 142, p. 1561, 2593.
Caton v. Rideout, 1 Macn. & G. 599, 601, 603, p. 2147, 2148.
Caton v. Stewart, 76 N. C. 357, p. 1700.
Cator v. Earl of Pembroke, 1 Brown Ch. 301, 302, 2 Brown Ch. 282, p. 192, 1510, 2516, 2536.
Catt v. Tourle, L. R. 4 Ch. 654, p. 1690, 2673, 2676.
Catte v. Jenkins, 88 Ga. 791, 15 S. E. 292, p. 2535.
Cattell v. Lowry, 45 Iowa, 478, p. 2678.
Cauffman v. Cauffman, 17 Serg. & R. 16, 24, 25, p. 782, 787, 820, 825, 855, 857.
Caulfield v. Stevens, 28 Cal. 118, p. 2252.
Caulfield v. Sullivan, 85 N. Y. 153, p. 857.
Caulk v. Fox, 13 Fla. 148, p. 2141.
Cavagnaro v. Dow, 63 Cal. 227, p. 1198.
Cavalli v. Allen, 57 N. Y. 508, 514, p. 93, 1524, 2722.
Cavanaugh v. Peterson, 47 Tex. 197, p. 1272.
Cave v. Cave, L. R. 15 Ch. Div. 639, 643, 646, p. 1174, 1261, 1286.
Cave v. Crafts, 53 Cal. 135, p. 2686.
Caveds v. Billings, 16 Fla. 261, p. 212.
Cavender v. Cavender, 114 U. S. 464, 5 Sup. Ct. 955, 29 L. ed. 212, p. 2069.
Cavender v. Naddingham, 5 Mo. App. 457, p. 1732.
Cavendish v. Greaves, 24 Beav. 163, 173, p. 1229.
Caviness v. Black, (Tex. Civ. App.) 33 S. W. 712, p. 1329.
Cawdor v. Lewis, 1 Younge & C. 427, p. 1195.
Caylor v. Caylor, 22 Ind. App. 666, 52 N. E. 465, 72 Am. St. Rep. 331, p. 2240, 2242.
Cecil v. Cecil, 20 Md. 153, p. 935, 938.
Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216, p. 351.
Cecil v. Juxon, 1 Atk. 278, p. 2143, 2175.
Cecil Bank v. Snively, 23 Md. 253, p. 1993, 1994.
Cecil Nat. Bank v. Thurber, 59 Fed. 913, 8 C. C. A. 365, 8 U. S. App. 496, p. 246, 323, 325.
Celluloid Mfg. Co. v. Goodyear etc. Co., 13 Blatchf. 375, p. 2696.
Center v. Planters' & M. Bank, 22 Ala. 743, p. 982, 1064, 1067, 1072, 1076, 1104, 1144, 1354, 2417.
Central Bank v. Copeland, 18 Md. 305, 81 Am. Dec. 597, p. 1738.
Central Bridge Corp. v. Lowell, 4 Gray, 474, p. 2683.
Central City Tr. Co. v. Waco Bldg. Ass'n, 95 Tex. 48, 64 S. W. 998, p. 1276.
Central Coal & Coke Co. v. Geo. S. Good & Co., 120 Fed. 793, p. 1177.
Central Crosstown R. R. v. Twenty-third St. R. R., 53 How. Pr. 45, p. 293.
Central Nat. Bank v. White, 37 N. Y. Super. Ct. 297, p. 293.
Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666, p. 1688.
Central Pac. R. R. Co. v. Dyer, 1 Saw. 641, 649, 650, Fed. Cas. No. 2,552, p. 419, 421, 455, 502, 2746, 2749, 2751.
Cent. R. R. v. Pa. R. R., 31 N. J. Eq. 475, p. 2675, 2680.
Cent. Ry. of Venezuela v. Kisch, L. R. 2 H. L. 99, 113, p. 1572, 1573, 2116.
Central Trust Co. v. Columbus, H. V. & T. R. Co., 87 Fed. 815, p. 2402.
Central Trust Co. v. Continental I. W., 51 N. J. Eq. 605, 28 Atl. 595, 40 Am. St. Rep. 539, p. 2387.
Central Trust Co. v. Wabash, St. L. & P. R'y Co., 29 Fed. 546, p. 353, 1050, 1055.
Central Trust Co. v. Washington R. Co., 124 Fed. 813, p. 2473.
Central Trust Co. v. Weeks, 15 App. Div. 598, 44 N. Y. Supp. 828, p. 1910.
Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387, p. 1212, 1254, 1288, 1289, 1292, 1295, 2585.
Central Trust & S. D. Co. v. Respass, 112 Ky. 606, 66 S. W. 421, 99 Am. St. Rep. 317, p. 1676, 1708.

Cerney v. Pawlot, 66 Wis. 262, 28 N. W. 183, p. 1997, 2005.
Chace v. Chapin, 130 Mass. 128, p. 1905, 1906.
Chadbourne v. Gilman, 64 N. H. 353, 10 Atl. 701, p. 2142.
Chadd v. Moser, 25 Utah, 369, 71 Pac. 870, p. 1739.
Chadwell v. Jordan, 2 Tenn. Ch. 637, p. 2702.
Chadwell v. Winston, 3 Tenn. Ch. 110, p. 2778, 2779.
Chadwick v. Bowman, L. R. 16 Q. B. Div. 561, p. 284.
Chadwick v. Carson, 78 Ala. 116, p. 1103, 1143.
Chadwick v. Chadwick, 59 Mich. 87, 26 N. W. 288, p. 1912.
Chadwick v. Clapp, 69 Ill. 119, p. 2475.
Chadwick v. Gulf States L. & I. Co., 74 Fed. 616, 41 U. S. App. 39, 20 C. C. A. 563, p. 1112.
Chadwick v. Livesey, 56 N. J. Eq. 453, 41 Atl. 1115, p. 1952, 1975.
Chadwick v. Manning, [1896] App. Cas. 231, p. 1436.
Chadwick v. Turner, L. R. 1 Ch. 310, 319, p. 1137, 1139, 1141.
Chadwin, Ex parte, 3 Swanst. 380, p. 2227.
Chaffee v. Lumber Co., 43 Nebr. 224, 61 N. W. 637, 47 Am. St. Rep. 753, p. 1328.
Chaffin v. Kimball, 23 Ill. 36, p. 1806.
Chalk v. Wyatt, 3 Mer. 688, p. 2685.
Challen v. Shippam, 4 Hare, 555, p. 2058.
Chalmer v. Bradley, 1 Jacob & W. 51, 68, p. 2106.
Chalmers v. Hack, 19 Me. 124, 127, p. 548, 555.
Chalmers v. Storil, 2 Ves. & B. 222, p. 837, 838, 848.
Chamberlain, In re, cited L. R. 6 Eq. 427, p. 2322.
Chamberlain v. Agar, 2 Ves. & B. 259, 262, p. 1653, 2035.
Chamberlain v. Bagley, 11 N. H. 234, p. 738, 742.
Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260, p. 1095, 1111, 1116, 1119.
Chamberlain v. Black, 64 Me. 40, p. 551.
Chamberlain v. Blue, 6 Blackf. 491, p. 2765.
Chamberlain v. Burlington, 19 Iowa, 395, p. 406.
Chamberlain v. Chamberlain, (N. J. Eq.) 20 Atl. 1085, p. 2281.
Chamberlain v. Lancey, 60 Me. 230, 233, p. 550.
Chamberlain v. Maynes, 108 Pa. St. 39, 36 Atl. 410, p. 2055.
Chamberlain v. O'Connor, 1 E. D. Smith, 665, p. 2642.
Chamberlain v. Pacific Wool etc. Co., 54 Cal. 103, p. 2080, 2085.
Chamberlain v. Stearns, 111 Mass. 267, p. 1957.
Chamberlain v. Taylor, 105 N. Y. 185, 11 N. E. 625, p. 2309.
Chamberlain v. Thompson, 10 Conn. 243, 26 Am. Dec. 390, p. 1515, 1523, 1529, 2346.
Chamberlain v. Williamson, 2 Mylne & S. 408, p. 2552.
Chamberlaine v. Chamberlaine, Freem. Ch. 34, 52, p. 1653, 2035.
Chamberlayne v. Brockett, L. R. 8 Ch. 206, p. 1933, 1950, 1962.
Chamberlin v. Peltz, 1 Mo. App. 183, p. 2472.
Chambers v. Baptist Educ. Society, 1 B. Mon. 215, p. 1979.
Chambers v. Cannon, 62 Tex. 293, p. 224.
Chambers v. Chambers, 98 Ala. 454, 13 South. 674, p. 214.
Chambers v. Church, 14 R. I. 398, 51 Am. Rep. 410, p. 1677.
Chambers v. City of St. Louis, 29 Mo. 543, p. 1834, 1974.
Chambers v. Crabbe, 34 Beav. 457, p. 1778, 2165.
Chambers v. Goldwin, 9 Ves. 254, 271, p. 2370, 2431.
Chambers v. Higgins' Ex'r, 20 Ky. Law Rep. 1425, 49 S. W. 436, p. 1940, 1959, 1980.
Chambers v. Howell, 11 Beav. 6, p. 1782.
Chambers v. Kingham, L. R. 10 Ch. Div. 743, 745, p. 1397, 1398.
Chambers v. Livermore, 15 Mich. 381, p. 1513, 1517, 1520.
Chambers v. Michael, 71 Ark. 373, 74 S. W. 516, p. 1997.

Chambers v. Penland, 78 N. C. 53, p. 2702.
Chambers v. Spencer, 5 Watts, 404, 406, p. 1800, 1801.
Chambers v. Warren, 13 Ill. 321, p. 259.
Chambers v. Watson, 56 Iowa, 676, 10 N. W. 239, p. 1549.
Chamblee v. Broughton, 120 N. C. 170, 27 S. E. 111, p. 1725.
Chambliss v. Smith, 30 Ala. 366, p. 2040.
Chamness v. Crutchfield, 2 Ired. Eq. 148, p. 1513.
Champion v. Brown, 6 Johns. Ch. 398, 402, 403, 10 Am. Dec. 343, p. 615, 2501.
Champion v. Miller, 2 Jones Eq. 194, p. 2702.
Champion v. Session, 1 Nev. 478, p. 569, 586.
Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126, p. 1510.
Champlin v. Champlin, 2 Edw. Ch. 362, p. 283.
Champlin v. Champlin, 136 Ill. 309, 29 Am. St. Rep. 323, 26 N. E. 526, p. 1998.
Champlin v. Laytin, 18 Wend. 407, 422, 31 Am. Dec. 382, 6 Paige, 189, 203, 1 Edw. Ch. 467, p. 1060, 1478, 1487, 1493, 1494.
Champlin v. Williams, 9 Pa. St. 341, p. 2411.
Champney v. Blanchard, 39 N. Y. 111, p. 2237, 2240.
Champney v. Coope, 34 Barb. 539, p. 1404.
Chance v. Isaacs, 5 Paige, 592, p. 1234.
Chance v. McWhorter, 26 Ga. 315, p. 2503.
Chance v. Teeple, 4 N. J. Eq. 173, p. 290.
Chancey's Case, 1 P. Wms. 408, 410, p. 877.
Chandler v. Dodson, 52 Mo. 128, p. 2279.
Chandler v. Dyer, 37 Vt. 345, p. 2435.
Chandler v. Graham, 123 Mich. 327, 82 N. W. 814, p. 213.
Chandler v. Hanna, 73 Ala. 392, p. 469.
Chandler v. Parsons, 100 Mich. 313, 58 N. W. 1011, p. 1281.
Chandler v. Pocock, L. R. 16 Ch. Div. 648, 15 Ch. Div. 491, p. 2315.
Chandler v. Woodward, 3 Harr. (Del.) 428, p. 826.
Chaney v. Coleman, 77 Tex. 100, 13 S. W. 850, p. 644.
Chanslor v. Chanslor's Trustees, 11 Bush, 663, p. 2130.
Chant v. Brown, 9 Hare, 790, p. 282, 287.
Chantler v. Hubbell, (Wash.) 75 Pac. 802, p. 2034.
Chapin, In re, 148 Mass. 588, 20 N. E. 195, 2 L. R. A. 768, p. 2320.
Chapin v. Brown, 83 Iowa, 156, 48 N. W. 1074, 32 Am. St. Rep. 297, 12 L. R. A. 428, p. 1689.
Chapin v. Cooke, 73 Conn. 72, 46 Atl. 282, 84 Am. St. Rep. 139, p. 1683.
Chapin v. Cram, 40 Me. 561, p. 2586.
Chapin v. Dake, 57 Ill. 295, 11 Am. Rep. 15, p. 1709.
Chapin v. Hill, 1 R. I. 446, p. 811, 820.
Chapin v. Marvin, 12 Wend. 538, p. 1683.
Chapin v. School Dist., 35 N. H. 445, p. 1975.
Chapin v. Univ. Soc., 8 Gray, 580, p. 1829.
Chapin v. Waters, 116 Mass. 140, p. 2492.
Chapin v. Weed, 1 Clark Ch. 469, p. 1754.
Chaplin v. Chaplin, 3 P. Wms. 245, p. 920.
Chaplin v. Horner, 1 P. Wms. 483, p. 2305.
Chaplin v. Sullivan, 128 Ind. 50, 27 N. E. 425, p. 2391.
Chaplin v. Young, 33 Beav. 330, p. 2428.
Chapman, In re, [1896] 2 Ch. 763, p. 2069.
Chapman, In re, L. R. 15 Eq. 75, p. 2703.
Chapman v. Beardsley, 31 Conn. 115, p. 2451, 2503, 2509.
Chapman v. Brewer, 114 U. S. 171, 5 Sup. Ct. 799, 805, p. 502.
Chapman v. Browne, [1902] 1 Ch. 785, p. 2073.

Chapman v. Butler, 22 Me. 191, p. 556.
Chapman v. Chapman, 13 Ind. 396, 397, p. 2176.
Chapman v. Chapman, 114 Mich. 144, 65 N. W. 215, 72 N. W. 131, p. 1993.
Chapman v. Chapman, 59 Pa. St. 214, p. 1436.
Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846, p. 1019, 1022, 1041, 1042, 1157, 1332.
Chapman v. Coats, 26 Iowa, 288, p. 1279.
Chapman v. Gibson, 3 Brown Ch. 229, p. 1467.
Chapman v. Gilbert, 4 De Gex, M. & G. 366, p. 1545.
Chapman v. Hamilton, 19 Ala. 121, p. 1194.
Chapman v. Hart, 1 Ves. Sr. 271, 273, p. 2213.
Chapman v. Holding, 60 Ala. 522, p. 1144.
Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982, p. 1166, 1354, 2018.
Chapman v. Hurd, 67 Ill. 234, p. 1550.
Chapman v. Lee, 64 Ala. 483, p. 2498, 2511.
Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736, p. 87, 90, 164, 216, 247, 252.
Chapman v. Leggett, 41 Ark. 292, p. 2498, 2516, 2519.
Chapman v. Mad River & L. E. Railroad Co., 6 Ohio St. 119, p. 1451.
Chapman v. Peebles, 84 Ala. 283, 4 South. 273, p. 2498, 2514.
Chapman v. Porter, 69 N. Y. 276, p. 2080.
Chapman v. Price, 83 Va. 392, 11 S. E. 879, p. 2153.
Chapman v. Salt, 2 Vern. 646, p. 943.
Chapman v. Sims, 53 Miss. 154, p. 1339.
Chapman v. Smith, 9 Vt. 153, p. 2431.
Chapman v. Steiner, 5 Kan. App. 326, 48 Pac. 607, p. 1224.
Chapman v. Tanner, 1 Vern. 267, p. 2497, 2505.
Chapman v. Toy Long, 4 Saw. 28, p. 2694.
Chapman v. Weimer, 4 Ohio St. 481, p. 2576, 2586.
Chapman v. West, 17 N. Y. 125, p. 1064, 1073, 1076, 2452.
Chapman v. White, 6 N. Y. 412, 57 Am. Dec. 464, p. 2569.
Chapman v. Wilbur, 3 Oreg. 326, p. 1902.
Chappell v. Allen, 38 Mo. 213, p. 2417.
Chappell v. Boyd, 56 Ga. 578, p. 2657.
Chapple v. Mahon, 5 I. R. Eq. 225, p. 2371.
Chaquette v. Ortet, 60 Cal. 591, 594, p. 2256, 2262.
Charitable Corp'n v. Sutton, 2 Atk. 400, 405, 406, p. 2063, 2065, 2093.
Charles v. Coker, 2 S. C. 122, p. 2144, 2145.
Charleston & W. C. R'y Co. v. Hughes, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972, p. 637, 653.
Charlton v. Coombes, 4 Giff. 372, 382, 385, p. 282, 1654.
Charlton v. Earl of Durham, L. R. 4 Ch. 433, p. 2045.
Charlton v. Low, 3 P. Wms. 328, p. 1375.
Charlton v. West, 30 Beav. 124, p. 874, 875, 877.
Charter v. Stevens, 3 Denio, 33, 45 Am. Dec. 444, p. 188, 2462.
Charter v. Trevelyan, 11 Clark & F. 714, 732, p. 1648, 1760, 1762, 1763, 1787.
Chartier v. Marshall, 51 N. H. 400, p. 524, 525, 2762.
Chartier v. Marshall, 56 N. H. 478, p. 345, 2782.
Chase v. Allen, 13 Gray, 42, p. 747.
Chase v. Barrett, 4 Paige, 148, p. 1461.
Chase v. Boughton, 93 Mich. 285, 54 N. W. 44, p. 351.
Chase v. Cannon, 47 Fed. 674, p. 419, 456.
Chase v. Chase, 2 Allen, 101, p. 1845, 1890, 1926.
Chase v. Davis, 65 Me. 102, p. 2495.
Chase v. Palmer, 25 Me. 341, 342, 348, p. 548, 549, 646.
Chase v. Peck, 21 N. Y. 581, 585, 586, p. 191, 192, 2474, 2502, 2509, 2536, 2714, 2718, 2722, 2770.
Chase v. Perley, 148 Mass. 289, 19 N. E. 398, p. 1906.
Chase v. Petroleum Bank, 66 Pa. St. 169, p. 2561.

Chase v. Redding, 13 Gray, 418, 420, p. 2236.
Chase v. Vanderbilt, 62 N. Y. 307, p. 2114.
Chase v. Woodbury, 6 Cush. 143, p. 2440, 2441, 2444, 2447, 2452.
Chase's Appeal, 57 Conn. 236, 18 Atl. 96, p. 1424, 1437.
Chase's Case, 1 Bland, 206, 17 Am. Dec. 277, p. 2734.
Chastain v. Smith, 30 Ga. 96, p. 2005.
Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 55 Am. St. Rep. 63, 33 L. R. A. 750, p. 750, 1702.
Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 692, p. 1104, 1119.
Chatham v. Brainerd, 11 Conn. 60, p. 1972.
Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N E. 168, 9 Am. St. Rep. 727, p. 1576.
Chattanooga Nat. Bank v. Rome Iron Co., 102 Fed. 755, p. 2471.
Chatterton v. Young, 2 Tenn. Ch. 768, p. 2198.
Chauncey v. Tahourden, 2 Atk. 392, p. 275.
Chautauque Co. Bank v. White, 6 Barb. 589, p. 1195.
Chave v. Farrant, 18 Ves. 8, p. 880.
Chawner's Will, In re, L. R. 8 Eq. 569, p. 2049.
Chaworth v. Beech, 4 Ves. 555, p. 2207, 2209.
Cheale v. Kenward, 3 De Gex & J. 27, p. 2764.
Cheatham v. Edgefield Mfg. Co., 131 Fed. 118, p. 1434.
Cheatham v. Huff, 2 Tenn. Ch. 616, p. 2155.
Cheatham v. Nashville Trust Co., (Tenn. Ch. App.) 57 S. W. 202, p. 1944, 1956, 1977.
Cheavin v. Walker, L. R. 5 Ch. Div. 850, p. 2690.
Cheddick v. Marsh, 21 N. J. L. 363, p. 744.
Cheeney v. Arnold, 18 Barb. 434, p. 1386.
Cheeseborough v. Millard, 1 Johns. Ch. 409, 414, 7 Am. Dec. 494, p. 1130, 1411, 2440, 2453, 2455, 2786, 2787.
Cheever v. Fair, 5 Cal. 337, p. 2444.
Cheever v. Hodgson, 9 Mo. App. 565, p. 2647.
Cheever v. Minton, 12 Colo. 557, 21 Pac. 710, 13 Am. St. Rep. 258, p. 1071.
Cheever v. Rutland etc. R. R., 39 Vt. 653, p. 2653.
Cheever v. Wilson, 9 Wall. 108, 119, 19 L. ed. 604, p. 2200.
Chellis v. Stearns, 22 N. H. 312, 315, p. 2351.
Chen v. Barnet, 11 Serg. & R. 389, p. 1107.
Chenango Bridge Co. v. Lewis, 63 Barb. 111, p. 2746.
Cheney v. Duke, 10 Gill & J. 11, p. 1720.
Chency v. Gleason, 125 Mass. 166, p. 541, 546.
Chennel v. Churchman, 3 Brown Ch. 16, p. 2728.
Chennell, In re, L. R. 8 Ch. Div. 492, p. 2070, 2073.
Cherbonnier v. Bussey, 92 Md. 413, 48 Atl. 923, p. 1844.
Cherbonnier v. Evitts, 56 Md. 276, p. 1738.
Cherokee Lodge v. White, 63 Ga. 742, p. 2191.
Cherokee Nation v. Southern Kan. R'y Co., 135 U. S. 641, 651, 10 Sup. Ct. 965, 969, 33 Fed. 900, 914, p. 494, 500.
Cherry v. Belcher, 5 Stew. & P. 133, p. 2257.
Cherry v. Bowen, 4 Sneed, 415, p. 2370.
Cherry v. Monro, 2 Barb. Ch. 618, p. 692, 1261, 1409, 2401.
Cherry v. Mott, 1 Mylne & C. 123, p. 1964.
Cherry v. Richardson, 120 Ala. 242, 24 South. 570, p. 2055.
Cherry v. Stein, 11 Md. 1, p. 2694.
Chesapeake & O. R. Co. v. Miller, 19 W. Va. 408, p. 418, 456.
Cheshire v. Payne, 16 B. Mon. 618, p. 2166.
Cheslyn v. Dalby, 2 Younge & C. 170, p. 1772.
Chess's Appeal, 4 Pa. St. 52, 45 Am. Dec. 668, p. 2777.
Chester v. Comstock, 40 N. Y. 575, p. 1588.

Chester v. Greer, 5 Humph. 26, p. 1295.
Chester v. Jumel, 125 N. Y. 237, 251, 252, 26 N. E. 297, p. 2473.
Chester v. Urwick, 23 Beav. 407, p. 1653, 2035.
Chesterfield v. Janssen, 2 Ves. Sr. 124, 125, 157, 1 Lead. Cas. Eq., 4th Am. ed., 773, 809, 825, 1 Atk. 314, p. 1581, 1634, 1745, 1784.
Chesterman v. Eyland, 81 N. Y. 398, p. 2069, 2076.
Chesterman v. Gardner, 5 Johns. 29, 9 Am. Dec. 265, p. 1026, 1047.
Chestnut Hill etc. Co. v. Chase, 14 Conn. 123, p. 1494.
Chetham v. Hoare, L. R. 9 Eq. 571, p. 1634, 1648.
Chetlain v. Republic Life Ins. Co., 86 Ill. 220, p. 2114, 2118, 2121.
Chetwood v. Brittan, 2 N. J. Eq. 438, p. 1659.
Chetwood v. Wood, 45 N. J. Eq. 369, 19 Atl. 622, p. 2196.
Chetwynd v. Fleetwood, 1 Brown Parl. C., Tomlins's ed., 300, p. 846.
Chetwynd v. Fleetwood, 4 Brown Parl. C. 435, p. 786.
Chetwynd's Settlement, In re, [1902] 1 Ch. 692, p. 2106.
Cheuvront v. Cheuvront, (W. Va.) 46 S. E. 233, p. 1746, 1748, 1781.
Chevallier v. Wilson, 1 Tex. 161, p. 2233.
Chew v. Bank of Baltimore, 14 Md. 299, p. 2784.
Chew v. Buchanan, 30 Md. 367, p. 239, 2393.
Chew v. Farmers' Bank, 2 Md. Ch. 231, p. 282.
Chew v. Gillespie, 56 Pa. St. 308, p. 1515, 1541.
Chew v. Henrietta M. & S. Co., 2 Fed. 5, p. 1154, 1157, 1163, 1166.
Chew v. Nicklin, 45 Pa. St. 84, p. 2309.
Chew v. Perkins, (Md.) 31 Atl. 507, p. 215.
Chewitt v. Moran, 17 Fed. 820, p. 508.
Chew's Appeal, 45 Pa. St. 228, p. 805.
Cheyney v. Geary, 194 Pa. St. 427, 45 Atl. 369, p. 1897.
Chicago v. Witt, 75 Ill. 211, p. 982, 985, 991, 994, 1132, 1145.
Chicago v. Wright, 69 Ill. 318, p. 2678.
Chicago & Alton R. R. v. Schoeneman, 90 Ill. 258, p. 2770, 2771.
Chicago & E. I. R. Co. v. Wright, 153 Ill. 307, 38 N. E. 1062, p. 988.
Chicago & G. W. R. Land Co. v. Peck, 112 Ill. 408, 451, p. 2499, 2573.
Chicago & N. W. R. R. v. Chicago & Pac. R. R., 6 Biss. 219, 221, 222, p. 517.
Chicago & N. W. R'y v. Nichols, 57 Ill. 464, p. 2557.
Chicago & N. W. R. Co. v. Wilcox, (C. C. A.) 116 Fed. 913, p. 1508, 1516.
Chicago, B. & Q. R. Co. v. Boyd, 118 Ill. 73, 7 N. E. 487, p. 1019.
Chicago, B. & Q. R. R. Co. v. City of Ottawa, 148 Ill. 397, 36 N. E. 85, p. 389, 452.
Chicago, B. & Q. R. R. Co. v. First Nat. Bk., 58 Nebr. 548, 78 N. W. 1064, p. 1992, 2000.
Chicago Dock Co. v. Foster, 48 Ill. 507, p. 1384.
Chicago Gas Light Co. v. Gas Light Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124, p. 669, 1688, 1712.
Chicago House-Wrecking Co. v. U. S., 166 Fed. 385, 45 C. C. A. 343, 53 L. R. A. 122, p. 732, 733.
Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312, 67 N. E. 17, p. 2127.
Chicago, Rock I. & P. R. R. Co. v. Kennedy, 70 Ill. 350, 361, 362, p. 977, 979, 982, 1007, 1011, 1050, 1145.
Chicago Sugar Ref. Co. v. Jackson Brewing Co., (Tenn. Ch. App.) 48 S. W. 275, p. 1102, 1113, 1161.
Chicago, T. & M. C. R'y Co. v. Titterington, 84 Tex. 218, 19 S. W. 472, p. 1561.
Chicago Title & Tr. Co. v. Aff, 183 Ill. 91, 55 N. E. 659, p. 1297.
Chicago Marine & F. Ins. Co. v. Stanford, 28 Ill. 168, 81 Am. Dec. 270, p. 2570.
Chichester v. Bickerstaff, 2 Vern. 295, p. 2334.
Chichester v. Coventry, L. R. 2 H. L. 71, p. 917, 920.

Chichester v. Marquis of Donegal, L. R. 4 Ch. 416, L. R. 5 Ch. 497, p. 263, 271, 283, 288.
Chichester's Executors v. Vass' Administrators, 1 Munf. 98, 4 Am. Dec. 531, p. 321, 333.
Chick v. Willetts, 2 Kan. 384, 391, p. 2358, 2362.
Chicot v. Lequesne, 2 Ves. Sr. 315, 418, p. 264.
Child v. Brace, 4 Paige, 309, p. 1753.
Child v. Danbridge, 2 Vern. 71, p. 1790.
Child v. Douglas, 5 De Gex, M. & G. 739, p. 1450.
Childers v. Childers, 1 De Gex & J. 482, p. 1540, 1659, 1835.
Childs v. Hyde, 10 Iowa, 294, 77 Am. Dec. 113, p. 2607.
Childs v. N. B. Carlstein Co., 76 Fed. 86, 92, 95, p. 505.
Chiles v. Woodson, 2 Bibb, 71, p. 1900.
Chili First Presb. Soc. v. Bowen, 21 Hun, 389, p. 1908.
Chilliner v. Chilliner, 2 Ves. 528, p. 729, 731, 749.
Chillingworth v. Chambers, [1896] 1 Ch. 685, p. 2092.
Chilton v. Braiden's Adm'x, 2 Black, 458, 17 L. ed. 304, p. 2504.
Chilvers v. Race, 196 Ill. 71, 63 N. E. 701, p. 1864.
China Steamship Co., In re, L. R. 7 Eq. 240, p. 1226, 1228, 1230.
Chinnock v. Marchioness of Ely, 4 De Gex, J. & S. 638, 643, p. 2589.
Chinnock v. Sainsbury, 30 L. J. N. S. 409, p. 345.
Chipman v. Glennon, 98 Ala. 263, 13 South. 822, p. 983.
Chipman v. Hubbard, 8 Cal. 268, 270, p. 458, 2719.
Chipman v. Montgomery, 63 N. Y. 221, 230, 235, 236, p. 181, 575, 580, 581, 2282, 2283, 2290, 2299, 2301.
Chipman v. Palmer, 77 N. Y. 51, 56, 33 Am. Rep. 566, p. 2746.
Chippendale, Ex parte, 4 De Gex, M. & G. 19, 52, p. 1722, 2101, 2103, 2111, 2114.
Chissum v. Dewes, 5 Russ. 29, p. 2773.
Chiswell v. Morris, 14 N. J. Eq. 101, p. 2735.
Chitty v. Parker, 2 Ves. 271, p. 2324.
Choate v. Tighe, 10 Heisk. 621, p. 2502.
Chollar v. Temple, 39 Ark. 238, p. 2345.
Cholmondelay v. Orford, 4 Brown Ch. 157, p. 297.
Cholmondeley v. Clinton, 4 Bligh, 1, 115, p. 1837.
Cholmondeley v. Clinton, 2 Mer. 171, 361, p. 1787.
Chorley, Ex parte, L. R. 11 Eq. 157, p. 1226.
Chosen Freeholders of Essex Co. v. Newark City Nat. Bank, 48 N. J. Eq. 51, 21 Atl. 185, p. 239.
Choudron v. Magee, 8 Ala. 570, p. 1064, 1065, 1075.
Chouteau v. Allen, 70 Mo. 290, p. 2114.
Chouteau v. Goddin, 39 Mo. 229, p. 1562.
Choynski v. Cohen, 39 Cal. 501, 2 Am. Rep. 476, p. 2691.
Chrislip v. Teter, 43 W. Va. 356, 27 S. E. 288, p. 224, 351.
Chrisman v. Hay, 43 Fed. 552, p. 2500.
Chrisman v. Partee, 38 Ark. 31, p. 2771, 2775.
Christ v. Diffenbach, 1 Serg. & R. 464, 7 Am. Dec. 624, p. 1523.
Christensen v. Hollingsworth, 6 Idaho, 87, 53 Pac. 211, 96 Am. St. Rep. 256, p. 1541.
Christian v. Cabell, 22 Gratt. 82, p. 2774.
Christian v. Field, 2 Hare, 177, p. 2436.
Christian v. Hughes, 12 Tex. Civ. App. 622, 36 S. W. 298, p. 1051, 1332.
Christian v. Keen, 80 Va. 369, p. 2153.
Christian v. Newberry, 61 Mo. 446, p. 1403, 1404.
Christian v. Taylor, 11 Sim. 401, p. 283.
Christiansen v. Aldrick, (Mont.) 76 Pac. 1007, p. 309.
Christian Union v. Yount, 101 U. S. 352, p. 1696.
Christie v. Bishop, 1 Barb. Ch. 105, p. 1336.

Christie v. Christie, L. R. 8 Ch. 499, p. 274.
Christie v. Hale, 46 Ill. 117, p. 1265.
Christie v. Sherwood, 113 Ga. 526, p. 1168.
Christler's Ex'r v. Meddis, 6 B. Mon. 35, p. 2310.
Christmas v. Mitchell, 3 Ired. Eq. 535, p. 1050.
Christmas v. Russell, 14 Wall. 69, 20 L. ed. 762, p. 2568.
Christmas's Adm'r v. Griswold, 8 Ohio St. 558, p. 2568.
Christopher v. Christopher, 64 Md. 583, 3 Atl. 296, p. 2500, 2516.
Christophers v. White, 10 Beav. 523, p. 2098.
Christy v. Christy, 176 Pa. St. 421, 35 Atl. 245, p. 2052.
Christy v. Clarke, 45 Barb. 529, p. 1737.
Christy v. Courtenay, 13 Beav. 96, p. 1997, 2001.
Christy v. Dana, 34 Cal. 548, p. 2477.
Christy v. Libby, 35 How. Pr. 119, p. 2283.
Christy v. McKee, 94 Mo. 241, 6 S. W. 656, p. 2501, 2514.
Christy v. Sill, 95 Pa. St. 380, p. 2034.
Chrysler v. Carraday, 90 N. Y. 276, 43 Am. Rep. 166, p. 1564.
Chubbuck v. Cleveland, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864, p. 1566.
Chudleigh's Case, 1 Co. 122a, p. 1834.
Chumley, Ex parte, 1 Ves. 296, p. 2622.
Church v. Bull, 2 Den. 430, 43 Am. Dec. 754, 5 Hill, 270, p. 810, 819, 852.
Church v. Chapin, 35 Vt. 223, p. 1801.
Church v. Church, 25 Pa. St. 278, p. 1345, 1346.
Church v. Cole, 36 Ind. 34, p. 2369, 2376.
Church v. Kemble, 5 Sim. 525, p. 792, 796.
Church v. Marine Ins. Co., 1 Mason, 341, 344, p. 1772.
Church v. Ruland, 64 Pa. St. 432, 441, 442, 444, p. 560, 1345, 1653, 2035.
Church v. Smith, 39 Wis. 492, 496, p. 2530, 2535.
Church v. Sterling, 16 Conn. 388, p. 701, 958, 1764, 1900, 2024.
Churcher v. Guernsey, 39 Pa. St. 84, p. 994.
Churchil v. Grove, 1 Ch. Cas. 35, Freem. Ch. 176, p. 1089.
Churchill v. Bee, 66 Ga. 621, p. 826, 855.
Churchill v. Churchill, L. R. 5 Eq. 44, p. 796, 2216.
Churchill v. Lauer, 84 Cal. 233, 24 Pac. 107, p. 397.
Churchill v. Morse, 23 Iowa, 229, 92 Am. Dec. 422, p. 1270, 1279.
Churchill v. Wells, 7 Coldw. 364, p. 1803.
Churchman v. Ireland, 1 Russ. & M. 250, 4 Sim. 520, p. 806.
Church of the Advent v. Farrow, 7 Rich. Eq. 378, p. 2780.
Church Patronage Trusts, In re, [1904] 2 Ch. 643, affirming [1904] 1 Ch. 41, p. 1940.
Cicotte v. Gagnier, 2 Mich. 381, p. 1227.
Cilley, In re, 58 Fed. 977, 982, 984, 985, 986, 989, p. 83, 202, 509, 2253, 2303.
Cilley v. Patten, 62 Fed. 498, p. 509.
Cincinnati & Chicago R. R. v. Washburn, 25 Ind. 259, p. 2773.
Cincinnati H. & D. R. R. Co. v. Bank, 54 Ohio St. 60, 42 N. E. 700, 56 Am. St. Rep. 700, 31 L. R. A. 653, p. 2569.
Cincinnati Tobacco Warehouse Co. v. Leslie & Whitaker's Trustee, 25 Ky. Law Rep. 1570, 78 S. W. 413, p. 2470.
Cincinnati, W. O. & T. C. Ry. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 47 N. E. 249, 43 L. R. A. 777, p. 1231.
Cissel v. Henderson, 88 Md. 574, 41 Atl. 1068, p. 1106.
Citizens' Bank v. Cook, 61 Ga. 177, p. 1706.
Citizens' Bank v. First Nat. Bank of N. O., L. R. 6 H. L. 352, p. 1561.
Citizens' Bank v. Shaw, 14 S. Dak. 197, 84 N. W. 779, p. 1098, 1322, 1336.
Citizens' Bk. & Tr. Co. v. Bradt, (Tenn. Ch. App.) 50 S. W. 778, p. 1911.
Citizens' Bank of Jellico v. McCarty, 99 Tenn. 469, 42 S. W. 4, p. 1102, 1115.

Citizens' Nat. Bank of Attica v. Judy, 146 Ind. 322, 43 N. E. 259, p. 1480, 1504, 1514.
Citizens' Nat. Bank of Middletown v. Trustees, 5 Del. Ch. 596, p. 2446.
Citizens' Nat. Bank of Utica v. Judy, 146 Ind. 322, 43 N. E. 259, p. 696.
Citizens' Sav. Bank v. Stewart, 90 Iowa, 467, 57 N. W. 957, p. 1072.
Citizens' Sav. Bank v. Walden, 21 Ky. Law Rep. 739, 52 S. W. 953, p. 1156.
Citizens' State Bank v. Julian, 153 Ind. 655, 55 N. E. 1007, p. 1300.
Citizens' St. R. Co. v. Horton, 18 Ind. App. 335, 48 N. E. 22, 45 Cent. Law J. 485, p. 1602.
Citizens' Trust & Surety Co. v. Zane, 113 Fed. 596, affirmed, 117 Fed. 814, p. 1156.
City Bank v. Bangs, 2 Paige, 570, p. 2640, 2642.
City Bank v. Luckie, L. R. 5 Ch. 773, p. 2478.
City Bank v. Skelton, 2 Blatchf. 14, p. 2646.
City Bank v. Smith, 3 Gill & J. 265, p. 762.
City Bank of Baltimore v. Smith, 3 Gill & J. 265, p. 750.
City Bldg. & Loan Ass'n v. Jones, 32 S. C. 308, 10 S. E. 1079, p. 2201.
City Council v. Page, 1 Speers Eq. 159, 212, p. 1148, 1346.
City Council of Charleston v. Ryan, 22 S. C. 339, 53 Am. Rep. 713, p. 1294.
City Fire Ins. Co. v. Olmsted, 33 Conn. 476, p. 2761.
City Nat. Bank v. Hamilton, 34 N. J. Eq. 158, p. 2139, 2147.
City National Bank v. Kusworm, 88 Wis. 188, 26 L. R. A. 48, 59 N. W. 564, 43 Am. St. Rep. 880, p. 1735.
City Nat. Bank v. Martin, 70 Tex. 643, 8 Am. St. Rep. 632, 8 S. W. 507, p. 1156.
City of Albert Lea v. Davies, 80 Minn. 101, 81 Am. St. Rep. 242, 82 N. W. 1104, p. 417.
City of Albert Lea v. Nielson, 83 Minn. 246, 86 N. W. 83, p. 417, 443, 455, 456.
City of Apalachicola v. Apalachicola Land Co., 9 Fla. 340, 79 Am. Dec. 284, p. 237.
City of Bloomington v. Smith, 123 Ind. 41, 23 N. E. 972, 18 Am. St. Rep. 310, p. 1464.
City of Boston v. Doyle, 184 Mass. 373, 68 N. E. 851, p. 1961, 1979.
City of Centerville v. Fidelity Trust & Guaranty Co., 118 Fed. 332, 55 C. C. A. 348, p. 353.
City of Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899, p. 2126.
City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408, p. 360, 406, 413, 454.
City of Chicago v. Union Stock Yards & Transit Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281, p. 642, 657, 660, 661.
City of Denver v. Sherret, 88 Fed. 226, 31 C. C. A. 499, p. 1154.
City of El Reno v. Cullinane, 4 Okla. 457, 46 Pac. 510, p. 744.
City of Ft. Scott v. W. G. Eads Brokerage Co., (C. C. A.) 117 Fed. 51, p. 1438.
City of Hartford v. Chipman, 21 Conn. 488, p. 2757.
City of Hutchinson v. Beckham, 118 Fed. 399, (C. C. A.) p. 390, 452.
City of Lafayette v. Fowler, 34 Ind. 140, p. 404, 405, 454.
City of Lincoln v. Morrison, 64 Nebr. 822, 90 N. W. 905, 57 L. R. A. 885, p. 2020, 2023.
City of London v. Levy, 8 Ves. 404, p. 260.
City of London v. Nash, 3 Atk. 512, 515, p. 2773.
City of London v. Perkins, 3 Brown Parl. Cas., Tomlins's ed., 602, 4 Brown Parl. Cas. 157, p. 363, 392, 455.
City of London v. Pugh, 4 Brown Parl. C., Tomlins's ed., 395, p. 749.
City of London etc. Co. v. Tennant, L. R. 9 Ch. 212, p. 2698.
City of Madison v. American Sanitary Engineering Co., (Wis.) 95 N. W. 1097, p. 744.
City of New Britain v. New Britain Tel. Co., 74 Conn. 326, 50 Atl. 881, p. 729, 735.
City of Owatonna v. Rosebrock, 88 Minn. 318, 92 N. W. 1122, p. 1946, 1971.

City of Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321, p. 390, 452.
City of St. Louis v. Johnston, 5 Dill. 241, Fed. Cas. No. 12,235, p. 1915.
City of St. Louis v. Priest, 88 Mo. 612, p 1862.
City of Salem v. Anson, 40 Oreg. 339, 67 Pac. 190, 56 L. R. A. 169, p. 741.
City of San Francisco v. Beideman, 17 Cal. 461, p. 380.
City of Seattle v. Liberman, 9 Wash. 276, 37 Pac. 433, p. 2567.
City of Somerville v. Beal, 49 Fed. 790, p. 1914.
Civil Service etc. Co. v. Dean, L. R. 13 Ch. Div. 512, p. 1695, 2690.
Clabaugh v. Byerly, 7 Gill 354, 48 Am. Dec. 575, p. 1127, 1281, 1388.
Clader v. Thomas, 89 Pa. St. 343, p. 1118.
Claflin v. Claflin, 149 Mass. 19, 14 Am. St. Rep. 393, 20 N. E. 454, 3 L. R. A. 370, Ames' Cas. on Trusts, 455, p. 1851.
Claflin v. Kimball, 52 Vt. 6, p. 2562, 2584.
Claflin v. Mess, 30 N. J. Eq. 211, p. 1803.
Claflin, H. B. Co. v. Furtick, 119 Fed. 429, p. 499.
Claggett v. Crall, 12 Kan. 393, 397, p. 1100.
Clanricarde v. Henning, 30 Beav. 175, p. 1769, 2096.
Clapham v. Shillito, 7 Beav. 146, 149, 150, p. 1440, 1508, 1592.
Clapp v. Ely, 10 N. J. Eq. 178, p. 307, 2703.
Clapp v. Emery, 98 Ill. 523, p. 1905, 1912.
Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681, p. 1727.
Clapp v. Tower, 11 N. Dak. 556, 93 N. W. 862, p. 112, 615, 2311.
Clapper v. House, 6 Paige, 149, p. 2006.
Clarey v. Marshall's Heirs, 4 Dana, (Ky.) 95, 96, p. 1071.
Claridge v. Hoare, 14 Ves. 59, 65, p. 257, 274.
Claridge v. Lavenburg, 7 Tex. Civ. App. 155, 26 S. W. 324, p. 2290.
Clark, In re, 118 Fed. 358, p. 2534.
Clark v. Anderson, 13 Bush, 11, p. 2035, 2068, 2077.
Clark v. Baker, 6 Mont. 153, 9 Pac. 911, p. 2462.
Clark v. Bamer, 2 Lans. 67, p. 1618.
Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, p. 764.
Clark v. Bever, 139 U. S. 96, 103, 11 Sup. Ct. 468, 470, p. 508, 517.
Clark v. Bininge, 75 N. Y. 344, p. 2662, 2663.
Clark v. Blackington, 110 Mass. 369, p. 2052.
Clark v. Bogardus, 2 Edw. Ch. 387, 12 Wend. 67, p. 878, 881, 882, 883.
Clark v. Brockway, 1 Abb. App. 351, p. 2661.
Clark v. Brown, 3 Allen, 509, p. 1263, 1285.
Clark v. Browne, 2 Smale & G. 524, p. 2214.
Clark v. Buffalo Hump Min. Co., 122 Fed. 243, p. 664.
Clark v. Charles, 55 Nebr. 202, 75 N. W. 563, p. 1076.
Clark v. Clark, 9 App. Cas. (Priv. Coun.) 733, p. 1757.
Clark v. Clark, 49 Cal. 586, p. 2761.
Clark v. Clark, 17 Ga. 485, p. 2299.
Clark v. Clark, (Md.) 58 Atl. 24, p. 1929.
Clark v. Clark, 108 Mass. 522, p. 1872.
Clark v. Clark, 23 Misc. Rep. 272, 50 N. Y. Supp. 1041, p. 2071.
Clark v. Clark, 56 N. H. 105, p. 1402, 1407, 1408.
Clark v. Clark, 20 Ohio St. 128, p. 2197.
Clark v. Clark, 8 Paige, 152, 35 Am. Dec. 676, p. 2061, 2095, 2096.
Clark v. Clark, 174 Pa. St. 309, 34 Atl. 610, 619, p. 1779.
Clark v. Clark, 43 Vt. 685, p. 1993.
Clark v. Condit, 18 N. J. Eq. 358, p. 2370.
Clark v. Cook, 3 De Gex & S. 333, p. 2170.
Clark v. Coolidge, 8 Kan. 189, 195, p. 1429, 1436, 1438, 1441, 1444.
Clark v. Covenant etc. Ins. Co., 52 Mo. 272, p. 2754, 2756.
Clark v. Dew, 1 Russ. & M. 103, p. 2657.
Clark v. Dickson, 6 Com. B., N. S., 453, p. 1574.
Clark v. Douglass, 62 Pa. St. 408, p. 1651, 1791.

Clark v. Drake, 3 Chand. 253, 259, p. 632, 753, 757, 766.
Clark v. Drake, 63 Me. 354, p. 1472.
Clark v. Duke, 59 Miss. 575, p. 1275.
Clark v. East Atlanta Land Co., 113 Ga. 21, 38 S. E. 323, p. 1881.
Clark v. Empire Lumber Co., 87 Ga. 742, 13 S. E. 826, p. 1073.
Clark v. Equitable Life Assur. Soc., 76 Miss. 22, 23 South. 453, p. 271.
Clark v. Eubank, 65 Ala. 245, 247, p. 2256.
Clark v. Everhart, 63 Pa. St. 347, p. 1591, 1594.
Clark v. Finlon, 90 Ill. 245, p. 2376, 2377.
Clark v. Fisk, 9 Utah, 94, 33 Pac. 248, p. 2409.
Clark v. Flint, 22 Pick. 231, 33 Am. Dec. 733, p. 234, 1327, 1330, 1331, 2763.
Clark v. Fosdick, 118 N. Y. 14, 22 N. E. 1111, 16 Am. St. Rep. 733, 6 L. R. A. 132, p. 1679.
Clark v. French, 23 Me. 221, 39 Am. Dec. 618, p. 1803.
Clark v. Fuller, 39 Conn. 238, p. 1144, 1157, 1163.
Clark v. German Sav. Bank, 61 Miss. 611, p. 1222.
Clark v. Girdwood, L. R. 7 Ch. Div. 9, p. 2727.
Clark v. Glos, 180 Ill. 556, 54 N. E. 631. 72 Am. St. Rep. 223, p. 1405, 1406, 1409, 1410.
Clark v. Griffith, 4 Iowa, 405, p. 821, 852.
Clark v. Haney, 62 Tex. 511, 50 Am. Rep. 536, p. 1899.
Clark v. Henry, 2 Cow. 324, p. 2370, 2377.
Clark v. Henry's Adm'r, 9 Mo. 336, 338-340, p. 229, 466, 564, 568, 581, 2279.
Clark v. Hezekiah, 24 Fed. 663, p. 2171.
Clark v. Hogeman, 13 W. Va. 718, p. 1212, 1224, 1254.
Clark v. Hogle, 52 Ill. 427, p. 2267.
Clark v. Hubbard, 8 Ohio, 382, p. 2750.
Clark v. Jacobs, 56 How. Pr. 519, p. 2536.
Clark v. Jeffersonville etc. R. R., 44 Ind. 248, p. 2693, 2695.
Clark v. Jetton, 5 Sneed, 229, p. 892, 896, 903.
Clark v. Johnson, 133 Ala. 432, 31 South. 960, p. 1366.
Clark v. Johnston, 10 N. J. Eq. 287, p. 578.
Clark v. Laughlin, 62 Ill. 278, p. 1403.
Clark v. Lyon, 46 Ga. 202, p. 2376.
Clark v. Lyons, 25 Ill. 105, p. 761.
Clark v. McNeal, 114 N. Y. 295, 21 N. E. 405, 11 Am. St. Rep. 638, p. 1345.
Clark v. Maguire, 16 Mo. 302, p. 2144.
Clark v. Malpas, 31 Beav. 80, p. 1728.
Clark v. Malpas, 4 De Gex, F. & J. 401, p. 1731, 1781, 2729.
Clark v. Martin, 49 Pa. St. 289, p. 2595.
Clark v. Mauran, 3 Paige, 373, p. 2561.
Clark v. Missouri, K. & T. Tr. Co., 59 Nebr. 53, 80 N. W. 257, p. 2360.
Clark v. Moody, 17 Mass. 145, 148, p. 2052.
Clark v. Munroe, 14 Mass. 351, p. 1280.
Clark v. National Bank, 47 Mo. 17, p. 2194.
Clark v. New York Life Ins. & T. Co., 64 N. Y. 33, p. 2595.
Clark v. Omaha etc. R. R., 5 Nebr. 314, p. 1696.
Clark v. Parsons, 69 N. H. 147, 39 Atl. 898, 76 Am. St. Rep. 157, p. 1439.
Clark v. Partridge, 2 Pa. St. 13, 4 Pa. St. 166, p. 77, 1507, 1523.
Clark v. Periam, 2 Atk. 333, p. 667, 669.
Clark v. Platt, 30 Conn. 282, p. 2100.
Clark v. Reeder, 40 Fed. 513, p. 1624.
Clark v. Reyburn, 1 Kan. 281, p. 2344.
Clark v. Rhode Island Locomotive Works, 24 R. I. 307, 53 Atl. 47, p. 251, 260.
Clark v. Robinson, 58 Me. 133, 137, p. 1637.
Clark v. St. Louis etc. R. R., 58 How. Pr. 21, p. 2070.
Clark v. Seagraves, (Mass.) 71 N. E. 813, p. 2381.
Clark v. Sewell, 3 Atk. 96, p. 874.
Clark v. Smith, 1 N. J. Eq. 121, 137, 138, 139, p. 2429, 2430, 2431.
Clark v. Smith, 13 Pet. 195, 203, p. 494, 497, 502, 517.

Clark v. Stilson, 36 Mich. 482, p. 2500, 2509, 2513.
Clark v. Tainter, 7 Cush. 567, p. 2046.
Clark v. Taylor, 1 Drew. 642, p. 1964.
Clark v. Timmons, (Tenn. Ch. App.) 39 S. W. 534, p. 1995.
Clark v. Valentino, 41 Ga. 143, p. 2191.
Clark v. Viles, 32 Me. 32, p. 2193.
Clark v. Village of Dunkirk, 12 Hun, 181, 187, p. 405, 404, 454.
Clark v. Wardwell, 55 Me. 61, p. 555.
Clark v. White, 12 Pet. 178, 188, p. 224, 345.
Clarke, In re, 21 Ch. Div. 817, p. 2618.
Clarke, In re, 36 Ch. Div. 348, p. 2584.
Clarke v. Butler, 1 Mer. 304, p. 2208.
Clarke v. Byne, 13 Ves. 383, p. 2646.
Clarke v. Clark, L. R. 1 Ch. 16, p. 2687.
Clarke v. Clarke, 46 S. C. 230, 24 S. E. 202, 57 Am. St. Rep. 675, p. 630, 2310.
Clarke v. Cobley, 2 Cox, 173, p. 1725.
Clarke v. Deveraux, 1 S. C. 172, 184, p. 1757.
Clarke v. Dutcher, 9 Cow. 674, p. 1477, 1503, 1511.
Clarke v. Earl of Ormonde, Jacob, 546, p. 2718.
Clarke v. Featherstone, 32 Ind. 142, p. 2725.
Clarke v. Franklin, 4 Kay & J. 257, p. 2312, 2313, 2324, 2328.
Clarke v. Grant, 14 Ves. 519, 524, 525, p. 1513, 1517, 1519, 1521, 1660.
Clarke v. Guise, 2 Ves. 617, 618, p. 792, 817.
Clarke v. Hart, 5 Jur., N. S., 447, p. 1453.
Clarke v. Johnston, 10 N. J. Eq. 287, p. 2281.
Clarke v. Lott, 11 Ill. 105, p. 1873.
Clarke v. Palmer, L. R. 21 Ch. Div. 124, p. 1196, 1296.
Clarke v. Parker, 19 Ves. 1, 13, 15, 16, 18, 22, p. 1681, 1682, 1683, 1686.
Clarke v. Peak, 15 La. Ann. 407, 409, p. 568, 588.
Clarke v. Perry, 5 Cal. 58, 60, 63 Am. Dec. 82, p. 2251, 2262.
Clarke v. Rochester etc. R. R., 18 Barb. 350, p. 2771.
Clarke v. Royle, 3 Sim. 499, p. 2510.
Clarke v. Sawyer, 3 Sand. Ch. 351, 357, p. 1728.
Clarke v. Sibley, 13 Met. 210, p. 535, 538.
Clarke v. Supervisors, 27 Ill. 305, 311, p. 409.
Clarke v. Swaile, 2 Eden, 134, p. 1758.
Clarke v. Tipping, 4 Beav. 594, 595, p. 638.
Clarke v. Tipping, 9 Beav. 282, p. 1762, 1763.
Clarke v. Webb, 2 Hen. & M. 8, p. 2788.
Clarke v. White, 12 Pet. 178, 187, 188, p. 331, 530, 1603, 1791.
Clark's Appeal, 57 Conn. 565, 19 Atl. 332, p. 1664.
Clark's Appeal, 70 Conn. 195, 39 Atl. 155, p. 1824.
Clarke's Appeal, 70 Conn. 195, 39 Atl. 155, p. 2311.
Clark's Trust, In re, L. R. 1 Ch. Div. 497, p. 1935, 1964.
Clarkson v. Hanway, 2 P. Wms. 203, p. 1671, 1673.
Clarkson v. Morgan's Devisees, 6 B. Mon. 444, 448, p. 1069, 1080, 1082, 1083.
Clarkson v. Robinson, [1900] 2 Ch. 722, p. 2098.
Clason v. Morris, 10 Johns. 524, p. 290.
Claussen v. Lafrenz, 4 G. Greene, 224–227, p. 148, 210, 567, 585.
Clavering v. Ellison, 8 De Gex, M. & G. 662, 7 H. L. Cas. 707, p. 1681.
Clavering v. Yorke, 2 Coll. C. C. 363, note, p. 2237.
Clay v. Allen, 63 Miss. 426, p. 1676.
Clay v. East Tenn. etc. R. R., 6 Heisk. 421, p. 2473, 2576, 2583.
Clay v. Edwards, 84 Ky. 548, 2 S. W. 147, p. 2107.
Clay v. Fry, 3 Bibb, 248, 6 Am. Dec. 654, p. 465.
Clay v. Gurley, 62 Ala. 14, p. 2299, 2303.
Clay v. Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146, p. 1639.
Clay v. Hart, 7 Dana, 1, 6, p. 855.
Clay v. Layton, (Mich.) 96 N. W. 459, p. 1877.
Clay v. Rufford, 5 De Gex & S. 768, p. 2050.

Clay v. Walter, 79 Va. 92, p. 2141.
Clayton v. Akin, 38 Ga. 320, 95 Am. Dec. 393, p. 826.
Clayton v. Cookes, 2 Atk. 449, p. 2738.
Clayton v. Frat, 10 Ohio St. 544, 546, p. 570, 587, 1487, 1489, 2726.
Clayton v. Hallett, 30 Colo. 231, 97 Am. St. Rep. 117, 70 Pac. 429, 59 L. R. A. 407, p. 1946, 1955, 1961, 1972.
Clayton v. Johnson, 36 Ark. 406, 38 Am. Rep. 40, p. 1857.
Clayton v. Pierson, (W. Va.) 46 S. E. 935, p. 2236, 2239.
Clayton v. Rose, 87 N. C. 106, p. 2154.
Cleary v. Babcock, 41 Ill. 271, p. 1515.
Cleaver v. Green, 107 Ill. 67, p. 1667.
Cleaver v. Mutual Reserve etc. Ass'n, [1892] 1 Q. B. 147, p. 1985.
Clee v. Sanders, 74 Mich. 692, 42 N. W. 154, p. 407, 454.
Cleere v. Cleere, 82 Ala. 581, 3 South. 107, 60 Am. Rep. 750, p. 1667, 1671.
Clegg v. Edmondson, 8 De Gex, M. & G. 787, 807, p. 1782, 1788, 2028.
Clegg v. Fishwick, 1 Macn. & G. 294, p. 2028, 2656.
Cleghorn v. Minnesota T. I. & T. Co., 57 Minn. 341, 47 Am. St. Rep. 615, 59 N. W. 320, 32 Am. St. Rep. 729, note, p. 189, 2463.
Cleghorn v. Postlewaite, 43 Ill. 428, 431, p. 409.
Cleland v. Campbell, 78 Ill. App. 624, p. 388, 452.
Cleland v. Fish, 43 Ill. 282, p. 1515, 1616, 1779.
Clemens v. Clemens, 60 Barb. 366, p. 2046.
Clemens v. Clemens, 37 N. Y. 59, p. 2740.
Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520, p. 673, 1718.
Clement v. Cash, 21 N. Y. 253, 259, 260, p. 731, 733, 741, 742, 745, 747.
Clement v. Cheeseman, 37 Ch. Div. 631, p. 2237.
Clement v. City of Philadelphia, 137 Pa. St. 328, 20 Atl. 1000, 21 Am. St. Rep. 876, p. 1226, 1229.
Clement v. Hyde, 50 Vt. 716, 28 Am. Rep. 522, p. 1933, 1945, 1953, 1961, 1967, 1978.
Clement v. Reid, 9 Smedes & M. 535, p. 1665.
Clements v. Graham, 24 La. Ann. 446, p. 1696.
Clements v. Hall, 2 De Gex & J. 173, p. 1782, 1788, 2028.
Clements v. Moore, 6 Wall. 299, p. 1791, 1793, 1796.
Clements v. Welles, L. R. 1 Eq. 200, 35 Beav. 513, p. 1014, 1041, 1047, 1050, 1053, 1199, 2675.
Clement v. Wheeler, 25 N. H. 361, p. 2682.
Clements v. Yturria, 81 N. Y. 285, p. 1696.
Clementson v. Gandy, 1 Keen, 309, p. 789.
Clementz v. M. T. Jones Lumber Co., 82 Tex. 424, 18 S. W. 599, p. 1102, 1126.
Clemmons v. Cox, 114 Ala. 350, 21 South. 426, p. 1338.
Clendenning v. Bell, 70 Tex. 632, 8 S. W. 324, p. 1034.
Clendenning v. Clymer, 17 Ind. 155, p. 896, 899, 901, 903, 935, 938, 945.
Clephane v. Provost of Edinburgh, L. R. 1 H. L. S. 417, p. 1964.
Clergy Society, In re, 2 K. & J. 615, 622, p. 1939, 1963.
Clermont v. Tasburgh, 1 Jacob & W. 112, p. 1605.
Cleveland v. Bergen Bldg. & Imp. Co., (N. J. Eq.) 55 Atl. 117, p. 2536.
Cleveland v. Burrill, 25 Barb. 532, p. 2633.
Cleveland v. Butts, 13 Tex. Civ. App. 272, 35 S. W. 804, p. 1336.
Cleveland v. City Gas Light Co., 20 N. J. Eq. 201, p. 2684.
Cleveland v. Cohrs, 10 S. C. 224, p. 2417, 2419.
Cleveland v. Martin, 2 Head, 128, p. 2534.
Cleveland v. Southard, 25 Wis. 479, p. 2401, 2402.
Cleveland v. Springfield Inst. for Sav., 182 Mass. 110, 65 N. E. 27, p. 1910.
Cleveland Ins. Co. v. Reed, 1 Bliss, 180, p. 1762.
Cleveland Woolen Mills v. Sibert, 81 Ala. 140, 1 South. 773, p. 970, 971.
Clevenstine's Appeal, 15 Pa. St. 495, 499, p. 2144.
Clews v. Friedman, 182 Mass. 555, 66 N. E. 201, p. 1222.

Clews v. Jamieson, 182 U. S. 461, 21 Sup. Ct. Rep. 845, 45 L. ed. 1183, p. 1852.
Clifford v. Beaumont, 4 Russ. 325, p. 1683.
Clifford v. Burlington, 2 Vern. 379, p. 1468.
Clifford v. Minor, 76 Minn. 12, 78 N. W. 861, p. 2402.
Clifford v. Turrell, 1 Younge & C. Ch. 138, 14 L. J. Ch. 390, p. 1521, 1673, 1674, 2601, 2763.
Clift v. Moses, 116 N. Y. 144, 22 N. E. 393, p. 2304, 2309, 2486, 2487, 2488.
Clift v. White, 12 N. Y. 519, p. 1402.
Clifton, Matter of, 47 How. Pr. 172, p. 2612.
Clifton v. Cockburn, 3 Mylne & K. 76, 99, p. 1492, 1499, 1502.
Clifton v. Davis, 1 Pars. Cas. 31, p. 1733.
Climer v. Hovey, 15 Mich. 18, p. 1532.
Clinan v. Cooke, 1 Schoales & L. 22, 38, 39, 41, p. 1513, 1521, 1530, 2780, 2781.
Clinch v. Financial Corporation, L. R. 2 Eq. 271, p. 283.
Clinch v. Financial Corporation, L. R. 5 Eq. 450, p. 2118.
Cline v. Cline, 204 Ill. 130, 68 N. E. 545, p. 2000.
Cline v. Libby, 46 Wis. 123, 32 Am. Rep. 700, 49 N. W. 832, p. 2461, 2462.
Cline v. Osborn, 24 Ky. L. Rep. 511, 68 S. W. 1083, p. 1333.
Clingman v. Hopkie, 78 Ill. 152, p. 1466.
Clinkscales v. Hall, 15 S. C. 602, p. 2201.
Clinton Loan Ass'n v. Merritt, 112 N. C. 243, 17 S. E. 296, p. 1298.
Clippinger v. Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519, p. 1699.
Clitherall v. Ogilvie, 1 Desaus. Eq. 257, p. 1665, 1672.
Clive v. Carew, 1 Johns. & H. 199, p. 2150, 2159.
Clive v. Clive, L. R. 7 Ch. 433, p. 2158.
Clodfelter v. Cox, 1 Sneed, 330, p. 1212.
Clopton v. Gholson, 53 Miss. 466, p. 2104, 2105.
Clopton v. Haughton, 57 Miss. 787, p. 2276, 2277.
Clopton v. Martin, 11 Ala. 187, p. 1489, 1523.
Close v. Riddle, 40 Oreg. 592, 67 Pac. 932, 91 Am. St. Rep. 580 and note, p. 735.
Closs v. Eldert, 37 N. Y. Supp. 353, 16 Misc. Rep. 104, p. 837.
Cloud v. Clinkinbeard, 8 B. Mon. 397, 48 Am. Dec. 397, p. 875.
Cloud v. Martin, 2 Dev. & B. 274, p. 1657.
Cloud v. Whiting, 38 Ala. 57, p. 1437.
Clough v. Bond, 3 Mylne & C. 490, 496, 497, p. 1471, 2060, 2061, 2064, 2068, 2072.
Clough v. Clough, 117 Mass. 83, p. 2233, 2240, 2242, 2247.
Clouse v. Elliott, 71 Ind. 302, p. 1145.
Clouston v. Shearer, 99 Mass. 209, p. 2754, 2757.
Clover v. Royden, L. R. 17 Eq. 190, p. 2696.
Clowes v. Dickenson, 5 Johns. Ch. 235, p. 2397, 2444, 2447.
Clowes v. Higginson, 1 Ves. & B. 524, 527, 15 Ves. 516, p. 1494, 1518, 1519.
Clowes v. Staffordshire etc. Co., L. R. 8 Ch. 125, p. 2685.
Cluff v. Day, 124 N. Y. 203, 26 N. E. 306, p. 1835.
Clugas v. Penaluna, 4 Term Rep. 466, p. 1720.
Clyde v. Simpson, 4 Ohio St. 445, 459, p. 2494.
Coaks v. Boswell, 11 App. Cas. (H. L.) 232, reversing 27 Ch. Div. 424, and restoring 23 Ch. Div. 302, p. 1612.
Coale v. Barney, 1 Gill & J. 324, p. 2600, 2766.
Coal etc. Co., In re, L. R. 1 Ch. Div. 182, L. R. 20 Eq. 114, p. 1573, 1613.
Coard v. Holderness, 20 Beav. 147, p. 1986.
Coast Line R. R. v. Cohen, 50 Ga. 451, p. 2683.
Coates v. Doran, 83 Mo. 337, p. 2569.
Coates's Appeal, 2 Pa. St. 129, p. 1927.
Coatney v. Hopkins, 14 W. Va. 338, p. 2141, 2144, 2153.
Coats v. Clarence R'y, 1 Russ. & M. 181, p. 2687.
Coats v. Holbrook, 2 Sand. Ch. 586, p. 2691.

Coats v. Robinson, 10 Mo. 757, p. 2153.
Coatsworth v. Lehigh Val. R. Co., 156 N. Y. 451, 51 N. E. 301, affirming 48 N. Y. Supp. 511, 24 App. Div. 273, p. 383, 451.
Cobb v. Dyer, 69 Me. 494, p. 2424.
Cobb v. Fant, 36 S. C. 1, 14 S. E. 959, p. 2099.
Cobb v. Fishel, 15 Colo. App. 384, 62 Pac. 625, p. 2414.
Cobb v. Hatfield, 46 N. Y. 533, p. 1788.
Cobb v. Knight, 74 Me. 253, p. 1906, 2018.
Cobbs v. Niblo, 6 Ill. App. 60, p. 2675.
Coburn v. Stephens, 137 Ind. 683, 36 N. E. 132, 45 Am. St. Rep. 218, p. 1406.
Cochran v. Cochran, 2 Del. Ch. 17, p. 215, 218.
Cochran v. Cochran, 42 Nebr. 612, 60 N. W. 942, p. 2177.
Cochran v. Collins, 29 Cal. 129, p. 2553.
Cochran v. Fillans, 20 S. C. 237, p. 2056.
Cochran v. Paris, 11 Gratt. 348, 356, p. 2051.
Cochran v. People's R'y Co., 113 Mo. 359, 21 S. W. 6, p. 733, 740.
Cochran v. Wimberly, 44 Miss. 503, p. 2534.
Cochrane, Ex parte, L. R. 20 Eq. 282, p. 2661.
Cochrane v. O'Brien, 2 Jones & L. 380, p. 2644.
Cochrane v. Pascault, 54 Md. 1, p. 1588.
Cochrane v. Willis, 34 Beav. 359, p. 634, 2589.
Cochrane v. Willis, L. R. 1 Ch. 58, p. 1477, 1494.
Cock v. Richards, 10 Ves. 429, p. 1678, 1679.
Cock v. Van Etten, 12 Minn. 522, p. 1648.
Cockell v. Taylor, 15 Beav. 103, 115, 125, p. 1226, 1667, 1671, 1784.
Cocker v. Quayle, 1 Russ. & M. 525, p. 2087.
Cockerell v. Cholmeley, 1 Russ. & M. 418, 425, p. 1487, 1784, 2096.
Cockey v. Milne's Lessee, 16 Md. 200, 207, p. 1106, 1114.
Cocking v. Pratt, 1 Ves. Sr. 400, p. 1477, 1494, 1499.
Cockrell v. Earl of Essex, 26 Ch. Div. 538, p. 1886.
Cockrill v. Armstrong, 31 Ark. 580, p. 1908, 1926, 1929.
Cockrill v. Maney, 2 Tenn. Ch. 49, p. 1075.
Cocks v. Chandler, L. R. 11 Eq. 446, p. 2690.
Cocks v. Izard, 7 Wall. 559, p. 1692.
Cocks v. Manners, L. R. 12 Eq. 574, p. 1933, 1939, 1940, 1959.
Coddington v. Bispham, 36 N. J. Eq. 574, 578, p. 2282.
Coddington v. Goddard, 16 Gray, 436, p. 1625.
Coddington v. Pensacola & G. R. R. Co., 103 U. S. 409, p. 1647.
Codman v. Brigham, (Mass.) 72 N. E. 1008, p. 1979.
Codman v. Tinkham, 15 Pick. 344, p. 2742.
Codrington v. Lindsay, L. R. 8 Ch. 578, p. 785, 786, 857.
Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518, p. 766, 1285, 1358.
Coe v. Finlayson, 41 Fla. 169, 26 South. 704, p. 2357.
Coe v. Lake Mfg. Co., 37 N. H. 254, p. 308.
Coe v. Manseau, 62 Wis. 81, 22 N. W. 155, p. 1024, 1034, 1048.
Coe v. N. J. Midland R'y, 31 N. J. Eq. 105, p. 2726, 2770, 2771.
Coe v. N. J. Midland R. R., 27 N. J. Eq. 37, p. 2662.
Coe v. Winnepiseogee etc. Co., 37 N. H. 254, 264, p. 529, 530, 2684.
Coe v. Winters, 15 Iowa, 481, p. 1358.
Coen & Conway v. Birchard, (Iowa) 100 N. W. 48, p. 741.
Coe's Trust, In re, 4 Kay & J. 199, p. 2050.
Cœur d'Alène Cons. & M. Co. v. Miners' Union, 51 Fed. 260, 19 L. R. A. 382, p. 660, 661.
Coffee v. Ruffin, 4 Cold. 487, p. 1668,
Coffeen v. Brunton, 5 McLean, 256, p. 2690.
Coffeen v. Brunton, 4 McLean, 516, p. 2691.
Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235, p. 1768.

Coffin v. Heath, 6 Met. 76, p. 1833.
Coffin v. Parker, 127 N. Y. 117, 27 N. E. 814, p. 687.
Coffin v. Ray, 1 Met. 212, p. 1101.
Coffman v. Keightley, 24 Ind. 509, p. 408.
Coffman v. Lookout Bank, 5 Lea, 232, 40 Am. Rep. 31, p. 1735.
Coffman v. Robbins, 8 Oreg. 278, p. 2762, 2765.
Coffman v. Sangston, 21 Gratt. 263, p. 321, 2799.
Cogan v. Cook, 22 Minn. 137, p. 1123, 1373.
Cogan v. Duffield, L. R. 20 Eq. 789, p. 1543, 1887.
Cogan v. Stephens, 1 Beav. 482, note, 5 L. J., N. S., Ch. 17, p. 2328.
Cogbill v. Boyd, 77 Va. 450, p. 2078.
Cogent v. Gibson, 33 Beav. 557, p. 2601, 2703.
Coger's Ex'rs v. McGee, 2 Bibb, 321, 5 Am. Dec. 610, p. 1507.
Coggeshall v. Pelton, 7 Johns. Ch. 292, 11 Am. Dec. 471, p. 176, 1933.
Coggswell v. Griffith, 23 Nebr. 334, 36 N. W. 538, p. 2034.
Coghill v. Bird, 79 Va. 1, p. 2009.
Coghlan, In re, [1894] 3 Ch. 76, p. 2141.
Cogswell v. Armstrong, 77 Ill. 139, p. 2636, 2642.
Cogswell v. Cogswell, 2 Edw. Ch. 231, p. 2006.
Cogswell v. Stout, 32 N. J. Eq. 240, p. 1107, 1130, 2453.
Cohen v. Comm'rs of Goldsboro, 77 N. C. 2, p. 2667, 2680.
Cohen v. Dubose, Harp. Eq. 102, 14 Am. Dec. 709, p. 2727.
Cohen v. Levy, 58 N. Y. Supp. 721, p. 1086.
Cohen v. Morris, 70 Ga. 313, p. 1856.
Cohen v. Sharp, 44 Cal. 29, p. 2755, 2756.
Cohen v. Wilkinson, 1 Macn. & G. 481, p. 2677.
Cohn, In re, 78 N. Y. 248, p. 2106.
Cohn v. Souders, 175 Mo. 455, 75 S. W. 413, p. 2452.
Cohoes Co. v. Goss, 13 Barb. 137, p. 1861.
Coil v. Pittsburg F. Coll., 40 Pa. St. 439, 445, p. 1563.
Coilies v. Howland, 26 N. J. Eq. 311, p. 2501.
Coit v. Comstock, 51 Conn. 352, 50 Am. St. Rep. 29, p. 1960, 1972.
Coit v. Fougera, 36 Barb. 195, p. 2509.
Coit v. Sullivan etc. Co., 84 Fed. 724, 725, p. 495.
Coker v. Shropshire, 59 Ala. 542, p. 2787.
Cokes v. Mascal, 2 Vern. 34, 200, p. 2591.
Colah, Matter of, 6 Daly, 308, p. 2624.
Colbert v. Daniel, 32 Ala. 314, 316, p. 1440, 2257.
Colburn v. Riley, 11 Colo. App. 184, 52 Pac. 684, p. 2463.
Colby v. Gadsden, 34 Beav. 416, p. 1508, 1591.
Colby v. Kenniston, 4 N. H. 262, p. 1147.
Colclough v. Boyse, 6 H. L. Cas. 1, p. 2303.
Cole v. Bolard, 22 Pa. St. 431, p. 1444.
Cole v. Cole, 41 Md. 301, p. 2772, 2780.
Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, p. 521.
Cole v. Edgerly, 48 Me. 108, p. 1404.
Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75, p. 342, 1176.
Cole v. Gibbons, 3 P. Wms. 290, 293, p. 1784.
Cole v. Gibson, 1 Ves. Sr. 503, 506, 507, p. 1678, 1784.
Cole v. Littlefield, 35 Me. 439, p. 1926.
Cole v. Malcolm, 66 N. Y. 363, p. 2796.
Cole v. Mette, 65 Ark. 503, 47 S. W. 407, 67 Am. St. Rep. 945, p. 214, 1184, 1187, 1307.
Cole v. Miller, 32 Miss. 89, 101, p. 1071.
Cole v. Millerton Iron Co., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615, p. 2014.
Cole v. Milmine, 88 Ill. 349, p. 1676.
Cole v. Reynolds, 18 N. Y. 74, 76, p. 586.
Cole v. Savage, 10 Paige, 583, p. 1706.
Cole v. Scot, 2 Wash. 141, p. 2504.
Cole v. Smith, 24 W. Va. 287, p. 2470, 2508.
Cole v. Turner, 4 Russ. 376, p. 2490.
Cole v. Van Riper, 44 Ill. 58, p. 2155.

Cole v. Wade, 16 Ves. 27, 42, p. 1890.
Cole v. Willard, 25 Beav. 568, 573, p. 874, 875, 877, 879.
Cole v. Wright, 50 Ind. 296, p. 2535.
Cole v. Young, 24 Kan. 435, p. 2703.
Cole Co. v. Madden, 91 Mo. 585, 4 S. W. 397, p. 1672.
Cole Silver Min. Co. v. Virginia etc. Water Co., 1 Saw. 685, p. 2698.
Coleman, In re, 39 Ch. D. 443, p. 1842.
Coleman v. Barklew, 27 N. J. L. 357, 359, p. 1037, 1147.
Coleman v. Britain, 2 Barn. & Ald. 93 (Doe ex dem.), p. 268.
Coleman v. Burr, 93 N. Y. 17, 45 Am. Rep. 160. p. 2200.
Coleman v. Carhart, 74 Ga. 392, p. 1263.
Coleman v. Cocke, 6 Rand. 618, 18 Am. Dec. 757, p. 1384.
Coleman v. Columbia Oil Co., 51 Pa. St. 74, 77, p. 1646.
Coleman v. Dunton, (Me.) 58 Atl. 430, p. 613, 973, 974, 1376.
Coleman v. Floyd, 131 Ind. 330, 31 N. E. 75, p. 2536.
Coleman v. Freeman, 3 Ga. 137, p. 229, 469.
Coleman v. Frazer, 3 Bush, 300, p. 1727.
Coleman v. O'Leary's Ex'r, 24 Ky. L. Rep. 1248, 70 S. W. 1068, p. 1935, 1938, 1943, 1952, 1955, 1980.
Coleman v. Parker, 114 Mass. 30, p. 2236, 2241, 2247.
Coleman v. Reynolds, 181 Pa. St. 317, 37 Atl. 543, p. 1108, 1136, 1363.
Coleman v. San Rafael etc. Co., 49 Cal. 517, p. 2748.
Coleman v. Semmes, 56 Miss. 321, p. 2147.
Coleman v. Wooley's Ex'r, 10 B. Mon. 320, p. 2153.
Coleman's Estate, In re, 193 Pa. St. 605, 42 Atl. 1085, p. 1778.
Coler v. Tacoma R'y & Power Co., (N. J. Eq.) 54 Atl. 413, p. 2118.
Coles v. Allen, 64 Ala. 98, p. 2030.
Coles v. Appleby, 22 Hun, 72, 87 N. Y. 114, 121, p. 2447, 2451.
Coles v. Bowne, 10 Paige, 526, 535, p. 1517, 1523, 1528.
Coles v. Jones, 2 Vern. 692, p. 1226.
Coles v. Kelsey, 2 Tex. 541, 553, 47 Am. Dec. 661, p. 571, 589.
Coles v. Northrup, 66 Fed. 831, 14 C. C. A. 138, 30 U. S. App. 270, p. 213.
Coles v. Pilkington, L. R. 19 Eq. 174, p. 2781.
Coles v. Sims, 5 De Gex, M. & G. 1, Kay, 56, 70, p. 696, 729, 750, 1199, 1450, 1788, 2673.
Coles v. Trecothick, 9 Ves. 234, 246, p. 1666, 1667, 1758.
Coles v. Withers, 33 Gratt. 186, p. 2524, 2525, 2526.
Cole's Com. v. Cole's Adm'r, 28 Gratt. 365, p. 2130.
Cole's Estate, In re, 102 Wis. 1, 72 Am. St. Rep. 854, 78 N. W. 402, p. 1850, 2049.
Colgate v. Compagnie Francaise du Telegraphe, 23 Fed. 82, p. 251, 265, 271.
Colgate's Ex'r v. Colgate, 23 N. J. Eq. 372, p. 812, 820, 827, 1754, 2762.
College Park Electric Belt Line v. Ide, 15 Tex. Civ. App. 273, 40 S. W. 64, p. 981.
Collerd v. Huson, 34 N. J. Eq. 38, p. 1263.
Colleton v. Garth, 6 Sim. 19, p. 2213.
Collett v. Collett, 35 Beav. 312, 315, p. 1686.
Collier v. Betterton, 87 Tex. 440, 29 S. W. 467, p. 733, 740, 748.
Collier v. Blake, 14 Kan. 250, p. 2108.
Collier v. Brown, 1 Cox, 428, p. 1665, 1666.
Collier v. Collier, (N. J. Eq.) 33 Atl. 193, p. 314, 321, 330, 332, 341.
Collier v. Collier's Ex'rs, 3 Ohio St. 369, p. 2315.
Collier v. Davis, 47 Ark. 367, 58 Am. Rep. 758, p. 1857.
Collier v. McBean, 34 Beav. 426, p. 1919.
Collier v. McBean, L. R. 1 Ch. 81, p. 2771.
Collier v. Miller, 137 N. Y. 332, 33 N. E. 374, affirming 62 Hun, 99, 42 N. Y. St. Rep. 66, 16 N. Y. Supp. 633, p. 1285.
Collier v. Slaughter, 20 Ala. 263, p. 1681, 1684.
Collignon v. Collignon, 52 N. J. Eq. 516, 28 Atl. 794, p. 1511.

Collingwood v. Brown, 106 N. C. 362, 366, 10 S. E. 868, p. 1082, 1087.
Collingwood v. Row, 3 Jur., N. S., 785, p. 2311, 2314.
Collins, In re, 18 N. J. Eq. 253, p. 2624.
Collins v. Aaron, 162 Pa. St. 539, 29 Atl. 724, p. 1108, 1133.
Collins v. Archer, 1 Russ. & M. 284, p. 1315, 1317, 1318, 1369.
Collins v. Barksdale, 23 Ga. 602, 610, p. 567.
Collins v. Blantern, 2 Wils. 341, 350, p. 67, 227, 460, 461.
Collins v. Campbell, 97 Me. 23, 28, 53 Atl. 837, 94 Am. St. Rep. 458, 463, p. 1229.
Collins v. Carlisle, 13 Ill. 254, p. 2387.
Collins v. Carlisle's Heirs, 7 B. Mon. 13, p. 1890, 1926.
Collins v. Champ's Heirs, 15 B. Mon. 118, 61 Am. Dec. 179, 1 Lead. Cas. Eq., 4th Am. ed., 1162–1171, p. 2306, 2316.
Collins v. Clayton, 53 Ga. 649, p. 210.
Collins v. Collins, 26 Beav. 306, p. 2773.
Collins v. Collins, 31 Beav. 346, 1 Lead. Cas., Eq. 4th Am. ed., 464, 465, p. 2510.
Collins v. Collins, 3 Lans. 368, p. 179.
Collins v. Collins, 6 Lans. 368, p. 2008.
Collins v. Collins, 19 Ohio St. 468, p. 181, 2750.
Collins v. Collins, 2 Mylne & K. 703, p. 2322.
Collins v. Davis, 132 N. C. 106, 43 S. E. 579, p. 1097, 1148.
Collins v. Evans, 5 Q. B. 820, p. 1577.
Collins v. Hare, 2 Bligh, N. S., 106, p. 1671.
Collins v. Heath, 34 Ga. 443, p. 1384.
Collins v. Karatopsky, 36 Ark. 316, p. 2762.
Collins v. Lamport, 4 De Gex, J. & S. 500, p. 2677.
Collins v. Lewis, L. R. 8 Eq. 708, p. 2222.
Collins v. Plumb, 16 Ves. 454, p. 2773.
Collins v. Richart, 14 Bush, 621, p. 2522, 2524, 2525.
Collins v. Rogers, 63 Mo. 515, p. 2722.
Collins v. Rowe, 1 Abb. N. C. 97, p. 2404.
Collins v. Smith, 57 Wis. 284, 15 N. W. 192, p. 1278.
Collins v. Stephens, 58 Ga. 284, p. 215, 218, 575, 2264.
Collins v. Steuart, 58 N. J. Eq. 392, 44 Atl. 467, p. 1910.
Collins v. Stubly, 7 Week. Rep. 710, p. 345.
Collins v. Sutton, 94 Va. 127, 26 S. E. 415, p. 325.
Collins v. Tillou, 26 Conn. 368, 68 Am. Dec. 398, p. 1659.
Collins v. Toppin, (N. J. Ch.) 55 Atl. 124, p. 1725.
Collins v. Underwood, 33 Ark. 265, p. 2190.
Collins v. Wakeman, 2 Ves. 683, p. 1986, 2326.
Collins v. Wassell, 34 Ark. 17, p. 2153, 2190.
Collins Co. v. Brown, 3 Kay & J. 423, p. 2690.
Collins Co. v. Cowen, 3 Kay & J. 428, p. 2690.
Collins & Armstrong Co. v. U. S. Ins. Co., 7 Tex. Civ. App. 579, 27 S. W. 147, p. 1155.
Collinson v. Collinson, 24 Beav. 269, p. 2215.
Collinson v. Lister, 7 De Gex, M. & G. 634, 20 Beav. 356, p. 1201, 1347.
Collins's Appeal, 107 Pa. St. 590, 52 Am. Rep. 479, p. 2585, 2587.
Collister v. Fassitt, 163 N. Y. 281, 57 N. E. 490, 79 Am. St. Rep. 586, p. 2051.
Collum v. Sanger Bros., (Tex.) 82 S. W. 459, reversing 78 S. W. 401, p. 1026, 1028, 1034.
Collyer v. Fallon, Turn. & R. 459, 470, 475, 476, p. 195, 2470, 2554, 2561, 2586.
Colman v. Eastern Cos. R'y, 10 Beav. 1, p. 2118.
Colman v. Sarrel, 3 Brown Ch. 12, 1 Ves. 50, p. 1872.
Colne Valley etc. R'y, In re, 1 De Gex, F. & J. 53, p. 2073.
Colombian Government v. Rothschild, 1 Sim. 94, p. 255, 266.
Colomer v. Morgan, 13 La. Ann. 202, p. 1116.
Colonial Bank v. Cady, 15 App. Cas. 267, 278, 285, affirming 38 Ch. Div. 388, and reversing 36 Ch. Div. 659, p. 1245.

Colorado Coal Co. v. United States, 123 U. S. 313, 8 Sup. Ct. 131, p. 1384.
Colorado Fuel & Iron Co. v. Kidwell, (Colo. App.) 76 Pac. 922, p. 2584.
Colsen v. Thompson, 2 Wheat. 336, p. 2775.
Colt v. Du Bois, 7 Nebr. 394, p. 1102.
Colt v. Ives, 31 Conn. 25, 81 Am. Dec. 161, p. 1220.
Colt v. Woollaston, 2 P. Wms. 154, 156, p. 1629, 1633.
Colthar v. North Plainfield Tp., 39 N. J. Eq. 380, p. 237.
Colton v. Colton, 127 U. S. 300, 317, 319, 320, 8 Sup. Ct. Rep. 1164, p. 509, 1924, 1929, 1930.
Colton v. Hanchett, 13 Ill. 615, 618, p. 407.
Colton v. Ross, 2 Paige, 396, 22 Am. Dec. 648, p. 1635.
Colton v. Stanford, 82 Cal. 351, 356, 389, 16 Am. St. Rep. 137, 150, 23 Pac. 16, p. 1508, 1594, 1758, 1782.
Coltrane v. Worrell, 30 Gratt. 434, p. 2080.
Columbia Ave. Sav. Fund etc. Co. v. City of Dawson, 130 Fed. 152, 176, p. 118.
Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792, p. 1271.
Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. Law Rep. 561, 76 S. W. 156, 157, p. 1212, 1254, 2560, 2563.
Columbia Paper Stock Co. v. Fidelity & Casualty Co., (Mo. App.) 78 S. W. 321, p. 1160.
Columbia W. Co. v. Columbia, 5 S. C. 225, p. 2773.
Columbian Govt. v. Rothschild, 1 Sim. 94, p. 244.
Columbine v. Chichester, 2 Phill. Ch. 27, p. 2772.
Columbus v. Jaques, 30 Ga. 506, p. 2683.
Columbus & S. H. R. Co. Appeals, 48 C. C. A. 275, 109 Fed. 177, 196, 208, 210, p. 1409, 1410, 2405, 2421, 2425, 2471, 2473.
Columbus & Shelby R. R. v. Watson, 26 Ind. 50, p. 2774.
Columbus Buggy Co. v. Graves, 108 Ill. 459, p. 1273.
Colvin v. Currier, 22 Barb. 371, p. 2186.
Colvin v. Hartwell, 5 Clark & F. 484, p. 643.
Colwell v. Lawrence, 38 Barb. 643, 38 N. Y. 77, p. 732, 748.
Colwell v. Mays Landing etc. Co., 19 N. J. Eq. 245, p. 2694.
Colwell v. Miles, 2 Del. Ch. 110, p. 697, 698.
Colwell v. Warner, 36 Conn. 224, p. 1549.
Colyear v. Lady Mulgrave, 2 Keen, 81, p. 1872.
Colyer v. Clay, 7 Beav. 188, p. 1477, 1659.
Colyer v. Finch, 19 Beav. 500, 5 H. L. Cas. 905, 921, p. 1016, 1196, 1295, 1315, 1316, 1317, 1369, 1377.
Coman v. Lakey, 80 N. Y. 345, 350, 351, p. 2011, 2497, 2774.
Combe v. Brazier, 2 Desaus. Eq. 431, p. 1977.
Combe v. Corporation of London, 15 L. J. Ch. 80, p. 282.
Combes v. Chandler, 33 Ohio St. 178, 181, 185, p. 1245, 1443.
Combination Land Co. v. Morgan, 95 Cal. 548, 30 Pac. 1102, p. 1333.
Combs v. Hodge, 62 U. S. (21 How.) 397, p. 1237, 1239.
Combs v. Little, 4 N. J. Eq. 310, 40 Am. Dec. 207, p. 2039.
Combs v. Scott, 76 Wis. 662, 45 N. W. 532, p. 344.
Combs v. Shisler, 47 W. Va. 373, 34 S. E. 763, p. 216.
Comby v. McMichael, 19 Ala. 747, p. 214.
Comegys v. Emerick, 134 Ind. 148, 39 Am. St. Rep. 245, 33 N. E. 899, p. 1755.
Comer v. Himes, 49 Ind. 482, 489, p. 1541.
Comes Ranelaugh v. Hayes, 1 Vern. 189, p. 2793.
Comins v. Supervisors, 3 Thomp. & C. 296, p. 434, 438.
Commercial & Farmers' Bk. v. Vass, 130 N. C. 183, 41 S. E. 791, p. 1060, 1910.
Commercial Bank v. Burgwyn, 110 N. C. 267, 17 L. R. A. 326, 14 S. E. 623, p. 1177.
Commercial Bank v. Colt, 15 Barb. 506, p. 1225, 1228.
Commercial Bank v. Cunningham, 24 Pick. 270, 35 Am. Dec. 322, p. 1177.

Commercial Bank v. Kortright, 22 Wend. 348, 34 Am. Dec. 317, p. 1219, 1222.
Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130, p. 2476.
Comm. Bank v. West. R. Bank, 11 Ohio, 444, 38 Am. Dec. 739, p. 2448.
Commercial Bank of Santa Ana v. Pritchard, 126 Cal. 600, 59 Pac. 130, p. 1096.
Commercial Bldg. & Loan Ass'n v. Robinson, 90 Md. 615, 45 Atl. 449, p. 2348.
Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582, p. 1158.
Commercial Mutual Ins. Co. v. McLoon, 14 Allen, 351, p. 542, 2707, 2730.
Commercial Nat. Bank v. Armstrong, 39 Fed. 684, p. 1913.
Commercial Nat. Bank v. Burch, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331, p. 663, 1236.
Commercial Nat. Bk. v. Hamilton Nat. Bk., 42 Fed. 880, p. 1913.
Com. Nat. Bk. v. Kirkwood, 172 Ill. 563, 50 N. E. 219, p. 1911.
Comm'rs of Lagrange Co. v. Rogers, 55 Ind. 297, p. 1967, 1974.
Commissioners of Special Purposes of the Income Tax v. Pemsel, [1891] A. C. 531, p. 1937, 1950.
Com'rs etc. v. Glasse, L. R. 15 Eq. 302, p. 262, 272.
Commissioners etc. v. Glasse, 41 L. J. Ch. 409, p. 2738.
Comm'rs v. Harby, 23 Beav. 508, p. 1214.
Common Council of Richmond v. State, 5 Ind. 334, p. 1966, 1974.
Commonwealth v. Addicks, 5 Binn. 520, 2 Serg. & R. 174, p. 2617.
Commonwealth v. American L. I. Co., 162 Pa. St. 586, 29 Atl. 660, 42 Am. St. Rep. 844, p. 2568.
Comm. v. Bank of Pa., 3 Watts & S. 184, 193, p. 560.
Com. v. Burnett, 19 Ky. Law Rep. 1836, 44 S. W. 966, p. 1224.
Commonwealth v. Calhoun, 184 Pa. St. 629, 39 Atl. 563, p. 987, 993.
Commonwealth v. Chesapeake etc. Co., 32 Md. 501, p. 1409.
Comm. v. McAlister, 28 Pa. St. 480, p. 2079, 2082.
Commonwealth v. Martin's Ex'rs, 5 Munf. 117, 121, 122, 127, p. 604, 621, 2316, 2325.
Commonwealth v. Naile, 88 Pa. St. 429, p. 1848.
Com. v. Niagara Ins. Co., 60 N. Y. 619, 3 Thomp. & C. 33, p. 346.
Commonwealth v. Pauline Temporary Home, 141 Pa. St. 537, 21 Atl. 661, p. 1976.
Commonwealth v. Richards, 131 Pa. St. 209, 18 Atl. 1007, p. 1679, 1680.
Comm. v. Smith, 10 Allen, 448, 87 Am. Dec. 672, p. 2753, 2757.
Commonwealth v. Stauffer, 10 Pa. St. 350, 51 Am. Dec. 489, p. 1682, 1683.
Commonwealth v. Susquehanna etc. R. R. Co., 122 Pa. St. 306, 15 Atl. 448, 1 L. R. A. 225, p. 1863.
Comm. v. Watmough, 6 Whart. 117, p. 1222.
Commonwealth v. Williams, 7 Gray, 337, p. 2193.
Commonwealth v. Young, 11 Phila. 606, p. 2662.
Commonwealth Title Ins. & T. Co. v. Ellis, 192 Pa. St. 321, 43 Atl. 1034, 73 Am. St. Rep. 816, p. 1283.
Compton v. Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147, p. 1641.
Compton v. Jesup, 68 Fed. 263, 316, 31 U. S. App. 486, 15 C. C. A. 397, p. 637, 638, 2427, 2431.
Compton v. Lea, L. R. 19 Eq. 115, 121, p. 2686.
Compton v. Pierson, 28 N. J. Eq. 229, p. 2196.
Comstock v. Adams, 23 Kan. 513, 33 Am. Rep. 191, p. 1701.
Comstock v. Ames, 3 Keyes, 357, p. 1785.
Comstock v. Comstock, 57 Barb. 453, p. 1762, 1779.
Comstock v. Drohan, 8 Hun, 373, p. 2407.
Comstock v. Henneberry, 66 Ill. 212, p. 149, 2702.
Comstock v. Herron, 55 Fed. 803, 811, 6 U. S. App. 626, p. 508.
Comstock v. Hitt, 37 Ill. 542, 546, p. 2404.
Comstock v. Johnson, 46 N. Y. 615, p. 642, 653.
Comstock v. Smith, 26 Mich. 306, p. 1435.

Comyns v. Comyns, 5 I. R. Eq. 583, p. 2371.
Conant v. Warren, 6 Gray, 562, p. 2193.
Conard v. Atlantic etc. Co., 1 Pet. 386, 441, p. 1325, 2344.
Conaway v. Sweeney, 24 W. Va. 643, p. 1666.
Concord Bank v. Gregg, 14 N. H. 331, p. 1625.
Conderman v. Smith, 41 Barb. 404, p. 2472.
Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137, p. 1625.
Condit v. Bigalow, 64 N. J. Eq. 504, 54 Atl. 160, p. 1051, 1890, 2331, 2333.
Condit v. Blackwell, 22 N. J. Eq. 481, p. 1762.
Condit v. Maxwell, 142 Mo. 266, 44 S. W. 467, p. 1993.
Condit v. Wilson, 36 N. J. Eq. 370, p. 1280.
Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671, p. 727, 730, 732.
Condon v. Knoxville, C. G. & L. R. R. Co., (Tenn. Ch. App.) 35 S. W. 781, p. 459.
Cone v. Cone, 61 S. C. 512, 39 S. E. 748, p. 1835.
Cone v. Dunham, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647, p. 1982.
Cone v. Niagara Ins. Co., 60 N. Y. 619, 3 Thomp. & C. 33, p. 94, 230, 231, 344, 1524, 1541.
Conemaugh Gas Co. v. Jackson Farm Gas Co., 186 Pa. St. 443, 65 Am. St. Rep. 865, 40 Atl. 1000, p. 344.
Congar v. Chicago & N. W. R. Co., 24 Wis. 157, 1 Am. Rep. 164, p. 1161.
Conger v. Cotton, 37 Ark. 286, p. 353.
Conger v. Parker, 29 Ind. 380, p. 2715.
Congregation Shaarai Tephila v. Mayor etc., 53 How. Pr. 213, p. 2754, 2757.
Congregational Church Bldg. Soc. v. Scandinavian Free Church, 24 Wash. 433, 64 Pac. 750, p. 1098, 1120, 1305.
Congress etc. Spring Co. v. High Rock etc. Co., 45 N. Y. 291, 6 Am. Rep. 82, p. 2690.
Conkey v. Bond, 36 N. Y. 427, 34 Barb. 276, p. 1761.
Conklin v. Conklin, 20 Hun, 278, p. 2232, 2234, 2237, 2241, 2247.
Conklin v. Conklin, 3 Sand. Ch. 64, p. 2742.
Conklin v. Davis, 63 Conn. 377, 28 Atl. 537, p. 1940, 1942, 1955, 1960, 1973.
Conklin v. Hinds, 16 Minn. 457, 2749.
Conley v. Bentley, 87 Pa. St. 40, p. 1803.
Conley v. Chedic, 6 Nev. 222, p. 569, 586.
Conn v. Manifee, 9 Ky. (2 A. K. Marsh.) 396, 12 Am. Dec. 417, p. 1100.
Connecticut v. Bradish, 14 Mass. 296, 303, p. 1136, 1345, 1359.
Connecticut v. Jackson, 1 Johns. Ch. 13, 17, 7 Am. Dec. 471, p. 2432.
Connecticut Gen. Life Ins. Co. v. Eldridge, 102 U. S. 545, p. 1197.
Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623, p. 982, 987, 1355, 1365, 1392.
Connecticut Mut. L. Ins. Co. v. Talbot, 113 Ind. 373, 14 N. E. 596, 3 Am. St. Rep. 655, p. 2417.
Connecticut Mut. Life Ins. Co. v. Westerhoff, 58 Nebr. 379, 78 N. W. 724, 76 Am. St Rep. 101, p. 724.
Connecticut River Sav. Bk. v. Albee, 64 Vt. 571, 13 Am. St. Rep. 944, 25 Atl. 487, p. 1864, 1866, 1877.
Connell v. Crosby, 210 Ill. 380, 71 N. E. 350, p. 2318.
Connelly v. Connelly, 7 Moore P. C. C. 438, p. 1681.
Connelly v. Fisher, 3 Tenn. Ch. 382, p. 1609, 1616, 1731, 2729.
Connelly v. Sheridan, 41 Minn. 18, 16 Am. St. Rep. 667, 42 N. W. 601, p. 2004.
Conner v. Banks, 18 Ala. 42, 52 Am. Dec. 209, p. 2526.
Conner v. Drake, 1 Ohio St. 166, p. 2772.
Conner v. Howe, 35 Minn. 518, 29 N. W. 314, p. 2411.
Connihan v. Thompson, 111 Mass. 270, p. 1146, 1435.
Connolly v. Branstler, 3 Bush, 702, 96 Am. Dec. 278, p. 1447.
Connolly v. Hammond, 51 Tex. 635, p. 1753.
Connolly v. Miller, 95 Pa. St. 513, p. 559.

Connor v. Alligator Lumber Co., 98 Fed. 155, p. 503.
Connor v. Follansbee, 59 N. H. 124, p. 1994.
Connor v. Jones, (S. Dak.) 72 N. W. 463, p. 2405.
Connor v. Stanley, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306, p. 1780.
Connor v. Trawick's Adm'r, 37 Ala. 289, 295, 79 Am. Dec. 58, p. 2237.
Conolly v. Parsons, 3 Ves. 625, p. 1694.
Conover, In re, 28 N. J. Eq. 330, p. 2624.
Conover v. Cutting, 50 N. H. 47, p. 157.
Conover v. Earl, 26 Iowa, 167, p. 2744.
Conover v. Hill, 76 Ill. 342, p. 2794.
Conover v. Hull, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810, p. 2012, 2014.
Conover v. Van Mater, 18 N. J. Eq. 481, p. 1304, 1344, 1358.
Conover v. Wardell, 20 N. J. Eq. 266, p. 1513, 1516.
Conrad v. Harrison, 3 Leigh, 532, p. 2447.
Conrad v. Williams, 6 Hill, 444, 2 Lead. Cas. Eq. 494–499, p. 1678.
Conrow v. Conrow, 7 H. L. Cas. 168, p. 2490.
Conser v. Snowden, 54 Md. 175, 39 Am. Rep. 368, p. 2232, 2241, 2244, 2248.
Consociated Pres. Soc. v. Staples, 23 Conn. 544, 555, p. 2642, 2649.
Const v. Harris, Turn. & R. 496, p. 2656.
Constable v. Bull, 3 De Gex & S. 411, p. 1929.
Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734, p. 1166, 1170, 1171.
Consterdine v. Moore, (Nebr.) 96 N. W. 1021, p. 2418.
Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193, p. 1689.
Continental Bank v. Bank of the Commonwealth, 50 N. Y. 575, 581, 582, p. 1425, 1435, 1445, 1452.
Continental Bank of N. Y. v. Weems, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802, p. 1912, 1914.
Continental Fire Ass'n v. Norris, 30 Tex. Civ. App. 299, 70 S. W. 769, p. 1159.
Continental Ins. Co. v. Garrett, 125 Fed. 589, p. 346.
Continental Inv. & L. Soc. v. Wood, 168 Ill. 421, 48 N. E. 221, p. 1136, 1283.
Continental Life Ins. Co. v. Webb, 54 Ala. 688, p. 245, 250, 262, 323.
Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. 369, p. 1221.
Continental Nat. Bank v. Heilman, 60 Fed. 184, p. 251, 265.
Continental Nat. Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606, p. 1164.
Contract Co., Ex parte, L. R. 2 Ch. 350, p. 265.
Converse v. Blumrich, 14 Mich. 109, 114, 123, 90 Am. Dec. 230, p. 1583, 2500, 2778.
Converse v. Cook, 8 Vt. 164, p. 2405, 2407.
Converse v. Dimock, 22 Fed. 573, p. 2128.
Converse v. Hartley, 31 Conn. 372, 380, p. 1804.
Converse v. Michigan Dairy Co., 45 Fed. 18, p. 2417.
Converse v. Sickles, 44 N. Y. Supp. 1080, 16 App. Div. 49, affirmed, 161 N. Y. 666, 57 N. E. 1107, p. 459, 460.
Conway v. Cutting, 51 N. H. 407, p. 2549, 2552, 2561.
Conway v. Ellison, 14 Ark. 360, p. 2710.
Conway v. Smith, 13 Wis. 125, p. 2200.
Conway's Ex'rs v. Alexander, 7 Cranch, 218, 3 L. ed. 321, p. 2373, 2376.
Conybeare v. New Brunswick etc. Co., 1 De Gex, F. & J. 578, 9 H. L. Cas. 711, 726, p. 1569, 1587, 1590, 1594, 1624.
Conybeare's Settlement, Ex parte, 1 Wkly. Rep. 458, Ames' Cas. on Trusts, 222, p. 2110.
Conyers v. Abergavenny, 1 Atk. 284, 285, p. 362, 453, 455.
Conyngham's Appeal, 57 Pa. St. 474, p. 2463.
Cooch's Lessee v. Gerry, 3 Harr. (Del.) 280, p. 2346.

Cook v. Addison, L. R. 7 Eq. 466, 470, p. 2082, 2089.
Cook v. Administrator, 3 Fed. 69, p. 2104.
Cook v. Berlin Woolen Co., 43 Wis. 433, p. 1755.
Cook v. Banker, 50 N. Y. 655, p. 2518.
Cook v. Barr, 44 N. Y. 156, p. 1902.
Cook v. Berry, 193 Pa. St. 377, 44 Atl. 771, p. 2407, 2426.
Cook v. Black, 54 Iowa, 693, 7 N. W. 121, p. 2472.
Cook v. Collingridge, Jacob, 607, 619, p. 2027.
Cook v. Cook, (R. I.) 43 Atl. 537, p. 1098, 1114.
Cook v. Dawson, 29 Beav. 123, p. 2489.
Cook v. Earl of Rosslyn, 1 Giff. 137, 167, p. 2645, 2646.
Cook v. Finch, 19 Minn. 407, p. 743.
Cook v. Fountain, 3 Swanst. 585, 591, 592, 600, p. 60, 175, 1836, 1921.
Cook v. French, 96 Mich. 525, 56 N. W. 101, p. 1066, 1070, 1083, 1096, 1360.
Cook v. Freudeuthal, 80 N. Y. 202, p. 1699, 1700.
Cook v. Gilmore, 133 Ill. 139, 24 N. E. 524, p. 2099.
Cook v. Kennerly, 12 Ala. 42, p. 2144.
Cook v. Kraft, 3 Lans. 512, p. 2482, 2518.
Cook v. Lowry, 95 N. Y. 103, p. 2090.
Cook v. Mancius, 5 Johns. Ch. 89, 93, p. 1064.
Cook v. Moody, 18 Wash. 114, 50 Pac. 1020, 63 Am. St. Rep. 872, p. 2014.
Cook v. Moore, 39 Tex. 255, p. 2729.
Cook v. Mut. Ins. Co., 53 Ala. 37, p. 1224.
Cook v. Ottawa University, 14 Kan. 548, p. 2428, 2429, 2430.
Cook v. Patterson, 103 N. C. 127, 130, 9 S. E. 402, p. 648, 1705.
Cook v. Petty, 108 Pa. St. 138, p. 2494.
Cook v. Platt, 98 N. Y. 35, p. 1895.
Cook v. Stationers' Co., 3 Mylne & K. 262, p. 1986.
Cook v. Travis, 22 Barb. 338, 20 N. Y. 400, 402, p. 1031, 1111, 1132, 1363.
Cook v. Trimble, 9 Watts, 15, p. 2504.
Cook v. Vick, 2 How. (Miss.) 882, p. 2764.
Cook v. Walker, 15 Ga. 457, 466–473, p. 567.
Cook v. Waugh, 2 Giff. 201, p. 1590.
Cook A. P. Co. v. Bell, 114 Mich. 283, 72 N. W. 174, p. 1910.
Cooke, Ex parte, L. R. 4 Ch. Div. 123, p. 2016, 2029, 2032.
Cooke v. Burtchaell, 2 Dru. & War. 165, p. 1776.
Cooke v. Caswell, 81 Tex. 678, 17 S. W. 385, p. 1011, 1050, 1056.
Cooke v. Chilcott, L. R. 3 Ch. Div. 694, p. 1200, 2698.
Cooke v. Clayworth, 18 Ves. 12, p. 1732, 1733.
Cooke v. Crawford, 13 Sim. 91, Ames' Cas. on Trusts, 509, p. 2059.
Cooke v. Dealey, 22 Beav. 196, p. 1988, 2320.
Cooke v. Husbands, 11 Md. 492, p. 1489, 2153, 2193.
Cooke v. Lamotte, 15 Beav. 234, p. 1671, 1732, 1738.
Cooke v. Nathan, 16 Barb. 342, p. 1478, 1493, 1495.
Cooke v. Platt, 98 N. Y. 35, p. 1896.
Cooke v. Smith, 45 Ch. Div. 38, p. 1989.
Cookes v. Hellier, 1 Ves. 235, p. 783.
Cookes v. Mascall, 2 Vern. 200, p. 1659.
Cookes's Contract, In re, L. R. 4 Ch. Div. 454, p. 2046.
Cooke's Lessee v. Kell, 13 Md. 469, 493, p. 1106, 1112.
Cook's Ex'r v. Cook's Adm'r, 20 N. J. Eq. 375, p. 2306, 2309, 2312.
Cookson v. Cookson, 12 Clark & F. 121, 146, 147, p. 2310, 2332, 2333.
Cookson v. Cookson, 8 Sim. 529, p. 2371.
Cookson v. Richardson, 69 Ill. 137, p. 2030, 2032.
Cookson v. Toole, 59 Ill. 515, p. 2155, 2191.
Cooley v. Betts, 24 Wend. 203, p. 2052.
Cooley v. Brayton, 16 Ill. 10, p. 1065.
Cooley v. Cooley, 172 Mass. 476, 52 N. E. 631, p. 1998.
Cooley v. Harris, 92 Mich. 126, 135, 52 N. W. 997, p. 1297.
Coolidge v. Heneky, 11 Oreg. 327, 8 Pac. 281, p. 983.
Coolidge v. Melvin, 42 N. H. 510, 531, 533, 534, p. 1801, 1803.
Coolidge v. Rhodes, 199 Ill. 24, 64 N. E. 1074, p. 1579, 1582, 1589.

Coolidge v. Schering, 32 Wash. 557, 73 Pac. 682, p. 1452.
Coombes v. Brookes, L. R. 12 Eq. 61, p. 2108.
Coombe's Ex'r v. Carthew, 59 N. J. Eq. 638, 43 Atl. 1057, p. 1739.
Coombs v. Barker, (Mont.) 79 Pac. 1, p. 2084.
Coombs v. Warren, 17 Me. 404, 408, p. 548, 555.
Coomer v. Bromley, 5 De Gex & S. 532, p. 1633.
Coon v. Atwell, 46 N. H. 510, p. 1565.
Coon v. Brook, 21 Barb. 546, p. 2152.
Coon v. Reed, 79 Pa. St. 240, p. 1254.
Coon v. Rigden, 4 Colo. 275, p. 2200.
Coon v. Swan, 30 Vt. 6, p. 278.
Cooney v. Woodburn, 33 Ind. 320, p. 2162.
Coonrod v. Kelly, 113 Fed. 378, p. 1355.
Coons v. Coons, 95 Va. 434, 64 Am. St. Rep. 804, 28 S. E. 885, p. 337.
Coope & Co. v. Emmerson, L. R. 12 App. C. 300, p. 268.
Cooper, Ex parte, L. R. 20 Eq. 762, p. 2561.
Cooper, In re, L. R. 20 Ch. Div. 611, p. 2728.
Cooper v. Alger, 51 N. H. 172, p. 2195.
Cooper v. Austin, 58 Tex. 494, p. 1508.
Cooper v. Bigly, 13 Mich. 463, p. 1130, 2447.
Cooper v. Blakey, 10 Ga. 263, p. 1277, 1381.
Cooper v. Burr, 45 Barb. 9, p. 2243.
Cooper v. Chamberlain, 78 Cal. 450, 21 Pac. 14, p. 1735.
Cooper v. Cooper, L. R. 6 Ch. 15, 16, 20, p. 774, 787, 793.
Cooper v. Cooper, L. R. 8 Ch. 813, 819, p. 865, 913, 917.
Cooper v. Cooper, L. R. 8 Eq. 312, 5 Ch. 203, p. 1657.
Cooper v. Cooper, L. R. 7 H. L. 53, 67, p. 845.
Cooper v. Cooper, 36 N. J. Eq. 121, p. 1851.
Cooper v. Cooper, 56 N. J. Eq. 48, 38 Atl. 198, p. 827.
Cooper v. Cooper, 77 Va. 198, p. 855.
Cooper v. Davis, 15 Conn. 556, p. 2682.
Cooper v. De Tastet, Tam. 177, 181, 182, p. 2640, 2645.
Cooper v. Ford, 29 Tex. Civ. App. 253, 69 S. W. 487, p. 1167, 1176.
Cooper v. Gordon, L. R. 8 Eq. 249, p. 2677.
Cooper v. Hubbuck, 30 Beav. 160, 7 Jur., N. S., 457, p. 696, 1450.
Cooper v. Jackson, 71 Ind. 244, p. 2748.
Cooper v. Joel, 1 De Gex, F. & J. 240, p. 1540.
Cooper v. Lee, 75 Tex. 114, 12 S. W. 483, p. 1768.
Cooper v. Lovering, 106 Mass. 77, 79, p. 1560, 1563, 1565.
Cooper v. Macdonald, L. R. 7 Ch. Div. 288, p. 1849, 2149, 2158.
Cooper v. Maggard, (Tex. Civ. App.) 79 S. W. 607, p. 1639.
Cooper v. Merritt, 30 Ark. 686, p. 2536.
Cooper v. Newland, 17 Abb. Pr. 342, p. 2419.
Cooper v. Pena, 21 Cal. 403, 411, p. 662, 2767, 2773, 2774.
Cooper v. Phibbs, L. R. 2 H. L. 149, 170, p. 1484, 1490, 1498.
Cooper v. Remsen, 5 Johns. Ch. 459, p. 1681.
Cooper v. Rielly, 2 Sim. 560, p. 2554.
Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. 360, p. 1576.
Cooper v. Tappan, 4 Wis. 376, p. 1706.
Cooper v. Thomason, 30 Oreg. 161, 45 Pac. 296, p. 1020.
Cooper v. Ulmann, Walk. Ch. 251, p. 2393.
Cooper v. Vesey, L. R. 20 Ch. Div. 611, p. 1368.
Cooper v. Wells, 11 Jur., N. S., 923, p. 2145.
Cooper, M. A. & Co. v. Sawyer, (Tex. Civ. App.) 73 S. W. 992, p. 1157.
Cooper's Estate, In re, 206 Pa. St. 628, 98 Am. St. Rep. 799, 56 Atl. 67, p. 2309.
Cooper's Trusts, In re, 4 De Gex, M. & G. 757, p. 2488.
Coore v. Todd, 7 De Gex, M. & G. 520, p. 2225.
Coos Bay Wagon Co. v. Crocker, 6 Saw. 574, 4 Fed. 577, p. 2502, 2504.
Coote v. Boyd, 2 Brown Ch. 521, Belt's ed., p. 889, 933, 937.

Cooth v. Jackson, 6 Ves. 12, 24, 31, 35, p. 1508, 1699.
Cope v. Evans, L. R. 18 Eq. 138, p. 2690.
Cope v. Smith's Ex'rs, 8 Serg. & R. 110, 115, p. 559.
Cope v. Wheeler, 41 N. Y. 303, p. 1707.
Copeland v. Bruning, 72 Fed. 5, 8, p. 509.
Copeland v. Copeland, 28 Me. 525, p. 1357.
Copeland v. Holman, (Tex. Civ. App.) 51 S. W. 257, p. 743.
Copeland v. Kehoe, 67 Ala. 594, p. 1104.
Copis v. Middleton, 2 Madd. 409, 410, 428, 430, p. 1665, 1791, 1793.
Copis v. Middleton, Turn. & R. 224, 231, p. 2796.
Copley v. Copley, 1 P. Wms. 147, p. 917, 918, 922.
Copp v. Sawyer, 6 N. H. 386, p. 2238.
Coppard v. Allen, 2 De Gex, J. & S. 173, 177, p. 2092.
Coppage v. Barnett, 34 Miss. 621, p. 1806.
Coppage v. Murphy, 24 Ky. Law Rep. 257, 68 S. W. 416, p. 1032.
Coppedge v. Threadgill, 3 Sneed, 577, p. 2169.
Copper v. Wells, 1 N. J. Eq. 10, p. 345.
Coppin v. Fernyhough, 2 Brown Ch. 291, p. 1001, 1051.
Copsey v. Sacramento Bank, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7, 204, p. 1756.
Coquillard v. Suydam, 8 Blackf. 24, 29, p. 215, 217, 2799.
Coquillard's Ad'mr v. Bearss, 21 Ind. 479, 83 Am. Dec. 362, p. 1703, 2555.
Corbas v. Teed, 69 Ill. 205, p. 2777.
Corbett, In re, [1903] 2 Ch. 326, p. 911.
Corbett v. Cantillon, 5 Ir. Ch. 126, p. 1093.
Corbett v. Carroll, 50 Ala. 315, p. 2130.
Corbett v. Rice, 2 Nev. 330, p. 2280.
Corbett v. Waterman, 11 Iowa, 86, p. 2405, 2407.
Corbett v. Woodward, 5 Saw. 403, p. 2114.
Corbin v. Mills's Ex'rs, 19 Gratt. 438, p. 2214, 2216, 2218.
Corbin v. Sullivan, 47 Ind. 356, p. 1340.
Corbin v. Tracy, 34 Conn. 325, p. 2601, 2763.
Corbitt v. Clenny, 52 Ala. 480, 483, p. 1050, 1052, 1143.
Corbus v. Alaska Treadwell Gold M. Co., 187 U. S. 455, 23 Sup. Ct. 156, p. 2128.
Corby v. Bean, 44 Mo. 379, p. 225, 644, 648, 1705.
Corby v. Corby, 85 Mo. 371, p. 1926.
Corbyn v. French, 4 Ves. 418, p. 1962.
Cord v. Lackland, 43 Mo. 139, p. 355.
Cordeviolle v. Dawson, 26 La. Ann. 534, p. 1116.
Cordova v. Hood, 17 Wall. 1, 21 L. ed. 587, p. 1007, 1149, 2504, 2522, 2525.
Cordwell's Estate, In re, L. R. 20 Eq. 644, p. 2168, 2173.
Corey v. Greene, 51 Me. 115, p. 2790.
Corey v. Long, 12 Abb. Pr. N. S. 427, p. 2662.
Corey v. Morrill, 71 Vt. 51, 42 Atl. 976, p. 1997.
Corey v. Sherman, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 490, 509, p. 416, 446.
Corey v. Smalley, 106 Mich. 257, 64 N. W. 13, 58 Am. St. Rep. 474, p. 1024, 1096, 1131.
Cork etc. R'y, In re, L. R. 4 Ch. 748, p. 1713, 1722, 2605.
Corle v. Monkhouse, 47 N. J. Eq. 73, 20 Atl. 367, p. 2322.
Corley v. Corley, 22 Ga. 178, p. 2172.
Corley v. Lord Stafford, 1 De Gex & J. 238, p. 1781.
Corlies v. Howland, 26 N. J. Eq. 311, p. 2511.
Corliss v. Corliss, 8 Vt. 373, p. 1148.
Corn v. Sims, 3 Met. (Ky.) 348, p. 1109.
Cornelison v. Roberts, 107 Iowa, 220, 77 N. W. 1028, p. 1903.
Cornelius v. Morrow, 12 Heisk. 630, p. 331, 337.
Cornelius v. Smith, 55 Mo. 528, p. 1901.
Cornell, Matter of, 110 N. Y. 358, 18 N. E. 142, p. 2066.
Cornell v. Andrews, 35 N. J. Eq. 7, p. 2771, 2775.

Cornell v. Hall, 22 Mich. 377, p. 2373.
Cornell v. Hichens, 11 Wis. 353, p. 1227.
Cornell v. Lovett, 35 Pa. St. 100, p. 1683, 1684.
Cornell v. Maltby, 165 N. Y. 557, 59 N. E. 291, p. 1035.
Cornell v. Radway, 22 Wis. 260, p. 2790.
Cornell v. Woodruff, 77 N. Y. 203, 206, p. 2400.
Corn Exch. Ins. Co. v. Babcock, 42 N. Y. 613, 1 Am. Rep. 601, p. 2200.
Cornfoot v. Fowke, 6 Mees. & W. 358, p. 1025.
Cornick v. Pearce, 7 Hare, 477, p. 2310.
Cornick v. Richards, 3 Lea (Tenn.) 1, p. 1223.
Corning v. Burton, 102 Mich. 86, 62 N. W. 1040, p. 2405.
Corning v. Lowerre, 6 Johns. Ch. 439, p. 2683, 2687.
Corning v. Murray, 3 Barb. 652, p. 1263.
Corning v. Troy Iron & Nail Factory, 40 N. Y. 191, 205, 206, 39 Barb. 311, 319, 325, 328, 34 Barb. 485, 491, 492, 493, 6 How. Pr. 89, p. 302, 382, 451, 2694, 2695, 2698.
Corning v. White, 2 Paige, 567, 22 Am. Dec. 659, p. 1079.
Cornish v. Abington, 4 Hurl. & N. 549, p. 1425, 1441.
Cornish v. Clark, L. R. 14 Eq. 184, p. 1801.
Cornish v. Gest, 2 Cox, 27, p. 2740.
Cornman's Estate, In re, 197 Pa. St. 125, 46 Atl. 940, p. 2000.
Cornog v. Cornog, 3 Del. Ch. 407, p. 1849.
Cornog v. Fuller, 30 Iowa, 212, p. 1300.
Cornthwaite v. Frith, 4 De Gex & S. 552, p. 1855.
Cornwell v. Deck, 8 Hun, 122, p. 2056.
Cornwell v. Wulff, 148 Mo. 542, 50 S. W. 439, 45 L. R. A. 53, p. 1839.
Corpman v. Baccaston, 84 Pa. St. 363, p. 1028, 1123, 1264, 1272, 1373.
Corp'n of Carlisle v. Wilson, 13 Ves. 276, 279, 280, p. 224, 331, 363, 455.
Corp'n of Feversham v. Parr, Reg. Lib. 1573, A, fol. 208, p. 1635.
Corporation of Gloucester v. Osborn, 1 H. L. Cas. 272, p. 1949.
Corporation of Gloucester v. Wood, 3 Hare, 131, 136–148, p. 1933, 1949.
Corporation of Hythe v. East, L. R. 1 Eq. 620, p. 345.
Corporation of N. Y. v. Mapes, 6 Johns. Ch. 46, p. 2667.
Corprew v. Arthur, 15 Ala. 525, p. 1806.
Corps v. Robinson, 2 Wash. C. C. 388, p. 277.
Correll v. Lauterbach, 159 N. Y. 553, 54 N. E. 1089, 12 App. Div. 531, 42 N. Y. Supp. 143, p. 1835.
Corriel v. Ham, 2 Iowa, 552, p. 851.
Corrigan v. Tierney, 100 Mo. 276, 13 S. W. 401, p. 1486, 1487, 1489, 1490.
Corrington, Matter of, 124 Ill. 363, 16 N. E. 252, p. 2305.
Corrothers v. Board of Education, 16 W. Va. 527, p. 407, 454.
Corrugating Co. v. Thacher, 87 Ala. 458, 465, 6 South. 366, p. 469.
Cortelyou v. Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 478, p. 2658.
Cortelyou v. Lansing, 2 Caines Cas. 200, 210, 213, p. 2460, 2461.
Corwine v. Corwine, 24 N. J. Eq. 579, 23 N. J. Eq. 368, p. 2492, 2493, 2494.
Cory v. Cory, 11 N. J. Eq. 400, p. 2176.
Cory v. Cory, 1 Ves. Sr. 19, p. 1733.
Cory v. Eyre, 1 De Gex, J. & S. 149, 163, 167, 168, 169, L. R. 4 Ch. 143, 146, p. 692, 1011, 1016, 1187, 1188, 1189, 1190, 1192, 1261, 1296, 1297.
Cory v. Geitchen, 2 Madd. 40, p. 663, 1725, 2087.
Cory v. Thames etc., 11 Week. Rep. 589, p. 345.
Coryton v. Helyar. 2 Cox, 340, p. 1545.
Coslake v. Till, 1 Russ. 376, p. 2773.
Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, p. 503.
Cosnahan v. Grice, 15 Moore P. C. C. 215, p. 2232, 2234.
Cosser v. Collinge, 3 Mylne & K. 282, p. 1053.
Cosser v. Radford, 1 De Gex, J. & S. 585, p. 1855, 2089.
Cossey v. London etc. R'y, L. R. 5 Com. P. 146, p. 279.

Costabadie v. Costabadie, 6 Hare, 410, 414, p. 1921, 2051.
Costello v. Costello, 4 McCrary, 547, 14 Fed. 207, 209, p. 509.
Coster v. Bank of Georgia, 24 Ala. 37, p. 1104.
Coster v. Coster, 1 Keen, 199, p. 2175.
Coster v. Coster, 9 Sim. 597, p. 646, 2174.
Cota v. Jones, 8 Pac. L. J. 1044, (Sup. Ct. Cal.) p. 1643, 1644, 1648.
Cothay v. Sydenham, 2 Brown Ch. 391, p. 1001, 1059.
Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716, p. 741, 745, 747.
Cottam v. Eastern Cos. R'y, 1 Johns. & H. 243, p. 1252, 1650, 2094.
Cotten v. McGehee, 54 Miss. 510, p. 2529.
Cotter v. Bank of England, 2 Dowl. Pr. 728, p. 2642.
Cottereil v. Long, 20 Ohio, 464, p. 2376, 2470.
Cotterell v. Purchase, Cas. t. Talb. 61, p. 2379.
Cottington v. Fletcher, 2 Atk. 155, p. 1988.
Cottle v. Harrold, 72 Ga. 830, p. 2005, 2006.
Cotton v. Carlisle, 85 Ala. 175, 4 South. 670, 7 Am. St. Rep. 29, p. 2345.
Cotton v. Dacey, 61 Fed. 481, p. 1074.
Cotton v. Graham, 84 Ky. 672, 2 S. W. 647, p. 1873.
Cotton v. King, 2 P. Wms. 358, 674, p. 2165.
Cotton v. Miss. etc. Co., 19 Minn. 497, p. 2684.
Cottriel v. Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549, p. 1591.
Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23, p. 1395, 2488.
Couch v. Stratton, 4 Ves. 391, p. 956.
Couch v. Sutton, 1 Grant Cas. 114, p. 1447.
Coughlin v. Seago, 53 Ga. 250, p. 1828, 1893.
Coulson v. Allison, 2 De Gex, F. & J. 521, p. 1781.
Coulson v. Harris, 43 Miss. 728, 754ff, p. 433.
Coulter v. Clark, 160 Ind. 311, 66 N. E. 739.
Coulter v. Lumpkin, 94 Ga. 225, 21 S. E. 461, p. 1072.
Council Bluffs Lodge v. Billups, 67 Iowa, 674, 25 N. W. 846, p. 1058.
Countess of Shrewsbury v. Earl of Shrewsbury, 1 Ves. 227, 233, p. 1407.
Countess of Mornington, In re, 4 De Gex, M. & G. 537, p. 2109.
Countess of Mornington v. Keane, 2 De Gex & J. 292, 313, p. 2472.
Countess of Strathmore v. Bowes, 2 Brown Ch. 345, 1 Ves. 22, 1 Lead. Cas. Eq. 405, 605, 611–617, 618–623, p. 1657, 2165.
County Bank of San Luis Obispo v. Fox, 119 Cal. 61, 51 Pac. 11, p. 1096, 1144, 1303.
County Court v. Boreman, 34 W. Va. 362, 368, 12 S. E. 490, p. 406, 409.
County of Ada v. Bullen, 5 Idaho, 188, 47 Pac. 818, 95 Am. St. Rep. 180, 36 L. R. A. 367, p. 1626, 1637.
County of Armstrong v. Brinton, 47 Pa. St. 367, 374, p. 2704.
County of Clinton v. Schuster, 82 Ill. 137, p. 2799.
County of Des Moines v. Hinkley, 62 Iowa, 637, 17 N. W. 915, p. 2561.
County of Lapeer v. Hart, Harr. (Mich.) 157, p. 411, 426, 432, 456.
County of Schuylkill v. Copley, 67 Pa. St. 386, 5 Am. Rep. 441, p. 1645.
County of Wapello v. Bigham, 10 Iowa, 39, 74 Am. Dec. 370, p. 2607.
Coursin's Appeal, 79 Pa. St. 220, p. 1764.
Courson v. Walker, 94 Ga. 175, 21 S. E. 287, p. 1281.
Courter v. Crescent Sewing Mach. Co., 60 N. J. Eq. 413, 45 Atl. 609, p. 263.
Courtney v. Carr, 6 Iowa, 238, p. 2358.
Courtwright v. Bear River etc. Co., 30 Cal. 573, p. 2252.
Cousins v. Smith, 13 Ves. 542, p. 274.
Cousins v. Wall, 3 Jones Eq. 43, p. 2037.
Coutant v. Schuyler, 1 Paige, 316, p. 2236.
Coutt v. Craig, 2 Hen. & M. 618, p. 1523.
Coutts v. Ackworth, L. R. 9 Eq. 519, p. 787, 794.

Covenhoven v. Shuler, 2 Paige, 122, 132, p. 2205.
Coventry v. Barclay, 3 De Gex, J. & S. 320, 328, p. 604.
Coventry v. Coventry, 1 Keen, 758, p. 2106.
Cover v. Black, 1 Pa. St. 493, p. 1107, 1269, 1274.
Coverdale v. Eastwood, 15 Eq. 121, p. 2592.
Coville v. Gilman, 13 W. Va. 314, p. 2707.
Covington v. Burnes, 1 Dill. 17, Fed. Cas. No. 3,291, p. 508.
Cowan v. Wheeler, 25 Me. 267, 282, 43 Am. Dec. 283, p. 552, 555.
Cowan's Appeal, 74 Pa. St. 329, p. 1775.
Coward v. Hughes, 1 Kay & J. 443, p. 1494, 1499.
Cowardin v. Anderson, 78 Va. 88, p. 1268, 1281, 1282.
Cowart v. Cowart, 3 Lea, 57, p. 2586.
Cowbridge R'y, In re, L. R. 5 Eq. 413, p. 2436.
Cowden v. Cowden, 2 How. (Miss.) 806, p. 1635.
Cowden's Estate, 1 Pa. St. 267, p. 2447.
Cowdery v. Railroad Co., 1 Woods, 331, p. 2662.
Cowdrey v. Galveston etc. R. R., 93 U. S. 352, p. 2663.
Cowdrey v. Vandenburgh, 101 U. S. 575, p. 1239.
Cowdry v. Day, 1 Giff. 316, p. 2370.
Cowee v. Cornell, 75 N. Y. 91, 99, 100, 31 Am. Rep. 428, p. 1722, 1728, 1730, 1732, 1748.
Cowell v. Craig, 79 Fed. 685, p. 2373, 2376.
Cowell v. Martin, 43 Cal. 605, p. 2686.
Cowell v. Sikes, 2 Russ. 191, p. 683.
Cowen v. Adams, 78 Fed. 536, 543, 552, 47 U. S. App. 676, (C. C. A.) p. 509, 1731, 1736, 1746, 1747, 1757, 2110.
Cowen v. Alsop, 51 Miss. 158, p. 1801.
Cowen v. Truefitt, Limited, [1898] 2 Ch. 551, [1899] 2 Ch. 309, p. 1541.
Cowen v. Withrow, 109 N. C. 636, 13 S. E. 1022, p. 1097.
Cowen v. Withrow, 111 N. C. 306, 16 S. E. 397, p. 1155.
Cowen v. Withrow, 116 N. C. 771, 21 S. E. 676, p. 1097, 1148.
Cowin v. Hurst, 124 Mich. 545, 83 Am. St. Rep. 344, 83 N. W. 274, p. 2034.
Cowin v. Toole, 31 Iowa, 513, p. 2269.
Cowing v. Cloud, (Colo. App.) 65 Pac. 417, p. 1226.
Cowing v. Rogers, 34 Cal. 648, 654, p. 2434.
Cowles v. Cowles, 56 Conn. 240, 13 Atl. 414, p. 895.
Cowles v. Garrett's Adm'rs, 30 Ala. 341, p. 2743.
Cowles v. Kichel, 65 N. Y. Supp. 349, p. 1245.
Cowles v. Pollard, 51 Ala. 445, 447, p. 335, 580, 2258, 2299.
Cowles v. Ragwet, 14 Ohio, 38, 55, p. 1708, 1710.
Cowles v. Watson, 14 Hun, 41, p. 1560, 1566.
Cowles v. Whitman, 10 Conn. 121, 124, 25 Am. Dec. 60, p. 2263, 2762, 2763, 2764.
Cowley v. Hartstonage, 1 Dow. 361, 378, p. 2051, 2310.
Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432, p. 1552, 1576.
Cowls v. Cowls, 3 Gilm. 435, 44 Am. Dec. 708, p. 2612, 2613.
Cowman v. Harrison, 10 Hare, 234, p. 1909, 1929.
Cowman v. Kingsland, 4 Edw. Ch. 627, p. 261.
Cowper v. Clerk, 3 P. Wms. 155, 157, p. 362, 393, 453.
Cowper v. Cowper, 2 P. Wms. 720, 753, p. 64, 707, 1652.
Cowper v. Scott, 3 P. Wms. 124, p. 783.
Cowperthwaite v. First Nat. Bank, 102 Pa. St. 397, p. 2039.
Cowperthwaite v. Sheffield, 3 N. Y. 243, 1 Sand. 416, p. 2568, 2569.
Cowtan v. Williams, 9 Ves. 107, p. 2646.
Cox v. Bennett, [1891] 1 Ch. 617, p. 2159.
Cox v. Cayau, 117 Mich. 599, 76 N. W. 96, 72 Am. St. Rep. 585, p. 1227.
Cox v. Clift, 2 N. Y. 118, p. 312, 2707, 2755, 2756.

Cox v. Collis, 109 Iowa, 270, 80 N. W. 343, p. 1324.
Cox v. Cox, 95 Va. 173, 27 S. E. 834, p. 1994.
Cox v. Cox, 5 W. Va. 335, p. 1149.
Cox v. Coventon, 31 Beav. 378, p. 1053.
Cox v. Divinney, 65 N. J. L. 389, 47 Atl. 569, p. 1036.
Cox v. Donnelly, 34 Ark. 762, p. 671, 1716.
Cox v. Hill, 6 Md. 274, p. 1872.
Cox v. Holcomb, 87 Ala. 589, 13 Am. St. Rep. 79, 6 South. 309, p. 961.
Cox v. Hoxie, 115 Mass. 120, p. 2411.
Cox v. McMullin, 14 Gratt. 82, p. 2742.
Cox v. Middleton, 2 Drew. 209, p. 1590, 1599.
Cox v. Milner, 23 Ill. 476, p. 998, 1274.
Cox v. Palmer, 60 Miss. 793, p. 1226.
Cox v. Peters, 13 N. J. Eq. 39, p. 2656.
Cox v. Rogers, 77 Pa. St. 160, p. 812, 820, 848, 849, 855.
Cox v. Volkert, 86 Mo. 505, p. 564.
Cox v. Wayt, 26 W. Va. 807, p. 1103, 1149, 1348.
Cox v. Wheeler, 7 Paige, 248, 257, p. 1409.
Coxe v. Basset, 3 Ves. 155, p. 2489.
Cox's Adm'r v. Wood, 20 Ind. 54, p. 2499.
Coy v. Coy, 15 Minn. 119, 126, p. 1057, 1096, 1146.
Coyle v. Davis, 20 Wis. 564, 593, p. 179, 2037.
Coyle v. Davis, 116 U. S. 109, 6 Sup. Ct. 314, 29 L. ed. 583, p. 1380.
Coyne v. Weaver, 84 N. Y. 386, p. 1858.
Coyote etc. Co. v. Ruble, 8 Oreg. 284, p. 2038.
Coysegame, Ex parte, 1 Atk. 192, p. 2167, 2171.
Cozart v. Lyon, 91 N. C. 282, p. 2300.
Cozine v. Graham, 2 Paige, 177, p. 1904.
Crabb v. Crabb, 1 Mylne & K. 511, 5 Sim. 25, p. 789, 1902, 2002.
Crabb v. Young, 92 N. Y. 56, p. 2078.
Crabtree v. Bramble, 3 Atk. 680, p. 620, 2333.
Crabtree v. Livings, 53 Ill. 526, p. 2776.
Cradock v. Owen, 2 Smale & G. 241, p. 1848.
Cradock v. Piper, 1 Macn. & G. 664, p. 2098.
Craft v. Comm'r etc., 5 Kan. 518, p. 369.
Craft v. Dickens, 78 Ill. 131, p. 210, 2726.
Craft v. Lathrop, 2 Wall. Jr. 103, Fed. Cas. No. 3,318, p. 385.
Craft v. McConoughty, 79 Ill. 346, 22 Am. Rep. 171, p. 1689.
Craft v. Russell, 67 Ala. 9, p. 2498, 2516.
Craft v. Thompson, 51 N. H. 536, 542, p. 522, 524, 527, 528, 529, 1470, 1641, 1652.
Crafts v. Aspinwall, 2 N. Y. 289, p. 2447.
Crafts v. Crafts, 13 Gray, 360, p. 1409.
Crafts v. Dexter, 8 Ala. 767, 42 Am. Dec. 666, p. 2709.
Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, p. 1155, 1170.
Craig v. Craig, 3 Barb. Ch. 76, 117, p. 2236, 2242.
Craig v. Craig, (W. Va.) 46 S. E. 371, p. 664.
Craig v. Gregg, 83 Pa. St. 19, p. 2121.
Craig v. Hesperia L. & W. Co., 113 Cal. 7, 45 Pac. 10, 54 Am. St. Rep. 316, 35 L. R. A. 306, p. 1228, 1229.
Craig v. Hone, 2 Edw. Ch. 564, p. 2110.
Craig v. Hukill, 37 W. Wa. 520, 16 S. E. 363, p. 765, 767.
Craig v. Kittredge, 23 N. H. 231, p. 528, 1523, 1529.
Craig v. Leiper, 2 Yerg. (Tenn.) 193, 24 Am. Dec. 479, p. 1102, 1191.
Craig v. Leslie, 3 Wheat. 563, 577, 582, 4 L. ed. 460, p. 185, 192, 605, 621, 1854, 2316, 2325, 2326, 2327.
Craig v. McKinney, 72 Ill. 305, p. 2801.
Craig v. Parkis, 40 N. Y. 181, 100 Am. Dec. 469, p. 2558.
Craig v. People, 47 Ill. 487, p. 2683.
Craig v. Phillips, L. R. Ch. Div. 722, p. 1613.
Craig v. Secrist, 54 Ind. 419, p. 1933, 1945, 1953, 1974.
Craig v. Tappin, 2 Sand. Ch. 78, p. 2383, 2387, 2388.

Craig v. Vicksburg, 31 Miss. 216, p. 1218, 1382.
Craig v. Ward, 36 Barb. 377, p. 1583.
Craig v. Watt, 8 Watts, 498, p. 2144.
Craig v. Wheeler, 29 Law J. (Ch.) 374, 376, p. 2322.
Craig v. Zimmerman, 87 Mo. 478, 56 Am. Rep. 466, p. 1347.
Craige v. Craige, 9 Phila. 545, p. 1912.
Craig School Tp. v. Scott, 124 Ind. 72, 24 N. E. 585, p. 1164.
Crain v. Barnes, 1 Md. Ch. 151, 154, p. 229, 462, 465.
Crain v. Crain, 17 Tex. 80, p. 2288.
Crain v. Kennedy, 85 Ill. 340, p. 2266, 2267.
Cram v. Cottrell, 48 Nebr. 646, 67 N. W. 452, 58 Am. St. Rep. 714, p. 1300, 2395, 2430.
Cram v. Cram, 63 N. H. 35, p. 2492.
Cram v. Green, 6 Ohio, 429, p. 570, 2285.
Cram v. Mitchell, 1 Sand. Ch. 251, p. 1365, 1753.
Crambaugh v. Kugler, 3 Ohio St. 544, p. 1801.
Cramer v. Benton, 60 Barb. 216, p. 2715.
Cramer v. Bird, L. R. 6 Eq. 143, p. 2052, 2054.
Cramer v. Hoose, 93 Ill. 503, p. 1995.
Cramer v. Lepper, 26 Ohio St. 59, 20 Am. Rep. 756, p. 2411.
Cramer v. Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594, p. 1803.
Cramer v. Watson, 73 Ala. 127, p. 2437.
Cramer v. Wilson, 202 Ill. 83, 66 N. E. 869, p. 2371.
Crampton v. Prince, 83 Ala. 246, 3 South. 519, 3 Am. St. Rep. 718, p. 2498, 2509, 2514.
Crane v. Bunnell, 10 Paige, 333, p. 220, 222, 224, 1637, 2706.
Crane v. Burntrager, 1 Ind. 165, p. 2645, 2646.
Crane v. Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519, p. 1733.
Crane v. Decamp, 21 N. J. Eq. 414, p. 662, 2380, 2768, 2775.
Crane v. Deming, 7 Conn. 387, p. 2387.
Crane v. Dwyer, 9 Mich. 350, 80 Am. Dec. 87, p. 765.
Crane v. Hearn, 26 N. J. Eq. 378, p. 2045.
Crane v. Hughes, 5 Kan. App. 100, 48 Pac. 865, p. 2402.
Crane v. McCoy, 1 Bond, 422, p. 2653, 2654, 2661.
Crane v. Moses, 13 S. C. 561, p. 2057.
Crane v. Randolph, 30 Ark. 579, p. 2753, 2756.
Crane v. Turner, 7 Hun, 357; affirmed, 67 N. Y. 437, 440, p. 1111, 1136, 1242, 1364.
Cranmer, Ex parte, 12 Ves. 445, p. 2623.
Cranmer v. McSwords, 24 W. Va. 594, p. 2223.
Cranmer's Case, 2 Salk. 508, p. 873, 874, 876.
Crapster v. Griffith, 2 Bland, 525, p. 2744.
Crary v. Goodman, 12 N. Y. 266, 268, 64 Am. Dec. 506, p. 93, 586, 1524, 2714, 2722.
Crary v. Smith, 2 N. Y. 60, 65, p. 2776.
Crary v. Williams, 5 Cow. 368, p. 882.
Crass v. Memphis & C. R. Co., 96 Ala. 447, 11 South. 480, p. 462, 463.
Crasson v. Swoveland, 22 Ind. 427, 428, 432, 434, p. 978, 1028, 1142, 1145.
Craven v. Brady, L. R. 4 Eq. 209, p. 1683.
Craven v. Craven, 2 Dev. Eq. 338, p. 825.
Craw v. Tyrell, 2 Madd. 397, p. 271.
Crawford, Estate of, 13 N. Y. 560, 21 N. E. 692, p. 908.
Crawford v. Bertholf, 1 N. J. Eq. 460, p. 615.
Crawford v. C. Aultman & Co., 139 Mo. 262, 40 S. W. 952, p. 1227.
Crawford v. Chicago etc. R. Co., 112 Ill. 314, p. 1033, 1048, 1051, 1055.
Crawford v. Crawford, 24 Nev. 410, 56 Pac. 94, p. 1747, 1781.
Crawford v. Edwards, 33 Mich. 354, p. 2405, 2411, 2412.
Crawford v. Fisher, 1 Hare, 436, 440, 441, p. 2636, 2637, 2646.
Crawford v. Hoeft, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870, p. 1371, 1730.
Crawford v. Jones, 163 Mo. 577, 63 S. W. 838, p. 1995, 2000.
Crawford v. Kirksey, 55 Ala. 282, 28 Am. Rep. 704, p. 1801.

Crawford v. Nimmons, 186 Ill. 143, 54 N. E. 209, p. 2402, 2403.
Crawford v. Osmun, 70 Mich. 461, 38 N. W. 573, p. 1567.
Crawford v. Ross, 39 Ga. 44, p. 2654.
Crawford v. Russell, 62 Barb. 92, p. 1678.
Crawford v. Scovell, 94 Pa. St. 48, p. 1725.
Crawford v. Tribble, 69 Ga. 519, p. 1754.
Crawford v. Wick, 18 Ohio St. 190, 98 Am. Dec. 103, p. 1688.
Crawford County v. Hathaway, (Nebr.) 93 N. W. 781, 796, p. 381, 395.
Crawford's Adm'r v. Smith's Ex'r, 93 Va. 623, 23 S. E. 235, p. 1648.
Crawford's Appeal, 61 Pa. St. 52, 100 Am. Dec. 609, p. 1872.
Crawford's Heirs v. Thomas, 21 Ky. Law Rep. 1100, 54 S. W. 197, p. 1940, 1955, 1980.
Crawley v. Riggs, 24 Ark. 563, p. 2519.
Crawley v. Timberlake, 2 Ired. Eq. 460, p. 2681.
Crawshay v. Thompson, 4 Man. & G. 357, 387, p. 1560.
Crawshay v. Thornton, 2 Mylne & C. 1, 19–24, p. 2635, 2640, 2643, 2645.
Cray v. Rooke, Cas. t. Talb. 153, p. 667.
Craythorne v. Swinburne, 14 Ves. 160, p. 2793, 2794.
Creager v. Walker, 7 Bush, 1, p. 2722.
Creagh v. Blood, 2 Jones & L. 509, p. 1727.
Creath's Adm'r v. Sims, 5 How. 192, p. 644, 659, 664, 2702.
Credland v. Potter, L. R. 10 Ch. 8, 12, p. 1011, 1094, 1137.
Creed v. Scruggs, 1 Heisk. 590, p. 652.
Creely v. Bay State Brick Co., 103 Mass. 514, p. 147, 149, 308, 2695.
Cregar v. Cramer, 31 N. J. Eq. 375, p. 2709.
Crellin v. Leyland, 6 Jur. 733, p. 2646.
Crem v. Handley, 94 U. S. 652, p. 2708.
Crenshaw v. Carpenter, 69 Ala. 572, 44 Am. Rep. 539, p. 823, 847.
Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454, p. 1946, 1966, 1973.
Cresap v. Cresap, (W. Va.) 46 S. E. 582, p. 1993.
Cresap v. Manor, 63 Tex. 485, p. 2503, 2512.
Crescent Min. Co. v. Wasalch Min. Co., 5 Utah, 624, 19 Pac. 198, p. 1529, 1540.
Creson's Appeal, 30 Pa. St. 437, p. 1933, 1977.
Cressman's Appeal, 42 Pa. St. 147, 82 Am. Dec. 498, p. 1872.
Cresswell v. Cresswell, L. R. 6 Eq. 69, p. 885, 1939, 1943.
Cresswell v. Dewell, 4 Giff. 460, p. 2087.
Cresswell's Adm'r v. Jones, 68 Ala. 420, p. 1058, 1909.
Cressy v. Willis, 159 Mass. 249, 34 N. E. 265, p. 2414.
Creswell v. Kennedy, 3 McAr. 78, p. 2294.
Creuze v. Hunter, 2 Cox, 242, p. 2616.
Creveling v. Fritts, 34 N. J. Eq. 134, p. 1754, 2086.
Crews v. Burcham, 1 Black, 352, p. 421.
Crew v. Crew's Adm'r, 113 Ky. 152, 67 S. W. 276, p. 1906.
Crewe v. Dicken, 4 Ves. 97, p. 2045.
Crews v. Threadgill, 35 Ala. 334, p. 2376.
Cribbins v. Markwood, 13 Gratt. 495, 67 Am. Dec. 775, p. 1665, 1743.
Crichton v. Crichton, [1896] 1 Ch. 870, p. 2017.
Cridland v. Lord De Mauley, 1 De Gex & S. 459, p. 1633.
Criel v. Lomax, 89 Ala. 420, 6 South. 741, p. 1608.
Crippen v. Baums, 15 Hun, 136, p. 2726.
Crippen v. Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187, p. 1479, 1502, 2423, 2424.
Crippen v. Hudson, 13 N. Y. 161, p. 540, 2789.
Cripps v. Jee, 4 Brown Ch. 472, p. 1506.
Crisp v. Crisp, 65 Md. 422, 5 Atl. 421, p. 1971.
Crisp v. Platel, 8 Beav. 62, p. 273, 289.
Crispell v. Dubois, 4 Barb. 393, p. 1780.
Critchfield v. Porter, 3 Ohio, 518, 522, p. 570.

Crocheron v. Jaques, 3 Edw. Ch. 207, p. 1904.
Crocker v. Beal, 1 Low. 416, p. 855.
Crocker v. Crocker, 31 N. Y. 500, p. 1194.
Crocker v. Dillon, 133 Mass. 91, p. 2067.
Crocker v. Lowenthall, 83 Ill. 579, p. 1863.
Crocker v. Manley, 164 Ill. 282, 45 N. E. 577, 56 Am. St. Rep. 196, p. 1564, 1645.
Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169, p. 1540.
Crockett v. Crockett, 1 Hare, 451, p. 1909.
Crockett v. Crockett, 2 Phill. Ch. 553, p. 1921.
Crockett v. Doriot, 85 Va. 240, 3 S. E. 128, p. 2183, 2199.
Crockett v. Maguire, 10 Mo. 34, p. 1132.
Crockford v. Alexander, 15 Ves. 138, p. 2693.
Croft v. Adam, 12 Sim. 639, p. 1890.
Croft v. Bunster, 9 Wis. 503, 508, 509, p. 1227, 1257, 1382, 2417.
Croft v. Goldsmid, 24 Beav. 312, p. 632, 753, 759.
Croft v. Graham, 2 De Gex, J. & S. 155, p. 1744.
Croft v. Lumbly, 5 El. & B. 648, p. 756.
Croft v. Peck, 64 Tex. 627, 631, p. 2600.
Crofton v. Ormsby, 2 Schoales & L. 583, p. 1025, 1047, 1198.
Crofts v. Middleton, 8 De Gex, M. & G. 192, p. 2704.
Crofut v. Wood, 3 Hun, 571, p. 1056.
Crombes v. Brookes, L. R. 12 Eq. 61, p. 2106.
Cromford etc. R'y v. Stockport etc. R'y, 1 De Gex & J. 326, p. 2677.
Cromies v. Louisville etc. Soc., 3 Bush, 365, p. 1979.
Crompton v. Sale, 2 P. Wms. 552, p. 875, 908.
Crompton v. Vesser, 19 Ala. 259, p. 1872.
Cromwell v. Clay, 31 Ky. (1 Dana) 578, 25 Am. Dec. 165, p. 1078.
Cronk v. Trumble, 66 Ill. 482, p. 2782.
Crook v. Corporation of Seaford, L. R. 6 Ch. 551, L. R. 10 Eq. 678, p. 1451, 2781.
Crook v. Findley, 60 How. Pr. 375, p. 2663.
Crook v. Rindskoff, 105 N. Y. 476, 12 N. E. 174, p. 1894.
Crooke v. Andrews, 40 N. Y. 547, p. 2754, 2756.
Crooker v. Frazier, 52 Me. 405, p. 550.
Crooks v. Crooks, 34 Ohio St. 610, p. 2139, 2142.
Crooks v. Jenkins, (Iowa) 100 N. W. 82, p. 1023.
Crooks v. Nippolt, 44 Minn. 239, 46 N. W. 349, p. 1784.
Crooks v. Rogers, 58 Me. 339, 342, p. 218, 448, 553.
Crooks v. Smith, (Iowa) 99 N. W. 112, p. 1729, 1739.
Crookston Imp. Co. v. Marshall, 57 Minn. 333, 47 Am. St. Rep. 612, 59 N. W. 294, p. 1505.
Croom v. Herring, 4 Hawks, 393, p. 2316.
Croome v. Lediard, 2 Mylne & K. 251, p. 1487, 1513, 1520.
Cropper v. Coburn, 2 Curt. 465, 472, Fed. Cas. No. 3,416, p. 498.
Cropsey v. Sweeney, 27 Barb. 310, p. 586.
Crosbie v. McDoual, 13 Ves. 148, p. 2591.
Crosby v. Berger, 11 Paige, 377, 42 Am. Dec. 117, p. 277.
Crosby v. Chase, 77 Me. 369, p. 1405.
Crosby v. Church, 3 Beav. 485, p. 2150.
Crosby v. Huston, 1 Tex. 203, 239, p. 1120, 1860, 1861.
Crosby v. Merriam, 31 Minn. 342, 17 N. W. 950, p. 2089.
Crosby v. Roub, 16 Wis. 616, 84 Am. Dec. 720, p. 1227.
Crosby v. Taylor, 15 Gray, 64, 77 Am. Dec. 352, p. 1405.
Crosier v. Acer, 7 Paige, 137, p. 1487, 1788.
Crosier v. McLaughlin, 1 Nev. 348, p. 586, 2741.
Croskey v. Chapman, 26 Ind. 333, p. 1050, 1054, 1145.
Cross v. Bean, 83 Me. 62, 21 Atl. 752, p. 613.
Cross v. De Valle, 1 Wall. 1, 1 Cliff. 282, p. 515.

Cross v. Kewnington, 9 Beav. 150, p. 2489.
Cross v. Knox, 32 Kan. 725, 5 Pac. 32, p. 2363, 2364.
Cross v. McClenahan, 54 Md. 21, p. 274.
Cross v. Morristown, 18 N. J. Eq. 305, p. 2694.
Cross v. Petree, 10 B. Mon. 413, p. 2066.
Cross v. Robinson, 21 Conn. 379, 387, p. 2346.
Cross v. Sprigg, 6 Hare, 552, p. 634, 2593.
Cross v. United States Trust Co., 131 N. Y. 330, 27 Am. St. Rep. 597, 30 N. E. 135, 15 L. R. A. 606, p. 1835.
Crossan v. Crossan, 169 Mo. 631, 70 S. W. 136, p. 1738.
Crossan v. Oliver, 37 Oreg. 514, 61 Pac. 885, p. 994.
Cross and Gault's Appeal, 97 Pa. St. 471, p. 2481.
Crossley v. Elworthy, L. R. 12 Eq. 158, p. 1803.
Crossley v. Lightowler, L. R. 2 Ch. 478, p. 2684, 2686.
Crossman v. Penrose Bdg. Co., 26 Pa. St. 69, p. 1625.
Crostwaight v. Hutchinson, 2 Bibb, 407, 5 Am. Dec. 619, p. 2602.
Crothers v. Lee, 29 Ala. 337, p. 2799.
Crouch v. Dakota, W. & M. R. R. Co., (S. Dak.) 101 N. W. 722, p. 2457.
Crouch v. Davis, 23 Gratt. 62, p. 873.
Crouch v. Miller, 141 N. Y. 495, 36 N. E. 394, p. 1224.
Crouch v. Waller, 4 De Gex & J. 302, p. 1872.
Crouse v. Holman, 19 Ind. 30, p. 2392.
Crouse v. Mitchell, 130 Mich. 347, 90 N. W. 32, 97 Am. St. Rep. 479, p. 1113.
Crouse v. Murphy, 140 Pa. St. 335, 21 Atl. 358, 23 Am. St. Rep. 232, 12 L. R. A. 58, p. 1108.
Crow v. Robinson, L. R. 3 Com. P. 264, p. 1207.
Crow v. Vance, 4 Iowa, 434, p. 2417.
Crowder v. Austin, 3 Bing. 368, p. 1693.
Crowder v. Moone, 52 Ala. 220, p. 2653.
Crowder v. Moore, 52 Ala. 220, p. 2661.
Crowder v. Shakelford, 35 Miss. 321, p. 2090.
Crowe v. Aiken, 4 Am. Law Rev. 450, p. 2689.
Crowe v. Ballard, 3 Brown Ch. 117, 119, 120, 2 Cox, 253, p. 1745, 1784.
Crowe v. Clay, 9 Ex. 604, p. 1463.
Crowe v. Crisford, 17 Beav. 507, p. 2322.
Crowe v. Del Rio, cited in Bent v. Young, 9 Sim. 180, etc., p. 256.
Crowe v. Peters, 63 Mo. 429, p. 1739, 2729.
Crowell v. Currier, 27 N. J. Eq. 152, p. 2413.
Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650, p. 2409, 2410.
Crowell v. Young, (Ind. T.) 64 S. W. 607, p. 341.
Crowley v. Crowley, 72 N. H. 241, 56 Atl. 190, p. 1994.
Crowley v. Davis, 37 Cal. 268, 269, p. 458, 2719.
Crowley v. Hicks, 72 Wis. 539, 40 N. W. 151, p. 2045.
Crowshay v. Maule, 1 Swanst. 405, 518, 523, p. 2657.
Crowther, In re, [1895] 2 Ch. 56, p. 2050.
Croxall v. Shererd, 5 Wall. 267, 268, 281, 282, p. 1829, 1848, 1883, 1886.
Croxton v. May, L. R. 9 Eq. 404, p. 2168, 2174.
Cruce v. Cruce, 81 Mo. 676, p. 2080.
Cruess v. Fessler, 39 Cal. 336, p. 1565.
Cruger v. Halliday, 11 Paige, 314, p. 2106.
Cruger v. Jones, 18 Barb. 467, p. 1897.
Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956, p. 1665, 2574.
Crumb, Ex parte, 2 Johns. Ch. 439, p. 2612.
Crumlish v. Shenandoah Valley R. R. Co., 28 W. Va. 623, p. 2127.
Crump v. Lambert, L. R. 3 Eq. 409, p. 2687.
Crump v. Redd's Adm'r, 6 Gratt. 372, p. 1926.
Crump v. U. S. Mining Co., 7 Gratt. 352, 56 Am. Dec. 116, p. 1625.
Crumpler v. Deens, 85 Ala. 149, 4 South. 826, p. 2066.
Cruse v. Axtell, 50 Ind. 49, p. 1933, 1935, 1944, 1959, 1974.
Cruse v. Barley, 3 P. Wms. 20, 22, p. 1985, 2326.

Crutcher v. Muir, 90 Ky. 142, 13 S. W. 435, 29 Am. St. Rep. 366, p. 2381.
Crutchfield v. Wason Car Works, 8 Baxt. 242, p. 2675.
Cruttwell v. Lye, 17 Ves. 335, p. 2675.
Cruwys v. Coleman, 9 Ves. 319, 322, 323, p. 1908, 1910, 1925.
Cubitt v. Smith, 10 Jur., N. S., 1123, p. 2765.
Cucullu v. Hernandez, 103 U. S. 105, p. 1108.
Cud v. Rutter, 1 P. Wms. 570, 571, p. 2761, 2762.
Cudworth v. Scott, 41 N. H. 476, p. 2586.
Cuff v. Dorland, 55 Barb. 481, p. 225, 231, 342, 2768.
Culbertson v. City of Cincinnati, 16 Ohio, 574, p. 2757.
Culbertson v. H. Witbeck Co., 92 Mich. 469, 52 N. W. 993, p. 1335, 1343.
Culbertson v. Witbeck Co., (Mich.) 127 U. S. 335, 8 Sup. Ct. Rep. 1136, 32 L. ed. 134, p. 1893.
Culbertson v. Young, 50 Mich. 190, 15 N. W. 77, p. 2034.
Culbertson's Appeal, 76 Pa. St. 145, 148, p. 1850.
Cull v. Showell, Amb. 727, p. 792.
Cullen v. Carey, 146 Mass. 50, 15 N. E. 131, p. 2379.
Cullen v. Dawson, 24 Minn. 66, p. 2642, 2643.
Culley, Ex parte, L. R. 9 Ch. Div. 307, p. 2056.
Cullingworth v. Loyd, 2 Beav. 385, 390, p. 672, 1716, 1790.
Cullison v. Bossom, 1 Md. Ch. 95, p. 270, 289.
Cull's Trusts, In re, L. R. 20 Eq. 561, p. 2059.
Cullum v. Erwin, 4 Ala. 452, p. 2394, 2396, 2397, 2417.
Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273, p. 2270.
Culp v. Price, 107 Iowa, 133, 77 N. W. 848, p. 1997.
Culpepper v. Aston, 2 Ch. Cas. 115, 221, p. 1061, 1065.
Culpepper's Case, cited in Sanders v. Deligne, Freem. Ch. 123, p. 1365.
Culver v. Guyer, 129 Ala. 602, 29 South. 779, p. 2020.
Cumberland B. & L. Ass'n v. Sparks, 111 Fed. 647, 49 C. C. A. 510, p. 1114, 1144.
Cumberland Coal Co. v. Sherman, 30 Barb. 553, 20 Md. 117, p. 1493, 1753, 1755, 1784, 1785, 2097.
Cumberland Nat. Bank v. St. Clair, 93 Me. 35, 44 Atl. 123, p. 2413.
Cumberland V. R. R. v. McLanahan, 59 Pa. St. 23, p. 1452.
Cumming v. Cumming, 3 Ga. 460, p. 2447.
Cumming v. Forrester, 2 Jacob & W. 345, p. 784.
Cumming v. Merchants' Nat. Bank, 101 U. S. 153, p. 418.
Cumming v. Williamson, 1 Sand. Ch. 17, 25, p. 2152.
Cummings v. Bramhall, 120 Mass. 552, p. 1867.
Cummings v. Coe, 10 Cal. 529, p. 2725.
Cummings v. Coleman, 7 Rich. Eq. (S. C.) 509, 62 Am. Dec. 402, p. 1391.
Cummings v. Dudley, 60 Cal. 383, 44 Am. Rep. 58, p. 743.
Cummings v. Freer, 26 Mich. 128, p. 2726.
Cummings v. Friedman, 65 Wis. 183, 26 N. W. 575, 56 Am. Rep. 628, p. 2142.
Cummings v. Jackson, 55 N. J. Eq. 805, 38 Atl. 763, p. 2410, 2411, 2475.
Cummings v. Long, 16 Iowa, 41, 85 Am. Dec. 502, p. 1100, 1121.
Cummings v. Mayor etc., 11 Paige, 596, p. 147, 149.
Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 904, p. 408, 435, 456, 500, 501.
Cummings v. Moore, 61 Miss. 184, p. 2501, 2512.
Cummings v. Morris, 25 N. Y. 625, 627, p. 158.
Cummings v. Thompson, 18 Minn. 246, p. 1625.
Cummings v. Webster, 43 Me. 192, p. 1444.
Cummings's Appeal, 67 Pa. St. 404, p. 1665.
Cummins v. Halstead, 26 Minn. 151, p. 2544.
Cummins v. Lods, 2 Fed. 661, p. 1647.

Cuneo v. Bessoni, 63 Ind. 524, p. 2624.
Cunliffe v. Cunliffe, Amb. 686, p. 1925.
Cunnack v. Edwards, [1896] 2 Ch. 679, [1895] 1 Ch. 489, p. 1936, 1963, 1987.
Cunninggim v. Peterson, 109 N. C. 33, 13 S. E. 714, p. 1097.
Cunningham v. Bell, 83 N. C. 328, p. 1993.
Cunningham v. Browning, 1 Bland, 299, 301, p. 568.
Cunningham v. City of Cleveland, 98 Fed. 657, 39 C. C. A. 211, p. 353.
Cunningham v. Davenport, 147 N. Y. 43, 49 Am. St. Rep. 641, 32 L. R. A. 373, 41 N. E. 412, p. 1867.
Cunningham v. Hawkins, 24 Cal. 403, 410, 85 Am. Dec. 73, p. 2434.
Cunningham v. Knight, 1 Barb. 399, p. 2437.
Cunningham v. Parker, 146 N. Y. 29, 48 Am. St. Rep. 765, 40 N. E. 635, p. 2492.
Cunningham v. Pattee, 99 Mass. 248, 252, p. 1033, 1047.
Cunningham v. Pell, 5 Paige, 607, p. 2093.
Cunningham v. Rome R. R., 27 Ga. 499, p. 2624.
Cunningham v. Shannon, 4 Rich. Eq. 135, p. 830.
Cunningham v. Sharp, 11 Humph. 116, 121, p. 2775.
Cunningham v. Spickler, 4 Gill, 280, p. 886.
Cunningham & Frayling, In re, [1891] 2 Ch. 567, p. 1836.
Cunningham's Estate, 137 Pa. St. 621, 21 Am. St. Rep. 901, 20 Atl. 714, p. 855.
Cunningham's Lessee v. Buckingham, 1 Ohio, 264, p. 1104.
Curd v. Brown, 148 Mo. 82, 49 S. W. 990, p. 1997.
Curd v. Curd's Adm'rs, 21 Ky. Law Rep. 919, 53 S. W. 522, p. 2005.
Curd v. Dodds, 6 Bush. 681, p. 1724,
Curd v. Field, 19 Ky. Law Rep. 2016, 45 S. W. 92, p. 1927.
Curd v. Lackland, 43 Mo. 139, p. 586.
Curdy v. Berton, 79 Cal. 420, 12 Am. St. Rep. 157, 21 Pac. 858, p. 2037.
Curlin v. Hendricks, 35 Tex. 225, p. 1666.
Curling v. Curling, 8 Dana, 38, 33 Am. Dec. 475, p. 1979.
Curling v. May, 3 Atk. 255, p. 2309.
Curling v. Townshend, 19 Ves. 628, p. 1745.
Curnen v. Mayor, etc., 79 N. Y. 511, 514, p. 1443, 1452.
Curnick v. Tucker, L. R. 17 Eq. 320, p. 1924.
Curran v. Abbott, 141 Ind. 492, 50 Am. St. Rep. 337, 40 N. E. 1091, p. 2103.
Curran v. Holyoke W. Co., 116 Mass. 90, p. 2770.
Curran v. Houston, 201 Ill. 442, 66 N. E. 228, p. 724.
Currant v. Jago, 1 Coll. C. C. 261, p. 1998.
Currence v. Ward, 43 W. Va. 367, 27 S. E. 329, p. 1900.
Currey v. Allen, 34 Cal. 254, p. 1992.
Currie v. Goold, 2 Madd. 163, p. 1483, 1503.
Currie v. Pye, 17 Ves. 462, p. 888.
Currie v. Tibb's Heirs, 5 T. B. Mon. 440, 443, p. 680.
Currier v. Concord R. R., 48 N. H. 321, p. 257, 274, 275, 277.
Currier v. Howard, 14 Gray, 511, p. 536.
Currier v. Rosebrooks, 48 Vt. 34, 38, p. 222.
Curriers' Co. v. Corbett, 4 De Gex, J. & S. 764, p. 2698.
Currin v. Spraull, 10 Gratt. 145, p. 2741.
Curry v. Curry, 114 Pa. St. 367, p. 559.
Curry v. Glass, 25 N. J. Eq. 108, p. 2791.
Curry v. Larer, 7 Pa. St. 470, 49 Am. Dec. 486, p. 732, 734, 746.
Curry v. Pile, 2 Brown Ch. 225, p. 890.
Curry v. Powers, 70 N. Y. 212, 219, 26 Am. Rep. 577, p. 1872.
Curry v. Williams, (Tenn. Ch. App.) 38 S. W. 278, p. 1017, 1018, 1030.
Curson v. Belworthy, 3 H. L. Cas. 742, p. 1664, 1732.
Curteis v. Wormald, L. R. 10 Ch. Div. 172, p. 2328.
Curteis's Trusts, In re, L. R. 14 Eq. 217, p. 1997.
Curtenius v. Grand Rapids etc. R. R., 37 Mich. 583, p. 2678.
Curtess v. Smalridge, 1 Eq. Cas. Abr. 377, pl. 1, p. 307.

Curtice v. Crawford Co. Bank, 110 Fed. 830, p. 1163.
Curtice v. Crawford County Bank, 118 Fed. 390, p. 1156.
Curtis, In re, 64 Conn. 501, 42 Am. St. Rep. 200, 30 Atl. 769, p. 1549.
Curtis v. Auber, 1 Jacob & W. 506, 512, 526, p. 2473, 2581, 2582.
Curtis v. Blair, 9 Miss. 309, 328, 59 Am. Dec. 257, p. 985.
Curtis v. Blair, 26 Miss. 309, 327, p. 148, 215, 974, 977, 990, 991, 994.
Curtis v. Bryan, 2 Daly, 312, 317, p. 1695, 2691.
Curtis v. Brewer, 17 Pick. 513, p. 741.
Curtis v. City of East Saginaw, 35 Mich. 508, p. 2755, 2757.
Curtis v. Clarke, 113 Mich. 458, 71 N. W. 845, p. 2501.
Curtis v. Crossley, 59 N. J. Eq. 358, 45 Atl. 905, p. 1220, 2045.
Curtis v. Curtis, 2 Brown Ch. 620, 631, 632, p. 2734, 2735.
Curtis v. Engel, 2 Sand. Ch. 287, 289, p. 2152.
Curtis v. Gokey, 68 N. Y. 300, p. 1690.
Curtis v. Leavitt, 15 N. Y. 9, 11, 97, 179, p. 671, 1325, 1719, 1721.
Curtis v. Lunn, 6 Munf. 42, p. 1346.
Curtis v. Lyman, 24 Vt. 338, 58 Am. Rep. 174, p. 1118.
Curtis v. Marquis of Buckingham, 3 Ves. & B. 168, p. 2670.
Curtis v. Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506, p. 1303, 1406, 2418.
Curtis v. Mundy, 3 Met. 405, 407, p. 994, 998, 1101, 1146.
Curtis v. Parks, 55 Cal. 106, p. 2794.
Curtis v. Portland Sav. Bk., 77 Me. 151, 52 Am. Rep. 750, p. 1866.
Curtis v. Rippon, 5 Madd. 434, p. 1925, 1929.
Curtis v. Root, 20 Ill. 53, p. 1281, 1282, 1283.
Curtis v. Sutter, 15 Cal. 259, 263, 264, p. 364, 2748, 2751, 2752.
Curtis v. Tyler, 9 Paige, 432, 435, p. 2405.
Curtis v. Vanbergh, 161 N. Y. 47, 55 N. E. 398, p. 739, 740.
Cushing v. Ayer, 25 Me. 383, p. 550, 2447.
Cushing v. Blake, 30 N. J. Eq. 689, p. 1849, 1882.
Cushing v. Drew, 97 Mass. 445, p. 727, 729, 737.
Cushing v. Hurd, 21 Mass. (4 Pick.) 253, 16 Am. Dec. 335, p. 1274.
Cushman v. Goodwin, 95 Me. 353, 50 Atl. 50, p. 2022.
Cushman v. Thayer Mfg. Co., 76 N. Y. 365, 371, 32 Am. Rep. 315, p. 234, 1219, 2784.
Cushney v. Henry, 4 Paige, 345, p. 1904.
Custance v. Bradshaw, 4 Hare, 315, p. 2318.
Custar v. Titusville etc. Co., 63 Pa. St. 381, p. 1625.
Cuthbert v. Chauvet, 60 Hun, 577, 14 N. Y. Supp. 385, 20 Civ. Proc. Rep. 391, p. 388, 452.
Cuthbert v. Cuthbert, 3 Yeates, 486, p. 2213.
Cuthbert v. Wolfe, 19 Ala. 373, p. 2144.
Cutler, In re, 14 Beav. 220, p. 2173.
Cutler v. Am. Ex. Nat. Bk., 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328, p. 1915.
Cutler v. Ammon, 65 Iowa, 281, 21 N. W. 604, p. 1270, 1273, 2500, 2517, 2518.
Cutler v. James, 64 Wis. 173, 54 Am. Rep. 603, 24 N. W. 874, p. 1339.
Cutler v. Tuttle, 19 N. J. Eq. 549, 558, 562, p. 1702, 1712, 1993.
Cutter v. Butler, 25 N. H. 343, 57 Am. Dec. 330, p. 2154.
Cutter v. Hardy, 48 Cal. 568, p. 1896,
Cutter v. Pool, 54 How. Pr. 311, p. 293.
Cutting v. Dana, 25 N. J. Eq. 265, p. 2601, 2763.
Cutting v. Gilbert, 5 Blatch. 259, 261–263, p. 434, 439, 440.
Cutting v. Marlor, 78 N. Y. 454, p. 1626.
Cutts v. Guild, 57 N. Y. 229, 232, 233, p. 1239, 1241.
Cutts v. Perkins, 12 Mass. 206, p. 2561.
Cuyler v. Bogert, 3 Paige, 186, p. 270, 283.
Cuyler v. Bradt, 2 Caines Cas. 326, p. 680.
Cuyler v. McCartney, 40 N. Y. 221, p. 1858.
Cythe v. La Fontain, 51 Barb. 186, p. 2722.

D.

Dabbs v. Nugent, 11 Jur., N. S., 943, p. 2799.
Dabney v. Bailey, 42 Ga. 521, p. 848, 849.
Dabney v. Green, 4 Hen. & M. 101, 4 Am. Dec. 503, p. 2437.
Da Costa v. Jones, Cowp. 729, p. 1676.
Dacoway v. Galt, 20 Ark. 190, p. 1099.
Dade v. Madison, 5 Leigh, 401, p. 1676.
D'Adhemar v. Bertrand, 35 Beav. 19, p. 2109.
Dagenham Dock Co., In re, L. R. 8 Ch. 1022, p. 717, 749.
Dagger v. Taylor, 60 Ala. 504, p. 2516.
Daggett v. Ayer, 65 N. H. 82, 18 Atl. 169, p. 1509.
Daggett v. Rankin, 31 Cal. 321, 326, p. 191, 622, 2470, 2471, 2475.
Daggs v. Wilson, (Ariz.) 59 Pac. 150, p. 1065.
Dahlgreen v. Duncan, 26 La. Ann. 363, p. 2750.
Dailey v. Abbott, 40 Ark. 275, p. 2431.
Dailey v. City of New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69, p. 1942, 1958, 1961, 1973.
Dailey v. Lichfield, 10 Mich. 29, p. 749.
Dails v. Lloyd, 12 Q. B. 531, p. 1477, 1511.
Daily's Adm'r v. Reid, 74 Ala. 415, p. 2498, 2520.
Dairiese v. Cooke, 91 U. S. 580, p. 2678.
Daisley v. Dun, 98 Fed. 497, p. 274.
Dakin v. Savage, 172 Mass. 23, 51 N. E. 186, p. 1829.
Dakin v. Williams, 17 Wend. 447, 22 Wend. 201, p. 727, 733, 747.
Daking v. Whimper, 26 Beav. 568, p. 1805.
Dalbiac v. Dalbiac, 16 Ves. 116, 124, 126, p. 1679, 2147.
Dale v. Hamilton, 2 Phill. Ch. 266, p. 1903.
Dale v. Kimpton, 46 Vt. 76, p. 1212, 1222.
Dale v. Robinson, 51 Vt. 20, 31 Am. Rep. 669, p. 2152, 2198.
Dale v. Roosevelt, 5 Johns. 174, p. 310, 2707.
Dalgleish's Settlement, In re, 4 Ch. Div. 143, p. 2109.
Dallaghen v. Fitch, 42 Wis. 679, p. 746.
Dallas, In re, [1904] 2 Ch. 385, p. 1211, 1214.
Dallas v. Heard, 32 Ga. 604, p. 2153.
Dally v. Wonham, 33 Beav. 154, p. 1763.
Dalrymple v. Security L. & T. Co., 9 N. D. 306, 83 N. W. 245, p. 1839.
Dalston v. Coatsworth, 1 P. Wms. 731, p. 1465, 1654.
Dalton, In re, 1 De Gex, M. & G. 265, p. 2619.
Dalton v. Dalton, 14 Nev. 419, p. 1738, 1779.
Daly v. Kelly, 4 Dow. 417, 440, p. 2671.
Daly v. New York & G. L. R'y Co., 55 N. J. Eq. 595, 38 Atl. 202, p. 1135, 1283, 2418.
Daly's Estate, In re, 208 Pa. St. 58, 57 Atl. 180, p. 1944, 1956, 1977.
Dalzell v. Crawford, 1 Pars. Cas. 37, 41, p. 560.
Dambman v. Butterfield, 4 Thomp. & C. 542, p. 292.
Dambmann v. Schulting, 75 N. Y. 55, 61, 63, p. 1509, 1559, 1609, 1610, 1611.
Dameron v. Eskridge, 104 N. C. 624, 10 S. E. 700, p. 2418.
Dameron v. Jamison, 4 Mo. App. 299, p. 1609, 1616, 2194.
Damm v. Damm, 109 Mich. 619, 67 N. W. 984, 63 Am. St. Rep. 601, p. 2442.
Dana v. Haskell, 41 Me. 25, p. 2790.
Dana v. National Bank of the Republic, 132 Mass. 156, p. 1176.
Dana v. Newhall, 13 Mass. 498, p. 1346.
Danaher v. Prentiss, 22 Wis. 311, p. 307, 571, 2703.
Danahy v. Noonan, 176 Mass. 467, 57 N. E. 679, p. 1850.
Danbury v. Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244, p. 268.
Dance v. Dance, 56 Md. 433, p. 2500, 2511, 2516.
Dance v. Goldingham, L. R. 8 Ch. 902, p. 2048, 2056, 2065, 2670.
Dancy v. Duncan, 96 N. C. 111, 1 S. E. 455, p. 1087.
Dane v. Daniel, 23 Wash. 379, 63 Pac. 268, p. 2361.

Dane v. Mallory, 16 Barb. 46, p. 2461.
Dane v. Young, 61 Me. 160, p. 556.
Danforth v. City of Oshkosh, 119 Wis. 262, 97 N. W. 258, p. 1969, 1976.
Danforth v. Dart, 4 Duer, 101, p. 981.
Danforth v. Laney, 28 Ala. 274, p. 2781.
Danforth v. Philadelphia etc. R'y, 30 N. J. Eq. 12, p. 2774.
Danforth v. Roberts, 20 Me. 307, p. 548.
Danforth's Adm'r v. Paxton, 1 Wash. St. 6, 23 Pac. 801, p. 235.
Daniel v. Coker, 70 Ala. 260, p. 2427.
Daniel v. Felt, 100 Fed. 727, p. 495.
Daniel v. Frazer, 40 Miss. 507, p. 2767.
Daniel v. Hester, 29 S. C. 147, 7 S. E. 65, p. 1022, 1024.
Daniel v. Hill, 52 Ala. 430, p. 1774.
Daniel v. Hodges, 87 N. C. 95, p. 1076.
Daniel v. Hollingshead, 16 Ga. 190, p. 2736.
Daniel v. Leitch, 13 Gratt. 195, p. 2736.
Daniel v. Mitchell, 1 Story, 172, 173, p. 290, 1559, 1582, 1588.
Daniel v. Smith, 64 Cal. 346, 30 Pac. 575, p. 2242.
Daniel v. Stewart, 55 Ala. 278, p. 2753, 2754, 2756.
Daniel v. Warren, 2 Younge & C. Ch. 290, p. 2322.
Daniell v. Sinclair, 6 App. Cas. (Priv. Coun.) 181, p. 1500, 1503.
Daniels v. Benedict, 50 Fed. 347, p. 163, 206, 671, 672, 1716, 1718.
Daniels v. Citizens' Ins. Co., 10 Bliss, 120, 5 Fed. 425, 429, p. 496.
Daniels v. Davison, 16 Ves. 249, p. 1198, 1293.
Daniels v. Davison, 17 Ves. 433, p. 1001, 1019, 1025, 1047.
Daniels v. Densmore, 32 Nebr. 40, 48 N. W. 906, p. 2418.
Daniels v. Johnson, 129 Cal. 415, 61 Pac. 1107, 79 Am. St. Rep. 123, p. 2413.
Daniels v. Mason, 90 Tex. 240, 59 Am. St. Rep. 815, 38 S. W. 161, reversing 36 S. W. 1113, p. 1372.
Danielson v. Gude, 11 Colo. 87, 17 Pac. 283, p. 338, 354.
Daniel's Settlement, In re, L. R. 1 Ch. Div. 375, p. 1543.
Danklessen v. Braynard, 3 Daly, 183, p. 2562.
Dann v. Spurrier, 7 Ves. 231, p. 1014.
Danner v. Crew, (Ala.) 34 South. 822, p. 1279.
Dannmeyer v. Coleman, 11 Fed. 97, p. 2121, 2125.
Dansell v. King, 7 Leigh, (Va.) 393, 401, p. 1390.
Dansen v. Warwick, 33 N. J. Eq. 133, p. 1906.
Danton v. Nanny, 8 Barb. 618, p. 2736.
Danzeisen's Appeal, 73 Pa. St. 65, p. 2369, 2376, 2380.
Darbey v. Whitaker, 4 Drew. 134, 139, 140, p. 2773.
Darby v. Darby, 3 Drew. 495, 503, p. 2318.
Darcin v. Wells, 61 How. Pr. 259, p. 2657.
D'Arcy v. Blake, 2 Schoales & L. 387, p. 1849, 2734.
Darcy v. Kelley, 153 Mass. 433, 26 N. E. 1110, p. 1979.
D'Arcy v. Mooshkin, 183 Mass. 382, 67 N. E. 339, p. 1274.
Darden v. Cowper, 7 Johns. 210, 75 Am. Dec. 461, p. 2800.
Dargin v. Beeker, 10 Iowa, 571, p. 1054, 1100.
Dargin v. Hewlitt, 115 Ala. 510, 22 South. 128, p. 214, 217.
Darke v. Martyn, 1 Beav. 525, p. 2060, 2071.
Darke v. Williamson, 25 Beav. 622, p. 2058.
Darkin v. Darkin, 17 Beav. 578, p. 2148.
Darland v. Taylor, 52 Iowa, 503, 35 Am. Rep. 285, 3 N. W. 510, p. 2232, 2238, 2247.
Darley v. Darley, 3 Atk. 399, p. 2139, 2143.
Darling, In re, [1896] 1 Ch. 50, p. 1940, 1950.
Darling v. Baltimore, 51 Md. 1, p. 1470.
Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726, p. 1781.
Darlington's Estate, 147 Pa. St. 624, 30 Am. St. Rep. 776, 23 Atl. 1046, p. 1762.
Darmitzer v. German Savings & Loan Soc., 23 Wash. 132, 62 Pac. 862, 891, p. 1774.

Darnell v. Rowland, 30 Ind. 342, p. 1728.
Darragh v. H. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609, p. 506.
D'Arras v. Keyser, 26 Pa. St. 249, p. 2314.
Darrenberger v. Haupt, 10 Nev. 43, p. 2200.
Darrow v. Cornell, 12 App. Div. 604, 42 N. Y. Supp. 1081, p. 748.
Darst v. Gale, 83 Ill. 136, p. 1721.
Darst v. Phillips, 41 Ohio St. 514, p. 462, 466.
Dart v. Barbour, 32 Mich. 267, 271, p. 210, 2726.
Dart v. Hercules, 57 Ill. 446, p. 2482.
Dart v. Orme, 41 Ga. 376, p. 416, 2750.
Dartmouth v. Holdsworth, 10 Sim. 476, p. 278.
Dartnall, In re, [1895] 1 Ch. 474, p. 2053.
Darwin v. Smith, 35 Vt. 69, p. 1703.
Dascomb v. Marston, 80 Me. 223, 13 Atl. 888, p. 1943, 1946, 1960, 1974.
Dashiell v. Att'y-Gen., 6 Har. & J. 1, p. 1971, 1986.
Dashner v. Buffington, 170 Mo. 260, 70 S. W. 699, p. 1639.
Dashwood v. Jermyn, L. R. 12 Ch. Div. 776, 781, p. 2591, 2592.
Dashwood v. Lord Bulkeley, 10 Ves. 229, 230, 245, p. 1681, 1686.
Dashwood v. Peyton, 18 Ves. 27, 41, 49, p. 782, 785, 786, 792, 794, 857.
Daubenspeck v. Grear, 18 Cal. 443, p. 2693.
Daubenspeck v. Platt, 22 Cal. 330, 335, p. 1026, 1028, 2434.
Daubigny v. Davallon, 2 Anstr. 467, 468, p. 256.
Daughaday v. Paine, 6 Minn. 443, p. 2501.
Daugherty v. Daugherty, 69 Iowa, 679, 29 N. W. 778, p. 821, 852.
Daugherty v. Yates, 13 Tex. Civ. App. 646, 35 S. W. 937, p. 1103, 1115.
Daun v. City of London Brewing Co., L. R. 8 Eq. 155, p. 2382.
Davenport v. Coltman, 12 Sim. 588, 610, p. 1987.
Davenport v. Dows, 18 Wall. 626, 21 L. ed. 938, p. 2125.
Davenport v. Gentry's Adm'r, 9 B. Mon. 427, 429, p. 2553.
Davenport v. McChesney, 86 N. Y. 242, p. 2461, 2462.
Davenport v. Moore, 74 Fed. 945, 952, p. 498.
Davenport v. Murray, 68 Mo. 198, p. 2501, 2509, 2511, 2514.
Davenport v. Receivers, 2 Woods, 519, p. 2662.
Davenport v. Turpin, 41 Cal. 100, p. 2427.
Davenport v. Turpin, 43 Cal. 270, 597, 602, p. 1438, 1444.
Davenport Plow Co. v. Lamp, 80 Iowa, 722, 20 Am. St. Rep. 442, 45 N. W. 1049, p. 2023.
Daverson, In re, [1893] 3 Ch. 421, p. 2331.
Davey v. Littlejohn, 2 Ired. Eq. 495, p. 1275.
David v. Park, 103 Mass. 501, p. 1590, 1594.
David v. Tileston, 6 How. 114, p. 2708.
David Payne & Co., In re, Ltd., [1904] 2 Ch. 608, p. 1160.
Davidson, In re, L. R. 11 Ch. Div. 341, p. 2333.
Davidson v. Barclay, 63 Pa. St. 406, p. 2482.
Davidson v. Calkins, 92 Fed. 230, p. 503, 504.
Davidson v. Carter, 55 Iowa, 117, 7 N. W. 466, p. 672, 1718.
Davidson v. Cowan, 1 Dev. Eq. 474, p. 1275.
Davidson v. Cox, 11 Nebr. 250, 9 N. W. 95, p. 2360.
Davidson v. Foley, 2 Brown Ch. 203, p. 1988.
Davidson v. Isham, 9 N. J. Eq. 186, p. 2684.
Davidson v. Kemper, 79 Ky. 5, p. 1844.
Davidson v. Kempton, L. R. 18 Ch. Div. 213, p. 2054.
Davidson v. Little, 22 Pa. St. 245, 247, 252, 60 Am. Dec. 81, p. 1665, 1668, 1669, 1742.
Davidson v. Seegar, 15 Fla. 671, p. 2757.
Davidson v. Thompson, 22 N. J. Eq. 83, p. 2743.
Davidson v. Young, 38 Ill. 145, p. 1562.

Davidson Lumber Co. v. Jones, (Tenn. Ch. App.) 62 S. W. 386, p. 337.
David Stevenson Brewing Co. v. Iba, 155 N. Y. 224, 49 N. E. 677, p. 1255, 1304.
Davies v. Ashford, 15 Sim. 42, p. 2333.
Davies v. Austen, 1 Ves. 247, p. 1255.
Davies v. Bush, 1 Younge, 341, p. 2227.
Davies v. Cooper, 6 Mylne & C. 270, p. 1611.
Davies v. Davies, 36 Ch. Div. 359, p. 1687.
Davies v. Davies, 4 Giff. 417, p. 1778.
Davies v. Davies, 6 Jur., N. S., 1320, p. 1451.
Davies v. Fitton, 2 Dru. & War. 225, 233, p. 1521.
Davies v. Fowler, L. R. 16 Eq. 308, p. 2208, 2210.
Davies v. Goodhew, 6 Sim. 585, p. 2310.
Davies v. Hodgson, 25 Beav. 177, 186, p. 2067.
Davies v. Jenkins, L. R. 6 Ch. Div. 728, p. 2185.
Davies v. London etc. Ins. Co., L. R. 8 Ch. Div. 469, 477, p. 667, 672, 674, 1613, 1713.
Davies v. Morgan, 1 Beav. 405, p. 2209.
Davies v. Otty, 35 Beav. 208, p. 1659, 1715, 1718, 1901.
Davies v. Penton, 6 Barn. & C. 216, 223, p. 743.
Davies v. Sear, L. R. 7 Eq. 427, 432, 433, p. 987, 1014, 1199, 1451.
Davies v. Thomas, 2 Younge & C. 234, p. 1001, 1050.
Davies v. Topp, 1 Brown Ch. 524, 526, 527, p. 2221, 2222.
Davies v. Tredwell, L. R. 18 Ch. Div. 354, p. 2141.
Davies's Trusts, In re, L. R. 13 Eq. 163, p. 2223.
Davis, In re, [1902] 1 Ch. 876, p. 1963, 1965.
Davis, In re, [1902] 2 Ch. 314, p. 2089.
Davis, In re, 112 Fed. 129, p. 1986.
Davis v. Alvord, 94 U. S. 545, 24 L. ed. 283, p. 2544.
Davis v. Am. Soc. etc., 6 Daly, 81, 75 N. Y. 362, p. 2667, 2680.
Davis v. Anderson, 1 Ga. 176, p. 2358.
Davis v. Bagley, 40 Ga. 181, 2 Am. Rep. 570, p. 1483.
Davis v. Bank of United States, 2 Hill, 451, p. 1177.
Davis v. Barrett, 14 Beav. 542, p. 1402, 1403, 1405.
Davis v. Baugh, 59 Cal. 568, p. 1989, 1992.
Davis v. Bechstein, 69 N. Y. 440, 25 Am. Rep. 218, p. 1238, 1241.
Davis v. Bemis, 40 N. Y. 453, p. 1625.
Davis v. Boone Co. Deposit Bank, (Ky.) 80 S. W. 161, p. 1175.
Davis v. Cain's Ex'r, 1 Ired. Eq. 304, p. 2144, 2216.
Davis v. Childers, 45 S. C. 133, 55 Am. St. Rep. 757, 22 S. E. 784, p. 2462, 2474.
Davis v. Christian, 15 Gratt. 11, p. 2104.
Davis v. Clabaugh, 30 Md. 508, p. 2272.
Davis v. Clay, 2 Mo. 161, p. 2376.
Davis v. Coburn, 128 Mass. 377, p. 1905, 2082.
Davis v. Chicago Dock Co., 129 Ill. 180, 21 N. E. 830, p. 1668, 1672.
Davis v. City of Boston, 129 Mass. 377, p. 2756.
Davis v. Crandall, 101 N. Y. 311, 4 N. E. 721, p. 2209.
Davis v. Davis, 1 Del. Ch. 256, p. 2799.
Davis v. Davis, 72 Fed. 81, 84, 30 U. S. App. 723, 18 C. C. A. 438, p. 495.
Davis v. Davis, 89 Fed. 532, 537, p. 508.
Davis v. Davis, 43 Ind. 561, p. 2139.
Davis v. Davis, 5 Mo. 183, p. 2736.
Davis v. Davis, 11 Ohio St. 386, p. 825.
Davis v. Demming, 12 W. Va. 246, p. 1705, 2376, 2377.
Davis v. Duke of Marlborough, 1 Swanst. 79, p. 2554.
Davis v. Duke of Marlborough, 2 Swanst. 108, 174, p. 1742, 1745, 2658.
Davis v. Dunne, 46 Iowa, 684, p. 1738, 1778.
Davis v. Earl of Strathmore, 16 Ves. 419, 428, p. 1137, 1138, 1139, 1357.
Davis v. Ely, 104 N. C. 16, 10 S. E. 138, 17 Am. St. Rep. 667, 5 L. R. A. 810, p. 1522, 1532.
Davis v. Tasig, 128 Ind. 271, 27 N. E. 726, p. 390, 452.

Davis v. First Nat. Bank, 5 Nebr. 242, 25 Am. Rep. 484, p. 2195.
Davis v. Fox, 59 Mo. 125, p. 2729.
Davis v. Frankenlust Tp., 118 Mich. 494, 76 N. W. 1045, p. 382, 450.
Davis v. Gemmell, 70 Md. 356, 17 Atl. 259, p. 2127.
Davis v. Gray, 16 Wall. 203, p. 2662.
Davis v. Hamilton, 50 Miss. 213, p. 192, 2522.
Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541, p. 1764, 2026, 2032.
Davis v. Handy, 37 N. H. 65, p. 1440.
Davis v. Hendrie, 1 Mont. Ter. 499, p. 735.
Davis v. Heppert, 96 Va. 775, 32 S. E. 467, p. 1839.
Davis v. Hone, 2 Schoales & L. 341, 347, p. 2600, 2766.
Davis v. Howard, 15 Serg. & R. 165, 171, 16 Am. Dec. 537, p. 2764.
Davis v. Hulett, 58 Vt. 90, 4 Atl. 139, p. 2405, 2414.
Davis v. Inscoe, 84 N. C. 396, p. 1097, 1147.
Davis v. Jackson, 22 Ind. 233, p. 1565.
Davis v. Jennings, 3 Tenn. Ch. 241, p. 2198.
Davis v. Jernigan, 71 Ark. 494, 76 S. W. 554, p. 1991.
Davis v. Kuck, (Minn.) 101 N. W. 165, p. 2240.
Davis v. Lamb, 30 Mo. 441, p. 2501.
Davis v. Lambertson, 56 Barb. 480, 483, 485, p. 231, 355, 2687, 2695.
Davis v. Langsdale, 41 Ind. 399, p. 2392.
Davis v. Leo, 6 Ves. 784, 787, p. 2682.
Davis v. Luster, 64 Mo. 43, p. 1735, 2729.
Davis v. Lutkeiweiz, 72 Iowa, 254, 33 N. W. 670, p. 1330.
Davis v. Marx, 55 Miss. 376, p. 2586.
Davis v. Monroe, 187 Pa. St. 212, 41 Atl. 44, 67 Am. St. Rep. 581, p. 1108, 1131.
Davis v. Morier, 2 Coll. C. C. 303, p. 1495, 1499, 1503, 1540.
Davis v. Newcomb, 72 Ind. 413, p. 1328.
Davis v. Newton, 6 Met. 544, p. 646.
Davis v. Ney, 125 Mass. 590, 28 Am. Rep. 272, p. 1872, 1878.
Davis v. Ownsby, 14 Mo. 170, 55 Am. Dec. 105, p. 1101, 1279.
Davis v. Parker, 14 Allen, 94, p. 155, 2633, 2761.
Davis v. Petway, 3 Head, 667, 75 Am. Dec. 789, p. 1694.
Davis v. Pierce, 10 Minn. 376, p. 1403.
Davis v. Piggott, 57 N. J. Eq. 619, 39 Atl. 698, p. 1304.
Davis v. Pope, 12 Gray, 193, 197, p. 536.
Davis v. Reaves, 2 Lea, 649, p. 2657.
Davis v. Reed, 14 Md. 152, p. 2694.
Davis v. Rock Creek etc. Co., 55 Cal. 359, 36 Am. Rep. 40, p. 2032, 2080, 2085, 2114.
Davis v. Settle, 43 W. Va. 17, 26 S. E. 557, p. 2040.
Davis v. Shepherd, L. R. 1 Ch. 410, p. 1539.
Davis v. Sitting, 65 Tex. 497, p. 1711.
Davis v. Smith, 88 Ala. 596, 7 South. 159, p. 2498, 2514.
Davis v. Smith, 75 Mo. 219, p. 2195.
Davis v. Smith, 68 N. H. 253, 44 Atl. 344, 73 Am. St. Rep. 584, p. 1703.
Davis v. Smith, 43 Vt. 269, p. 1771.
Davis v. Stambaugh, 163 Ill. 557, 45 N. E. 170, p. 1903, 2040.
Davis v. Steeps, 87 Wis. 472, 58 N. W. 769, 41 Am. St. Rep. 51, L. R. A. 818, p. 1098, 1160.
Davis v. Stevens, 3 Iowa, 158, p. 2779.
Davis v. Strange's Executor, 86 Va. 808, 11 S. E. 406, 8 L. R. A. 261, p. 1737, 1751, 1778.
Davis v. Strathmore, 16 Ves. 419, p. 1089.
Davis v. Symonds, 1 Cox, 402, p. 680, 1515.
Davis v. Teays, 3 Gratt. 283, p. 2337.
Davis v. Thomas, 1 Russ. & M. 506, p. 724, 2372.
Davis v. Turvey, 32 Beav. 554, p. 2742.
Davis v. Van Buren, 72 N. Y. 587, 588, 589, p. 2608.
Davis v. Walker, 51 Miss. 659, p. 2796.
Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29, p. 1096, 1124, 1334, 1336.
Davis v. Wattier, 1 Sim. & St. 463, p. 1471.
Davis v. West, 12 Ves. 475, p. 758.
Davis v. Wetherell, 13 Allen, 60, 90 Am. Dec. 177, p. 1412, 2437.

Davis v. Whitaker, 114 N. C. 279, 19 S. E. 699, 41 Am. St. Rep. 793, p. 1097, 1118, 1119.
Davis v. Whittaker, 38 Ark. 435, p. 903.
Davis v. Williams, 130 Ala. 530, 537, 538, 89 Am. St. Rep. 55, 60, 61, 30 South. 488, 54 L. R. A. 749, p. 611, 612, 616, 705.
Davison v. Davison, 13 N. J. Eq. 246, p. 2782.
Davison v. Jersey Co. Ass'n, 6 Hun, 470, 71 N. Y. 333, p. 2778, 2779.
Davison v. Perrine, 22 N. J. Eq. 87, p. 649.
Davis's Appeal, 183 Mass. 499, 67 N. E. 604, p. 2071.
Davis's Appeal, 83 Pa. St. 348, p. 2325, 2494.
Davis' Appeal, 100 Pa. St. 201, p. 2100.
Davis's Estate, In re, 36 Iowa, 24, p. 852.
Davis's Trusts, In re, L. R. 12 Eq. 214, p. 2109.
Davoue v. Fanning, 2 Johns. Ch. 251, 252, 253, 258, 260, p. 1754, 1755, 1761, 2028, 2083, 2086.
Davys v. Boucher, 3 Younge & C. 397, p. 891, 892, 903, 908.
Dawes v. Tredwell, L. R. 18 Ch. Div. 354, p. 2146.
Dawkins v. Gill, 10 Ala. 206, p. 1701.
Dawkins v. Patterson, 87 N. C. 384, p. 1756.
Dawkins v. Penrhyn, 4 App. Cas. 51, p. 2054.
Dawsett v. Meakin, [1901] 1 Ch. 398, p. 2215.
Dawson v. Bank of Whitehaven, L. R. 4 Ch. Div. 639, p. 2735.
Dawson v. Clark, 18 Ves. 247, 254, p. 1986.
Dawson v. Danbury Bank, 15 Mich. 489, p. 1027, 1031.
Dawson v. Dawson, 1 Dev. Eq. 93, 400, 18 Am. Dec. 573, p. 1872.
Dawson v. Dawson, L. R. 4 Eq. 504, p. 877, 909, 917, 920, 921.
Dawson v. Dawson, Rice Eq. 243, p. 1105.
Dawson v. Drake, 30 N. J. Eq. 601, p. 2428.
Dawson v. Girard L. Ins. Co., 27 Minn. 411, p. 2501, 2509, 2518.
Dawson v. Hayes, 1 Met. (Ky.) 461, p. 852.
Dawson v. Jay, 3 De Gex, M. & G. 764, p. 2615.
Dawson v. McCarty, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841, p. 1267, 1271, 1273.
Dawson v. Massey, 1 Ball & B. 219, 226, p. 1773, 1774.
Dawson v. Merch. etc. Bank, 30 Ga. 664, p. 2709.
Dawson v. Peter, 119 Mich. 274, 77 N. W. 997, p. 2359.
Dawson v. Prince, 2 De Gex & J. 41, p. 1376.
Dawson v. Small, L. R. 18 Eq. 114, p. 1935, 1941.
Day v. Brenton, 102 Iowa, 482, 71 N. W. 538, 63 Am. St. Rep. 460, p. 1198.
Day v. Brownrigg, L. R. 10 Ch. Div. 294, p. 2690, 2696.
Day v. Clark, 25 Vt. 397, 402, p. 1136, 1358.
Day v. Cooley, 118 Mass. 524, p. 1803, 2041.
Day v. Cummings, 19 Vt. 495, 496, p. 229, 307, 465, 2702.
Day v. Davey, (Mich.) 93 N. W. 256, p. 1763.
Day v. Day, 84 N. C. 408, p. 2726.
Day v. Exchange Bank, (Ky.) 78 S. W. 132, p. 1166.
Day v. Hale, 22 Gratt. 146, p. 2529, 2534.
Day v. Merry, 16 Ves. 375, p. 2682.
Day v. Newman, 2 Cox, 77, 10 Ves. 300, p. 1665.
Day v. Patterson, 18 Ind. 114, p. 2447.
Day v. Railroad Co., 41 Ohio St. 392, p. 1024, 1039.
Day v. Roth, 18 N. Y. 448, p. 1869, 2004.
Day v. Swift, 48 Me. 369, p. 552.
Day v. Zimmerman, 68 Pa. St. 72, 8 Am. Rep. 157, p. 1079.
Day Bros. Lumber Co. v. Ison, 23 Ky. L. Rep. 80, 62 S. W. 516, p. 731.
Days v. Boucher, 3 Younge & C. 411, p. 902.
Deacon v. Colquhoun, 2 Drew. 21, p. 2000.
Deacon v. Smith, 3 Atk. 323, p. 700, 949, 950, 952, 953, 954.

Deaderick v. Mitchell, 6 Baxt. 35, p. 2670, 2704.
Deaderick v. Watkins, 8 Humph. 520, p. 1668.
Deaderick v. Wilson, 8 Baxt. 108, p. 2114, 2135.
Dean, In re, 86 N. Y. 398, p. 2130.
Dean v. Anderson, 34 N. J. Eq. 496, p. 1392, 2761.
Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205, p. 651.
Dean v. Dean, 6 Conn. 285, p. 1898, 1900, 1903, 2503.
Dean v. Dean, 9 N. J. Eq. 425, p. 1904.
Dean v. Dean, 42 Oreg. 290, 70 Pac. 1039, p. 1729, 1739.
Dean v. Dean's Estate, 43 Vt. 337, p. 2234, 2236, 2237, 2247.
Dean v. Emerson, 102 Mass. 480, p. 1690.
Dean v. Equitable F. Ins. Co., 4 Cliff. 575, p. 2726.
Dean v. Fuller, 40 Pa. St. 474, p. 1728.
Dean v. Gibson, (Tex. Civ. App.) 48 S. W. 57, 58 S. W. 51, 79 S. W. 363, p. 1103, 1122.
Dean v. Landford, 9 Rich. Eq. 423, p. 2109.
Dean v. Long, 122 Ill. 447, 14 N. E. 34, p. 1837.
Dean v. Madison, 9 Wis. 402, p. 2750, 2752.
Dean v. Negley, 41 Pa. St. 312, 80 Am. Dec. 620, p. 1781.
Dean v. O'Meara, 47 Ill. 120, p. 2742.
Dean v. Robertson, 64 Miss. 195, 1 South. 159, p. 649.
Dean v. Scott, 67 Iowa, 233, 25 N. W. 147, p. 2500.
Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467, p. 2407, 2413.
Dean v. Yates, 22 Ohio St. 388, p. 1385.
Dean v. Younell's Adm'r, 8 Wall. 14, p. 2729.
Deane v. Rastron, 1 Anstr. 64, p. 1619, 1671.
Dean's Appeal, 90 Pa. St. 106, p. 2624.
Dear v. Varnum, 80 Cal. 86, 22 Pac. 76, p. 1735.
Dearborn v. Taylor, 18 N. H. 153, p. 2796.
Deare v. Attorney-General, 1 Younge & C. 205, 206, p. 319.
Deare v. Soutten, L. R. 9 Eq. 151, 154, p. 2603.
Dearing v. Watkins, 16 Ala. 20, p. 1104, 1144.
Dearle v. Hall, 3 Russ. 1, p. 1205, 1208, 1210, 1217.
Deas v. Harvie, 2 Barb. Ch. 448, p. 245, 263.
Deason v. Taylor, 53 Miss. 697, 701, p. 1007, 1050, 1054, 1089, 1146.
Deavitt v. Judevine, 60 Vt. 695, 17 Atl. 410, p. 2446.
Deavitt v. Ring, (Vt.) 56 Atl. 978, p. 1482.
De Barante v. Gott, 6 Barb. 492, 497, p. 1905, 2316.
De Bardeleben v. Bessemer Land & Imp. Co., (Ala.) 37 South. 511, p. 2027, 2085.
De Baun v. Van Wagoner, 56 Mo. 347, 349, p. 2194.
De Beauvoir v. De Beauvoir, 3 H. L. Cas. 524, 548, p. 2309, 2310.
De Beil v. Thomson, 3 Beav. 469, 12 Clark & F. 61, p. 1561, 2591.
Debell v. Foxworthy, 9 B. Mon. 228, p. 1070.
De Bemer v. Drew, 39 How. Pr. 466, p. 225.
Debenham v. Ox, 1 Ves. Sr. 276, p. 1679.
De Berry v. Wheeler, 128 Mo. 84, 49 Am. St. Rep. 538, 30 S. W. 338, p. 1440.
De Bevoise v. H. & W. Co., (N. J. Eq.) 58 Atl. 91, p. 320, 2463.
Debeze v. Mann, 2 Brown Ch. 165, 166, 519, 521, 1 Cox, 346, p. 910, 911, 933, 937.
De Brassac v. Martin, 11 Week. Rep. 1020, p. 345.
De Bruhl v. Maas, 54 Tex. 464, p. 2378, 2502, 2513, 2521.
De Bussche v. Alt, L. R. 8 Ch. Div. 286, 314, p. 1764, 1786.
De Bussierre v. Holladay, 55 How. Pr. 210, p. 2283.
De Camp v. Dobbins, 31 N. J. Eq. 671, p. 1975.
De Camp v. Dobbins, 29 N. J. Eq. 36, p. 1933, 1939, 1944, 1945, 1954, 1975.

De Camp v. Feay, 5 Serg. & R. 323, 326, 327, 9 Am. Dec. 372, p. 761, 2778.
Decan v. Shipper, 25 Pa. St. 239, 78 Am. Dec. 334, p. 1385.
De Caters v. Le Ray de Chaumont, 3 Paige, 178, p. 1753, 1754.
Decatur Mineral Land Co. v. Palm, 113 Ala. 531, 21 South. 315, 59 Am. St. Rep. 140, p. 2121.
De Cazara v. Oreña, 80 Cal. 132, 22 Pac. 74, p. 651, 2382.
De Celis v. Brunson, 53 Cal. 372, p. 1771.
Deck v. Yerke, 12 Cal. 433, 436, 73 Am. Dec. 555, p. 2251, 2262.
Decker v. Adams, 28 N. J. Law, 511, 78 Am. Dec. 65, p. 1226.
Decker v. Boice, 83 N. Y. 215, p. 1303.
Decker v. Decker's Adm'x, 27 N. J. Eq. 239, p. 2281.
Decker v. Judson, 16 N. Y. 439–450, p. 2718.
De Costa v. De Pas, Amb. 228, 2 Swanst. 487, p. 1962.
Dederer v. Voorhies, 81 N. Y. 153, p. 1641, 1652, 2697, 2728, 2755, 2757.
Dederick v. Boysradt, 4 How. Pr. 350, p. 2716.
Deegan v. Capner, 44 N. J. Eq. 339, 15 Atl. 819, p. 1754, 2080.
Deek v. Whitman, 96 Fed. 873, p. 500, 518.
Deeks v. Strutt, 5 Term Rep. 69, p. 180, 2202.
Deem v. Phillips, 5 W. Va. 188, p. 1779.
Deere v. Young, 39 Iowa, 588, p. 1265.
Deering v. Boyle, 8 Kan. 525, 12 Am. Rep. 480, p. 2192.
Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240, p. 1170.
Deering v. Schreyer, 171 N. Y. 451, 64 N. E. 179, p. 158.
Deery v. McClintock, 31 Wis. 195, p. 355.
Deeth v. Hale, 2 Molloy, 317, p. 2332.
Deford v. Mercer, 24 Iowa, 118, 92 Am. Dec. 460, p. 2776.
Deforest v. Bates, 1 Edw. Ch. 394, p. 717.
De Forest v. Holum, 38 Mo. 516, p. 2503, 2509, 2512, 2513, 2535.
De Forest v. Thompson, 40 Fed. 375, p. 360, 420, 431, 445, 455.
Deg v. Deg, 2 P. Wms. 412, 414, 418, p. 701, 817, 958, 2024.
Degge, Ex parte, 4 Brown Ch. 235, note, p. 2622.
De Give v. Healey, 60 Ga. 391, p. 1482.
De Godey v. Godey, 39 Cal. 157, 164, p. 809.
De Golls v. Ward, 3 P. Wms. 311, p. 264.
De Graaf v. Teerpenning, 52 How. Pr. 313, p. 896, 901.
De Graffrenried v. Brunswick etc. R. R., 57 Ga. 22, p. 2663.
De Graff, Vrieling & Co. v. Wickham, 89 Iowa, 720, 52 N. W. 503, p. 728, 729, 739, 740.
De Hart v. Hatch, 3 Hun, 375, 380, p. 570, 586.
De Houghton v. Money, L. R. 2 Ch. 164, 169, p. 2556, 2729.
Deibert's Appeal, 78 Pa. St. 296, p. 1830.
Deibler v. Barwick, 4 Blackf. 339, p. 2499.
Deichmann v. Deichmann, 49 Mo. 107, p. 2776.
De Klyn v. Watkins, 3 Sand. Ch. 185, p. 2633.
Delafield v. Anderson, 7 Smedes & M. 630, p. 1665.
Delafield v. Barlow, 107 N. Y. 535, 14 N. E. 498, p. 2305.
Delafield v. Illinois, 26 Wend. 192, p. 312, 2707.
Delafield v. State of Illinois, 2 Hill, 159, 164, p. 2252, 2253.
De la Garde v. Lemprière, 6 Beav. 344, p. 2174.
Delahay v. Clement, 3 Scam. 201, p. 2346.
Delaire v. Keenan, 3 Desaus. Eq. 74, 4 Am. Dec. 604, p. 2470, 2475.
De Lancey, Matter of, L. R. 5 Ex. 102, p. 2310.
Delancey v. Stearns, 66 N. Y. 157, 161, p. 1323, 1329, 1336.
Delaney, Estate of, 49 Cal. 76, 77, 86, p. 782, 857, 1895, 1896.
Delaney v. McCormack, 88 N. Y. 174, p. 2300, 2306, 2745.
Delaney v. Van Aulen, 84 N. Y. 16, p. 1896.

Delany, In re, [1902] 2 Ch. 642, p. 1940.
Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788, p. 1729, 1739.
Delassus v. Poston, 19 Mo. 425, p. 2501.
De Lassus v. Winn, 174 Mo. 636, 74 S. W. 635, p. 1102, 1120.
De la Touche's Settlement, In re, L. R. 10 Eq. 599, p. 1543.
De Laurence v. De Boom, 48 Cal. 581, p. 1902, 1903.
Delavan v. Duncan, 49 N. Y. 485, 487, p. 2776, 2779.
De La Vergne Refrig. Mach. Co. v. Montgomery Brewing Co., 46 Fed. 829, p. 501, 2544.
Delaware & Hudson C. Co. v. Bonnell, 46 Conn. 9, p. 1403.
Delaware & Hudson C. Co. v. Clark, 13 Wall. 311, p. 2690.
Delaware & Md. R. R. v. Stump, 8 Gill & J. 479, 29 Am. Dec. 561, p. 2683.
Delaware, Lack. & W. R. R. v. Erie R. R., 21 N. J. Eq. 298, p. 2653, 2660.
Delaware R. R. Co. v. Gilbert, 44 Hun, 202, p. 2103.
Delaware Surety Co. v. Layton, (Del. Ch.) 50 Atl. 378, p. 660, 661.
Delay v. Vinal, 1 Met. 57, p. 824.
Delbert's Appeal, 83 Pa. St. 462, p. 1830, 1850.
De Leon v. Higuera, 15 Cal. 483, p. 2474.
Delespine v. Campbell, 52 Tex. 12, p. 1278.
De Levillain v. Evans, 39 Cal. 120, p. 2243.
De Levnis v. Walsh, 140 Cal. 175, 73 Pac. 813, p. 2379.
De Linden, In re, [1897] 1 Ch. 453, p. 2626.
Dellinger's Appeal, 71 Pa. St. 425, p. 1872, 1907.
Delmar Charitable Trust, In re, [1897] 2 Ch. 163, p. 1951.
Delmotte v. Taylor, 1 Redf. 417, p. 2233, 2234.
Delves v. Gray, [1902] 2 Ch. 606, p. 1755.
Demain v. Cassidy, 55 Miss. 320, p. 2662.
De Mallagh v. De Mallagh, 77 Cal. 126, 19 Pac. 256, p. 1761.
De Manneville v. Crompton, 1 Ves. & B. 354, p. 2165.
De Manneville v. De Manneville, 10 Ves. 52, 62, 63, p. 2612, 2616.
Demarest v. Hardman, 34 N. J. Eq. 472, p. 376.
Demarest v. Wynkoop, 3 Johns. Ch. 129, 147, 8 Am. Dec. 467, p. 1314, 1344, 1346.
De Martin v. Phelan, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115, p. 2372.
De Mattos v. Gibson, 4 De Gex & J. 276, p. 2671, 2675.
Dement v. Boggess's Adm'rs, 13 Ala. 140, p. 2257.
Demeter v. Wilcox, 115 Mo. 634, 22 S. W. 613, 37 Am. St. Rep. 422, p. 1280, 1282, 1283.
De Mey v. Defer, 103 Mich. 239, 61 N. W. 524, p. 1330.
Deming v. James, 72 Ill. 78, p. 2678.
Deming v. Miles, 35 Nebr. 739, 53 N. W. 665, 37 Am. St. Rep. 464, p. 1102, 1116, 1119.
De Montmorency v. Devereux, 7 Clark & F. 188, p. 1784.
Demoss v. Demoss, 7 Cold. 256, 258, p. 825.
De Mott v. Starkey, 3 Barb. Ch. 403, p. 1336.
Dempsey v. Bush, 18 Ohio St. 376, p. 2793.
Demuth v. Old Town Bank, 85 Md. 315, 37 Atl. 266, 60 Am. St. Rep. 322, p. 1303, 2418.
Den v. Bordine, 20 N. J. L. 394, p. 1850.
Den v. Rickman, 13 N. J. L. 43, p. 1276, 1381.
Denechaud v. Berrey, 48 Ala. 591, p. 2153.
Deneff v. Helms, 42 Oreg. 161, 70 Pac. 390, p. 2232.
Denham v. Williams, 39 Ga. 312, p. 2787.
Denike v. Harris, 84 N. Y. 89, reversing 23 Hun, 213, p. 2070, 2071, 2076.
Dening v. Ware, 22 Beav. 184, p. 1872.
Denisdale v. Denisdale, 3 Drew. 556, p. 1788.

Denis' Estate, In re, 201 Pa. St. 616, 51 Atl. 335, p. 1835.
Denison v. Crawford Co., 48 Iowa, 211, p. 1700.
Denison University v. Manning, 65 Ohio St. 138, 61 N. E. 706, p. 2409.
Dennett v. Dennett, 43 N. H. 499, 501, 503, p. 529, 530.
Dennis v. Burritt, 6 Cal. 670, p. 1095, 1111, 1127, 1128.
Dennis v. Cummins, 3 Johns. Cas. 297, 2 Am. Dec. 160, p. 733.
Dennis v. Dennis, 119 Mich. 380, 78 N. W. 333, p. 1146.
Dennis v. Dennis, 4 Rich. Eq. 307, p. 1532.
Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899, p. 1449, 1646.
Dennis v. Mobile & Montgomery R'y Co., 137 Ala. 649, 657, 35 South. 30, 97 Am. St. Rep. 69, 72, p. 357.
Dennis v. Northern Pac. R. Co., 20 Wash. 320, 55 Pac. 210, p. 1024, 1032, 1039, 1539, 1542.
Dennis v. Riley, 21 N. H. 50, p. 526.
Dennis v. Williams, 40 Ala. 633, p. 2498.
Dennison v. Goehring, 7 Pa. St. 175, 177, 178, 47 Am. Dec. 505, p. 960, 1468, 1872, 1886.
Denny v. Denny, 113 Ind. 22, 14 N. E. 593, p. 2269.
Denny v. Gilman, 26 Me. 149, 153, p. 551, 556.
Denny v. Hancock, L. R. 6 Ch. 1, p. 1518, 1539, 1560, 1585, 1609, 1619.
Denny v. Lyon, 38 Pa. St. 98, 80 Am. Dec. 463, p. 1253.
Denny v. Steakly, 2 Heisk. 156, p. 2511.
Dent v. Auction Mart. Co., L. R. 2 Eq. 238, 244, 246, 247, p. 2687.
Dent v. Bennett, 4 Mylne & C. 269, 273, p. 1671, 1738, 1780.
Dent v. Dent, 30 Beav. 363, p. 2483.
Dent v. Long, 90 Ala. 172, 7 South. 640, p. 1787.
Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, p. 664.
Dent v. Wait's Adm'r, 9 W. Va. 41, p. 2796.
Denton, Matter of, 102 N. Y. 200, 6 N. E. 299, p. 1918.
Denton v. Baker, 79 Fed. 189, 24 C. C. A. 476, p. 216.
Denton v. Davies, 18 Ves. 499, 503, p. 1901.
Denton v. Denton, 17 Md. 403, p. 1829.
Denton v. Donner, 23 Beav. 285, 291, p. 1670, 1758.
Denton v. MacNeil, L. R. 2 Eq. 352, p. 1453, 1572, 1573, 1788.
Denton v. Nanny, 8 Barb. 618, p. 2437.
Denton v. Ontario Co. Nat. Bank, 150 N. Y. 126, 44 N. E. 781, p. 1166.
Denton v. Sanford, 103 N. Y. 607, 9 N. E. 490, p. 2076.
Denton v. Stewart, 1 Cox, 258, p. 345, 2772.
Denver Brick etc. Mfg. Co. v. McAllister, 6 Colo. 261, p. 1490.
Denys v. Shuckburgh, 4 Younge & C. 42, p. 1483, 1499.
Depeyster v. Gould, 3 N. J. Eq. (2 H. N. Green) 474, 29 Am. Dec. 723, p. 1268.
De Peyster v. Hasbrouck, 11 N. Y. 582, p. 1529, 1533, 1541.
De Pierres v. Thorn, 4 Bosw. 266, p. 2761.
D'Epineiul, In re, 20 Ch. Div. 758, p. 2584.
De Pothonier, In re, [1900] 2 Ch. 529, p. 2071.
Derbishire v. Home, 3 De Gex, M. & G. 80, p. 696, 2094.
Derby v. Derby, 4 R. I. 414, 431, p. 1977, 2494.
Dering v. Earl of Winchelsea, 1 Cox, 318, 1 Lead. Cas. Eq., 4th Am. ed., 120, 124, 134–188, p. 162, 235, 2422, 2793, 2794, 2796.
De Rivafinoli v. Corsetti, 4 Paige, 264, 25 Am. Dec. 532, p. 2773.
De Ros's Trust, In re, 31 Ch. Div. 81, 88, p. 2141.
Derrett v. Britton, (Tex. Civ. App.) 80 S. W. 562, p. 1038.
Derrick v. Brown, 66 Ala. 162, p. 1338.
Derrick v. Lamar Ins. Co., 74 Ill. 404, p. 1560, 1566, 1639, 2730.
Derringer v. Plate, 29 Cal. 292, 87 Am. Dec. 170, p. 2691.
Derry v. Derry, 74 Ind. 560, p. 2005, 2024, 2030.

Derry v. Peek, 14 App. Cas. (H. L.) 337, p. 1387, 1424, 1434, 1573, 1577, 1578, 1632.
De Ruyter v. Trustees etc., 2 Barb. Ch. 556, p. 1109.
De Saussure v. Lyons, 9 S. C. 492, p. 2046.
Desbody v. Boyville, 2 P. Wms. 547, p. 1681.
Desborough v. Harris, 5 De Gex, M. & G. 439, 455, p. 2638, 2644.
Descarlett v. Dennett, 9 Mod. 22, p. 759.
Desmare v. United States, 93 U. S. 605, p. 1696.
Des Moines Gas Co. v. West, 44 Iowa, 23, p. 2658, 2678.
Des Moines Life Ins. Co. v. Seifert, (Ill.) 71 N. E. 349, p. 1640.
De Soto v. American Guaranty Fund Mut. Fire Ins. Co., (Mo. App.) 74 S. W. 1, p. 1158.
Despard v. Despard, 53 W. Va. 443, 44 S. E. 448, p. 1066.
Despard v. Walbridge, 15 N. Y. 374, p. 2714, 2718, 2722.
Dethlefs v. Tamsen, 7 Daly, 354, p. 1688, 1690.
Detroit v. Board of Public Works, 23 Mich. 546, 552, p. 148.
Detroit Chamber of Commerce v. Goodman, 110 Mich. 498, 68 N. W. 295, 35 L. R. A. 96, p. 2194.
Detroit & Milwaukee R. R. v. Brown, 37 Mich. 533, p. 2703.
Detroit Citizens' St. R'y Co. v. City of Detroit, 124 Mich. 449, 83 N. W. 104, p. 1087.
Detroit Citizens' St. R'y Co. v. Common Council, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589, p. 2551.
Detroit Copper & Brass Rolling Mills Co. v. Ledwidge, 162 Ill. 305, 44 N. E. 751, p. 264.
Detroit Nat. Bank v. Blodgett, 115 Mich. 160, 73 N. W. 120, 885, p. 1735, 1736.
Detwilder v. Heckenlaible, 63 Kan. 627, 66 Pac. 653, p. 1301.
Detwiller v. Hartman, 37 N. J. Eq. 348, p. 1934, 1975.
Deuchatell v. Robinson, 24 La. Ann. 176, p. 2750.
Deuninck v. West Gallatin Irr. Co., 28 Mont. 255, 72 Pac. 618, p. 736.
De Uprey v. De Uprey, 27 Cal. 329, 87 Am. Dec. 81, p. 2740.
Deuster v. McCamus, 14 Wis. 307, 311, p. 1130, 2453, 2455.
De Vandal v. Malone's Ex'rs, 25 Ala. 272, p. 1144.
Devaynes v. Noble, 1 Mer. 538, 539, p. 683.
Devaynes v. Noble, 2 Russ. & M. 495, p. 683, 2606.
Devaynes v. Robinson, 24 Beav. 86, p. 2088.
De Vandal v. Malone's Ex'rs, 25 Ala. 1104.
De Vendell v. Hamilton, 27 Ala. 156, p. 1279.
De Veney v. Gallagher, 20 N. J. Eq. 33, p. 308, 1472, 2693, 2737.
Devenish v. Baines, Prec. Ch. 3, p. 1653, 2035.
Devereux v. Devereux, 81 N. C. 12, p. 2284, 2300.
Deverges v. Sandeman, Clark & Co., [1902] 1 Ch. 579, p. 2461.
Devese v. Pontet, 1 Cox, 188, p. 875, 956.
Devey v. Thornton, 9 Hare, 222, 229, p. 2655.
Devine v. Devine, 180 Ill. 447, 54 N. E. 336, p. 1997.
Devinney v. Mann, 24 Kan. 682, p. 2710.
De Visme, In re, 2 De Gex, J. & S. 17, p. 1998.
Devlin v. The Mayor, 63 N. Y. 8, p. 2550, 2552.
Devling v. Little, 26 Pa. St. 502, p. 1525.
Devoe v. Brandt, 53 N. Y. 462, p. 1385.
De Voin v. De Voin, 76 Wis. 66, 44 N. W. 839, p. 1541.
Devoll v. Scales, 49 Me. 320, p. 555, 2709.
Devonshire v. Newenham, 2 Schoales & L. 208, 209, p. 298, 364, 385, 452.
Devoy v. Devoy, 3 Smale & G. 403, p. 1997, 2001.
Devries' Estate v. Hawkins, (Nebr.) 97 N. W. 792, p. 1906.
Dew v. Clarke, 5 Russ. 163, 167, p. 1727.

Dew v. Clark, 1 Sim. & St. 108, p. 298.
De Walsh v. Braman, 160 Ill. 415, 43 N. E. 597, p. 637, 641, 652.
Dewar v. Maitland, L. R. 2 Eq. 834, 838, p. 802, 803, 848, 851, 854, 856.
Deware v. Wyatt, 50 Mo. 236, p. 2750.
Dewey v. Allgire, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. Rep. 468, p. 1726.
Dewey v. Bowman, 8 Cal. 145, p. 2461.
Dewey v. Bulkley, 1 Gray, 416, p. 2750.
Dewey v. Hoag, 15 Barb. 365, p. 2715.
Dewey v. Ingersoll, 42 Mich. 18, 3 N. W. 235, p. 1096, 1130.
Dewey v. Moyer, 72 N. Y. 70, 76, p. 1801, 1803, 2034, 2041.
Dewey v. Sugg, 109 N. C. 328, 13 S. E. 923, 14 L. R. A. 393, p. 1097.
Dewey v. White, 65 N. C. 225, p. 2644, 2648.
Dewhurst, Ex parte, L. R. 8 Ch. 965, p. 2478.
De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352, p. 566, 585, 2753, 2757.
De Witt v. Moulton, 17 Me. 418, p. 1114.
Dewitt v. Schoonmaker, 2 Johns. 243, p. 2203.
De Witt v. Yates, 10 Johns. 156, 6 Am. Dec. 326, p. 884, 886, 889, 890.
De Witte v. Addison, [1899] 80 Law T., N. S., 207, p. 1778.
De Witte v. Palin, L. R. 14 Eq. 251, p. 2619.
De Wolf v. Johnson, 10 Wheat. 367, 392, p. 1706.
De Wolf v. Lawson, 61 Wis. 469, 21 N. W. 615, 50 Am. Rep. 148, p. 1969.
De Wolf v. Sprague Mfg. Co., 49 Conn. 282, p. 1858.
Dews v. Olwill, 3 Baxt. 432, p. 1212.
Dexheimer v. Gautier, 5 Rob. (N. Y.) 216, p. 2233.
Dexter v. Arnold, 2 Sum. 108, Fed. Cas. No. 3,858, p. 2431.
Dexter v. Evans, 63 Conn. 58, 38 Am. St. Rep. 336, 27 Atl. 308, p. 1927.
Dexter v. Gardner, 7 Allen, 243, p. 1978.
Dexter v. President etc. of Harvard College, 176 Mass. 192, 57 N. E. 371, p. 1946, 1979.
Dey v. Dey, 26 N. J. Eq. 182, p. 2017.
Dey v. Dey's Adm'r, 19 N. J. Eq. 137, p. 2493.
Dey v. Dunham, 2 Johns. Ch. 182, 190, p. 1123, 1142.
Dey v. Williams, 2 Dev. & B. Eq. 66, p. 872.
Dezell v. Odell, 3 Hill, 215, 38 Am. Dec. 628, p. 1428, 1435.
Dial v. Hair, 18 Ala. 798, 54 Am. Dec. 179, p. 669, 1696, 1712.
Dial's Ex'rs v. Rogers, 4 Desaus. Eq. 175, p. 2801.
Diamond v. Lawrence Co. Bank, 37 Pa. St. 353, 78 Am. Dec. 429, p. 1077.
Diamond Flint Glass Co. v. Boyd, 30 Ind. App. 485, 66 N. E. 479, p. 2446.
Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, p. 1691.
Dibrell v. Eastland, 3 Yerg. 533, 535, p. 571.
Dibrell v. Smith, 49 Tex. 474, p. 2502, 2511.
Dibbs v. Goren, 11 Beav. 483, p. 1226.
Dicconson v. Talbot, L. R. 6 Ch. 32, p. 1609, 1613.
Dick v. Balch, 33 U. S. (8 Pet.) 30, p. 1106.
Dick v. Dick, 172 Ill. 578, 50 N. E. 142, p. 1993, 1995.
Dick v. Equitable Fire & Marine Ins. Co., 92 Wis. 46, 65 N. W. 742, p. 1159.
Dick v. Foraker, 155 U. S. 404, 415, 15 Sup. Ct. 124, 129, p. 504.
Dick v. Hamilton, 1 Deady, 322, Fed. Cas. No. 3,890, p. 2197.
Dick v. Maury, 9 Smedes & M. 448, p. 2417.
Dick v. Pitchford, 1 Dev. & B. Eq. 480, p. 1840.
Dickason v. Williams, 129 Mass. 182, 37 Am. Rep. 316, p. 2426.
Dickenson v. Glenney, 27 Conn. 104, p. 1098, 1111.
Dickenson v. Grand Junc. C. Co., 15 Beav. 260, 270, p. 2673.
Dickenson v. Seater, 44 Mich. 624, p. 1644.
Dickenson v. Stoll, 8 N. J. Eq. 294, 298, p. 148, 212.
Dicker v. Union Dime Sav. Inst., 15 App. Div. 553, 44 N. Y. Supp. 521, p. 1910.
Dickerman v. Abrahams, 21 Barb. 551, p. 2152.

Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, p. 1783.
Dickerson v. Bridges, 147 Mo. 235, 48 S. W. 825, p. 1136.
Dickerson v. Campbell, 32 Mo. 544, p. 998.
Dickerson v. Carroll, 76 Ala. 377, p. 1273, 2498, 2518.
Dickerson v. Colgrove, 100 U. S. 578, p. 1338.
Dickerson v. Evans, 84 Ill. 451, p. 1384.
Dickerson v. Rogers, 114 N. Y. 406, 21 N. E. 992, p. 2200.
Dickerson v. Thomas, 67 Miss. 777, 7 South. 503, p. 1705.
Dickerson v. Tillinghast, 4 Paige, 215, 25 Am. Dec. 528, p. 1278, 1314, 1323, 1327, 1330, 1335, 1355, 1381.
Dickey v. Henarie, 15 Oreg. 351, 15 Pac. 464, p. 992.
Dickey v. Lyon, 19 Iowa, 544, p. 1048.
Dickey v. Thompson, 8 B. Mon. 312, p. 2448.
Dickie, In re, 7 Abb. N. C. 417, p. 2624.
Dickinson v. Burrell, L. R. 1 Eq. 337, p. 1808, 1864, 2006.
Dickinson v. Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351, p. 1164.
Dickinson v. Codwise, 1 Sand. Ch. 214, 226, p. 2028.
Dickinson v. Conniff, 65 Ala. 581, p. 2103.
Dickinson v. Consolidated Traction Co., 119 Fed. 871, 56 C. C. A. 401, p. 2128.
Dickinson v. Crowell, 120 Iowa, 254, 94 N. W. 495, p. 1100, 1127.
Dickinson v. Hoomes's Adm'r, 8 Gratt. 353, p. 2633.
Dickinson v. Lewis, 34 Ala. 638, 645, p. 323, 2798.
Dickinson v. Marrow, 14 Mees. & W. 713, p. 2567.
Dickinson v. Seaver, 44 Mich. 624, 7 N. W. 182, p. 2275.
Dickinson v. Worthington, 10 Fed. 860, p. 2516.
Dickinson's Appeal, 152 Mass. 184, 25 N. E. 99, p. 2078.
Dicks v. Brooks, L. R. 15 Ch. Div. 22, p. 2695.
Dickson v. Cole, 34 Wis. 621, 625, p. 355, 588.
Dickson v. Kempinsky, 96 Mo. 252, 9 S. W. 618, p. 1664, 1672, 1730.
Dickson v. Marks, 10 La. Ann. 518, p. 2750.
Dickson v. Montgomery, 1 Swan, 348, p. 1954, 1967, 1977.
Dickson v. Robinson, 1 Jacob, 503, p. 819, 837.
Dickson v. Stewart, (Nebr.) 98 N. W. 1085, p. 2039.
Dickson's Trusts, In re, 1 Sim., N. S., 37, 43, 44, 46, p. 1681, 1683.
Didisheim v. London & Westminster Bank, [1900] 2 Ch. 15, p. 2626.
Diefendorf v. Spraker, 10 N. Y. 246, p. 2106.
Diehl v. Page, 3 N. J. Eq. 143, p. 1019.
Dierks v. Martin, 16 Nebr. 120, 19 N. W. 598, p. 1647.
Dietrich v. Folk, 40 Ohio St. 635, p. 2502, 2513.
Dietrich v. Hutchinson, 73 Vt. 134, 50 Atl. 810, 87 Am. St. Rep. 703, p. 1491.
Diffendarfer v. Dicks, 105 N. Y. 445, 11 N. E. 825, p. 1665.
Diffenderffer v. Winder, 3 Gill & J. 311, p. 2080.
Digman v. McCollum, 47 Mo. 372, 375, 376, p. 1111, 1135, 1147.
Dike v. Green, 4 R. I. 288, 295, p. 749.
Dikeman v. Norrie, 36 Cal. 94, p. 1992, 1995.
Dill v. Hamilton, (Ga.) 44 S. E. 989, p. 1372.
Dill v. Shahan, 25 Ala. 694, 702, 60 Am. Dec. 540, p. 1483, 1487, 1495.
Dill v. Wisner, 88 N. Y. 153, 158, 160, p. 2300, 2301, 2486, 2489, 2745.
Dillard v. Dillard, 97 Va. 434, 34 S. E. 60, p. 2046.
Dillard & Coffin Co. v. Smith, 105 Tenn. 372, 59 S. W. 1010, p. 1078.
Dillaway v. Peterson, 11 S. Dak. 210, 76 N. W. 925, p. 2408.
Diller v. Brubacker, 52 Pa. St. 498, 502, 91 Am. Dec. 177, p. 1757, 2463.
Dillett v. Kemble, 25 N. J. Eq. 66, p. 1510.
Dilley v. Love, 61 Md. 603, p. 907.
Dillman v. Carlin, 105 Wis. 14, 80 N. W. 932, 76 Am. St. Rep. 902, p. 2570.
Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. 88, p. 1564, 1590.

Dillon, In re, 44 Ch. Div. 76, p. 2236, 2237.
Dillon v. Coppin, 4 Mylne & C. 647, p. 1872.
Dillon v. Costelloe, 2 Molloy, 512, p. 1389.
Dillon v. Farley, 114 Iowa, 629, 87 N. W. 677, p. 1911.
Dillon v. Jones, cited in 5 Ves. 290, p. 667.
Dillon v. Parker, 1 Swanst. 359, 376, 380, 381, 382, 386, 387, 394, 401, Jacob, 505, 7 Bligh, N. S., 325, 1 Clark & F. 303, p. 769, 770, 771, 775, 785, 793, 848, 849, 850, 853, 854, 856, 858, 859.
Dillwyn v. Llewelyn, 4 De Gex, F. & J. 517, p. 1872.
Dilly v. Barnard, 8 Gill & J. 170, p. 2703.
Dilly v. Doig, 2 Ves. 486, p. 363, 369, 379, 424, 455.
Dilts v. Stevenson, 17 N. J. Eq. 407, p. 2195.
Dilts v. Stewart, (Pa.) 1 Atl. 587, p. 2040.
Diman v. Providence R. R., 5 R. I. 130, 135, p. 1476, 1510, 1541, 1789.
Dimech v. Corlett, 12 Moore P. C. C. 199, p. 729, 743.
Dimes v. Scott, 4 Russ. 195, p. 2073, 2321.
Dimes v. Steinberg, 2 Smale & G. 75, p. 1653.
Dimmick v. Delaware, L. & W. R. R. Co., 180 Pa. St. 468, 36 Atl. 866, p. 469.
Dimmoch v. Atkinson, 3 Brown Ch. 195, p. 2173.
Dimmock v. Bixby, 20 Pick. 368, 372, p. 534, 537.
Dimmock v. Hallett, L. R. 2 Ch. 21, p. 1694.
Dimon v. Dunn, 15 N. Y. 498, p. 1127.
Dimond v. Sanderson, 103 Cal. 97, 37 Pac. 189, p. 1781.
Dimpfell v. O. & M. R'y Co., 110 U. S. 209, 3 Sup. Ct. 573, 28 L. ed. 121, p. 2128.
Dimsdale v. Dimsdale, 3 Drew. 556, p. 1776.
Dineley v. Dineley, 2 Atk. 394, p. 264.
Dingens v. Clancey, 67 Barb. 566, p. 1446.
Dingley v. Bank of Ventura, 57 Cal. 467, p. 2522, 2523, 2524, 2525, 2527.
Dingman v. Romine, 141 Mo. 466, 42 S. W. 1087, p. 1729, 1730, 1736.
Dings v. Parshall, 7 Hun, 522, p. 2424.
Dingus v. Minneapolis Imp. Co., 98 Va. 739, 37 S. E. 353, p. 2525.
Dingwell v. Askew, 1 Cox, 427, p. 2214.
Dinham v. Bradford, L. R. 5 Ch. 519, p. 2773.
Dinn v. Grant, 5 De Gex & S. 451, p. 2536.
Dinsmore v. Crossman, 53 Me. 441, p. 556.
Dinsmore v. Savage, 68 Me. 191, 193, p. 550.
Dinsmore v. Southern Express Co., 92 Fed. 714, p. 417.
Dinwidde v. Bailey, 6 Ves. 136, p. 542, 2798.
Dinwiddie v. Bell, 95 Ill. 360, p. 353.
Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892, p. 1482, 1487, 1489.
Diplock v. Hammond, 5 De Gex, M. & G. 320, p. 2561.
Disch v. Timm, 101 Wis. 179, 191, 192, 77 N. W. 196, p. 1738, 1781.
Disher v. Disher, 45 Nebr. 100, 63 N. W. 368, p. 354.
Dishong v. Finkbiner, 46 Fed. 12, 16, p. 385, 452.
Disney v. Crosse, L. R. 2 Eq. 592, p. 2218.
Distilled Spirits, 11 Wall. 356, p. 1152, 1163, 1168, 1171, 1172.
District of Algona v. District etc., 54 Iowa, 286, 6 N. W. 295, p. 1642, 1653.
District of Columbia v. Robinson, 180 U. S. 92, 21 Sup. Ct. 283, p. 289.
District Township of Lodomillo v. District etc. of Cass, 54 Iowa, 115, p. 2678.
Ditch v. Sennott, 117 Ill. 362, 7 N. E. 640, p. 811, 813.
Ditch v. Western Nat. Bk., 79 Md. 192, 47 Am. St. Rep. 375, 29 Atl. 72, 138, p. 1914.
Dittman v. Distilling Co. of America, 64 N. J. Eq. 537, 54 Atl. 570, p. 2118.
Dix v. Cobb, 4 Mass. 508, 511, p. 1212, 1222.

Dixie v. Wright, 32 Beav. 662, p. 2319.
Dixon v. Bristol Savings Bank, 102 Ga. 461, 66 Am. St. Rep. 193, 31 S. E. 96, p. 1371.
Dixon v. Caldwell, 15 Ohio St. 412, 415, 86 Am. Dec. 487, p. 570, 587.
Dixon v. Clayville, 44 Md. 573, p. 2393, 2397.
Dixon v. Dixon, L. R. 9 Ch. Div. 587, p. 2067, 2087, 2097.
Dixon v. Dixon, 1 Md. Ch. 220, p. 2520.
Dixon v. Dixon, 22 N. J. Eq. 91, p. 1735.
Dixon v. Doe, 1 Smedes & M. 70, p. 1274.
Dixon v. Fraser, L. R. 2 Eq. 497, p. 272.
Dixon v. Gayfere, 17 Beav. 433, p. 2333.
Dixon v. Gayfere, 1 De Gex & J. 655, p. 2512, 2529.
Dixon v. Hammond, 2 Barn. & Ald. 310, 313, p. 2645.
Dixon v. Holden, L. R. 7 Eq. 488, p. 545, 2696.
Dixon v. Homer, 2 Met. 420, p. 2100.
Dixon v. Kennaway & Co., [1900] 1 Ch. 833, p. 1445.
Dixon v. Lacoste, 1 Smedes & M. 107, p. 1024.
Dixon v. McCue, 14 Gratt. 540, p. 821.
Dixon v. Muckleston, L. R. 8 Ch. 155, 158, 161, p. 1016, 1261, 1296, 2539.
Dixon v. Olmius, 1 Cox, 414, p. 2035, 2145.
Dixon v. Parker, 2 Ves. Sr. 219, 225, p. 2379.
Dixon v. Saville, 1 Brown Ch. 325, p. 1849.
Dixon v. Wilmington Sav. & Tr. Co., 115 N. C. 274, 20 S. E. 464, p. 1384.
Dixon v. Winch, [1900] 1 Ch. Div. 736, 69 Law J. Ch. 465, 82 Law T. (N. S.) 437, 48 Wkly. Rep. 612, p. 1155.
Dixon Crucible Co. v. Guggenheim, 2 Brewst. 321, p. 2690.
Dixon's Estate, In re, (Cal.) 77 Pac. 412, p. 1895.
Doan v. Dunham, 64 Nebr. 137, 89 N. W. 640, p. 2000.
Doan v. Mauzey, 33 Ill. 227, p. 343.
Doane v. Russell, 3 Gray, 382, 384, p. 2461.
Dobbin v. Bryan, 5 Tex. 276, p. 2288.
Dobbin v. Cordiner, 41 Minn. 165, 42 N. W. 870, 16 Am. St. Rep. 683, 4 L. R. A. 333, p. 1446.
Dobbins v. Colorado & S. Ry. Co., (Colo. App.) 75 Pac. 156, p. 2544.
Dobbins v. Wilson, 107 Ill. 17, p. 2446.
Dobbs v. Distributees of Cockerham, 2 Port. 328, p. 2255.
Dobbs v. Norcross, 24 N. J. Eq. 327, p. 2771, 2775.
Dobbs v. Turner, (Tex. Civ. App.) 70 S. W. 458, p. 730.
Dobell v. Stevens, 3 Barn. & C. 623, 625, p. 1601.
Dobey's Appeal, 97 Pa. St. 153, p. 1062.
Dobson v. Leadbeater, 13 Ves. 230, p. 1393.
Dobson v. Pearce, 12 N. Y. 156, 165, 166, 168, 62 Am. Dec. 152, p. 93, 586, 1652, 2708, 2714, 2818, 2822.
Dobson v. Racey, 8 Barb. 216, p. 1761.
Dobson v. Racey, 8 N. Y. 216, p. 1784, 1785.
Dobson v. Racey, 3 Sandf. Ch. 60, p. 1755.
Dobson's Estate, 11 Phila. 81, p. 2306, 2309, 2315.
Dobyns v. McGovern, 15 Mo. 662, 668, p. 229, 461.
Dobyns v. Waring, 82 Va. 159, p. 1105, 1106, 1149.
Dock v. Dock, 180 Pa. St. 14, 57 Am. St. Rep. 617, 36 Atl. 411, p. 234, 272, 288, 321.
Docker v. Somes, 2 Mylne & K. 665, p. 182, 2028, 2032, 2079.
Dockery v. French, 73 N. C. 420, p. 2057, 2068, 2077.
Dockray v. Mason, 48 Me. 178, p. 2790.
Dodd v. Bellows, 29 N. J. Eq. 127, p. 2640.
Dodd v. Brott, 1 Minn. 270, 66 Am. Dec. 541, p. 1224.
Dodd v. Evans, [1901] 1 Ch. 916, p. 2071.
Dodd v. Gaines, 82 Tex. 429, 18 S. W. 618, p. 983.
Dodd v. Ghiselin, 27 Fed. 405, 407–410, p. 509, 511.
Dodd v. Hartford, 25 Conn. 232, 238, p. 434, 436, 437, 454.

Dodd v. Lee, 57 Mo. App. 167, p. 1062, 1079, 1084.
Dodd v. Parker, 40 Ark. 536, p. 1099, 1144.
Dodd v. Wakeman, 26 N. J. Eq. 484, p. 179, 1760, 1764, 2039.
Dodd v. Winship, 133 Mass. 359, p. 2052.
Doddington v. Hallet, 1 Ves. Sr. 497, p. 2483.
Dodds v. Snyder, 44 Ill. 53, p. 2447.
Dodge v. Briggs, 27 Fed. 160, p. 120, 455, 1341.
Dodge v. Cole, 97 Ill. 338, 37 Am. Rep. 111, p. 2024, 2030.
Dodge v. Davis, 85 Iowa, 77, 52 N. W. 2, p. 1030.
Dodge v. Essex Ins. Co., 12 Gray, 65, p. 1648.
Dodge v. Evans, 43 Miss. 570, p. 2501, 2511.
Dodge v. Griswold, 8 N. H. 425, p. 527, 2791.
Dodge v. Manning, 1 N. Y. 298, p. 2488.
Dodge v. Pond, 23 N. Y. 69, p. 1896, 1968, 2310.
Dodge v. Silverthorne, 12 Wis. 644, p. 2478.
Dodge v. Stevens, 94 N. Y. 209, 215, p. 1198, 1754, 2018.
Dodge v. Tulleys, 144 U. S. 451, 12 Sup. Ct. 728, p. 494.
Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103, p. 1936, 1945, 1969, 2306, 2309, 2310, 2315.
Dodge v. Woolsey, 18 How. 331, 341, 15 L. ed. 401, p. 182, 2125.
Dodkin v. Brunt, L. R. 6 Eq. 580, p. 1905, 2108, 2109.
Dodson v. Ball, 60 Pa. St. 492, 100 Am. Dec. 586, p. 1831.
Doe v. Allcock, 1 Barn. & Ald. 137, p. 1545.
Doe v. Allsop, 5 Barn. & Ald. 142, p. 1138.
Doe v. Bank of Cleveland, 3 McLean, 140, p. 1104.
Doe v. Bower, 3 Barn. & Adol. 453, p. 1547.
Doe v. Clifton, 4 Ad. & E. 809, p. 2337.
Doe v. Guy, 3 East, 120, p. 180, 2202.
Doe v. Hassell, 68 N. C. 213, p. 1774.
Doe v. Lyford, 4 Moore & S. 550, p. 1548.
Doe v. Manning, 9 East, 59, p. 1805, 1186.
Doe v. Martin, 4 Barn. & Adol. 771, p. 1547.
Doe v. McLoskey, 1 Ala. 708, p. 2345, 2417, 2419.
Doe v. Oxenden, 3 Taunt. 147, 4 Dow. 65, p. 1548.
Doe v. Parkin, 5 Taunt. 321, p. 1547.
Doe v. Roe, 31 Fed. 100, p. 496.
Doe v. Roe, 13 Fla. 602, p. 1144.
Doe v. Roe, 25 Ga. 55, p. 1145.
Doe v. Stenlake, 12 East, 515, p. 1545.
Doe v. Thomas, 3 Ad.&E. 123, p. 1545.
Doe v. Tunnell, 1 Houst. 320, p. 2346.
Doescher v. Doescher, 61 Minn. 326, 63 N. W. 736, p. 2523.
Doescher v. Spratt, 61 Minn. 326, 63 N. W. 736, p. 2522.
Doggett v. Emerson, 3 Story, 700, Fed. Cas. No. 3,960, p. 1518, 1539, 1559, 1582, 1648.
Doggett v. Hart, 5 Fla. 215, 58 Am Dec. 464, p. 412, 426, 2737.
Doherty v. Mercantile Trust Co., 184 Mass. 590, 69 N. E. 335, p. 2127.
Dohnert's Appeal, 64 Pa. St. 311, 313, p. 560.
Dolan, Matter of, 4 Redf. 511, p. 2227.
Dolan v. Kehr, 9 Mo. App. 351, p. 2729.
Dolan v. Macdermot, L. R. 5 Eq. 60, 3 Ch. 676, p. 1933, 1943, 1950.
Dole v. Lincoln, 31 Me. 422, p. 2233.
Dole v. Thurlow, 12 Met. 157, 163, p. 1101.
Dolin v. Gardner, 15 Ala. 758, p. 1132.
Doll v. Cash, 61 N. J. Eq. 108, 47 Atl. 1059, p. 2281.
Doll v. Rigotti, 20 La. Ann. 265, 96 Am. Dec. 399, p. 1228.
Dollard v. Roberts, 130 N. Y. 269, 14 L. R. A. 238, 29 N. E. 104, p. 1155.
Dolman v. Norkes, 22 Beav. 402, p. 1609, 1615, 1618.
Doloret v. Rothschild, 1 Sim. & St. 590, p. 2764, 2767, 2778.
Domestic & F. Missionary Soc. of the P. E. Church v. Eels, 68 Vt. 497, 54 Am. St. Rep. 888, 35 Atl. 463, p. 1635, 1636, 2250, 2291, 2303.
Domestic Foreign Missionary Society v. Gaither, 62 Fed. 422, p. 2203.

Dominick v. Michael, 4 Sand. 374, p. 2309.
Dominick v. Sayre, 3 Sand. 555, p. 1926.
Domvile v. Taylor, 32 Beav. 604, p. 2213.
Donaghe v. Tams, 81 Va. 132, p. 2000.
Donahoe v. Chicago Cricket Club, 177 Ill. 351, 52 N. E. 351, p. 1739.
Donahue v. O'Conor, 13 Jones & S. 278, p. 2750.
Donahue v. Quackenbush, 75 Minn. 43, 77 N. W. 430, p. 182.
Donald v. Beals, 57 Cal. 399, p. 1096, 1144, 1154.
Donalds v. Plumb, 8 Conn. 447, p. 1843.
Donaldson v. Bank of Cape Fear, 1 Dev. Eq. 103, 18 Am. Dec. 577, p. 1329.
Donaldson v. Donaldson, Kay, 711, 719, p. 1207, 1872, 1879.
Donaldson v. Gillot, L. R. 3 Eq. 274, p. 1645, 1650, 1762.
Donaldson v. Grant, 15 Utah, 231, 49 Pac. 779, p. 1299.
Donaldson v. State Bank, 16 N. C. 103, 18 Am. Dec. 577, p. 1328.
Donaldson v. Williams, 50 Mo. 407, p. 1463.
Donegan's Adm'r v. Hentz, 70 Ala. 437, p. 2498, 2514.
Dongan v. McPherson, [1902] A. C. 197, p. 1757.
Donham v. Hahn, 127 Mo. 439, 30 S. W. 134, p. 1161.
Donisthorpe, In re, L. R. 10 Ch. 55, p. 2109.
Donk v. Alexander, 117 Ill. 330, 7 N. E. 672, p. 1399, 1400.
Donley v. Hays, 17 Serg. & R. 400, p. 2392, 2397.
Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. 646, p. 1223.
Donnell v. Bennett, L. R. 22 Ch. Div. 835, p. 2674.
Donnell v. Mateer, 7 Ired. Eq. 94, p. 2739, 2741.
Donnelly v. Eastes, 94 Wis. 390, 69 N. W. 157, p. 761, 765.
Donnelly v. Edelen, 40 Md. 117, p. 2486, 2489.
Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433, p. 671, 672, 1718.
Donnelly v. Simonton, 7 Minn. 167, p. 2359.
Donnelly v. West, 17 Hun, 564, p. 2662.
Donnington v. Mitchell, 2 N. J. Eq. 243, p. 2162.
Donohoe v. Conrahy, 2 Jones & S. 688, 694, p. 1907.
Donohoe v. Gamble, 38 Cal. 340, 99 Am. Dec. 399, p. 189, 2463, 2464.
Donohue-Kelly Bkg. Co. v. Southern Pac. Co., 138 Cal. 183, 71 Pac. 93, 94 Am. St. Rep. 28, p. 2569.
Donovan v. Fireman's Ins. Co., 30 Md. 155, p. 1452.
Donovan v. Simmons, 96 Ga. 340, 22 S. E. 966, p. 1271.
Donovan v. Van de Mark, 78 N. Y. 244, p. 1911, 1896.
Donovan's Appeal, 41 Conn. 551, p. 2190.
Doody, In re, [1893] 1 Ch. 129, p. 2098.
Dooley v. Gibson, 32 La. Ann. 192, p. 2750.
Dooley v. Watson, 1 Gray, 414, p. 749, 750.
Dooley v. Wolcott, 4 Allen, 406, p. 978, 1146.
Doolin v. Ward, 6 Johns. 194, p. 1692.
Doolittle v. Cook, 75 Ill. 354, p. 1024, 1130, 1327.
Doolittle v. Supervisors, 18 N. Y. 155, p. 369, 434, 435, 436, 438.
Doonan v. Board of Education, 9 W. Va. 246, p. 407, 410, 454.
Doran v. Dazey, 5 N. D. 167, 64 N. W. 1023, 57 Am. St. Rep. 550, p. 1097, 1133, 1148.
Doremus v. Williams, 4 Hun, 458, p. 149.
Dorgan v. Waring, 11 Ala. 988, 46 Am. Dec. 234, p. 1076.
Dorin v. Harvey, 15 Sim. 49, p. 2775.
Dority, In re, 40 App. Div. 236, 57 N. Y. Supp. 1073, p. 2053.
Dorlarque v. Cress, 71 Ill. 380, 381, 382, p. 1432, 1437, 1444, 1448.
Dorman v. Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210, p. 1997.
Dormay v. Borradaile, 10 Beav. 263, p. 2489.
Dormer v. Fortescue, 3 Atk. 124, 130, 132, p. 1465, 2734, 2735.
Dormer's Case, 2 P. Wms. 265 p. 2622.

Dorn v. Fox, 61 N. Y. 264, p. 2635, 2639.
Dorr v. Harrahan, 101 Mass. 531, 3 Am. Rep. 398, p. 767.
Dorr v. Life Ins. Clearing Co., 71 Minn. 38, 73 N. W. 635, 70 Am. St. Rep. 309, p. 1164, 1177.
Dorr v. Meyer, 51 Nebr. 94, 70 N. W. 543, p. 1328.
Dorr v. Shaw, 4 Johns. Ch. 17, p. 655, 2787.
Dorrance v. McAlester, 1 Ind. T. 473, 45 S. W. 141, p. 1154.
Dorrow v. Kelly, 1 Dall. 142, 144, p. 559.
Dorsey v. Banks, 70 Md. 508, 17 Atl. 272, p. 2080.
Dorsey v. Dorsey, 3 Har. & J. 410, p. 1755.
Dorsey v. Hall, 7 Nebr. 465, p. 1102.
Dorsey v. Reese, 14 B. Mon. 127, 128, p. 228, 229, 467, 2719.
Dorsey v. Thompson, 37 Md. 25, p. 2108.
Dorsey v. Wolcott, 173 Ill. 539, 50 N. E. 1015, p. 2039.
Dorsheimer v. Rorback, 23 N. J. Eq. 46, p. 181, 582.
Dortch v. Benton, 98 N. C. 190, 2 Am. St. Rep. 331, 3 S. E. 638, p. 616.
Doss v. Ditmars, 70 Ind. 451, p. 2392, 2396.
Doswell v. Buchanan's Ex'rs, 3 Leigh, 365, 381, 23 Am. Dec. 280, p. 1109, 1134, 1149, 1334, 1348.
Doton v. Russell, 17 Conn. 146, 154, p. 2346.
Dotterer v. Pike, 60 Ga. 29, p. 2017.
Doty v. Deposit Bldg. & L. Ass'n, 20 Ky. L. Rep. 625, 46 S. W. 219, 47 S. W. 433, p. 2508.
Doty v. First Nat. Bank, 3 N. Dak. 9, 53 N. W. 77, 17 L. R. A. 259, p. 1222.
Doty v. Martin, 32 Mich. 462, p. 2675.
Doty v. Mitchell, 9 Smedes & M. 435, 447, p. 2155.
Douce v. Lady Torrington, 2 Mylne & K. 600, p. 921, 2489.
Doughaday v. Paine, 6 Minn. 443, p. 1146.
Dougherty v. Creary, 30 Cal. 209, 297, 89 Am. Dec. 116, p. 566, 570.
Dougherty v. Jack, 5 Watts, 456, 30 Am. Dec. 335, p. 1806.
Dougherty v. Kubat, (Nebr.) 93 N. W. 317, p. 2435.
Dougherty v. McColgan, 6 Gill & J. 275, p. 2373, 2430.
Dougherty v. McDougald, 10 Ga. 121, p. 2653.
Dougherty v. Sprinkle, 88 N. C. 300, p. 2196.
Dougherty v. Van Nostrand, 1 Hoff. Ch. 68, 70, p. 2028.
Doughten v. Vandever, 5 Del. Ch. 51, p. 1973.
Doughty v. Bull, 2 P. Wms. 320, p. 2312.
Doughty v. Doughty, 27 N. J. Eq. 227, 315, p. 1641, 1652, 1788.
Doughty v. King, 10 N. J. Eq. 396, p. 1801.
Doughty v. Savage, 28 Conn. 146, p. 1790.
Doughty v. Stillwell, 1 Bradf. 300, 309, p. 2214.
Douglas, In re, 35 Ch. Div. 472, p. 1947, 1951.
Douglas v. Archbutt, 2 De Gex & J. 148, p. 2098, 2101.
Douglas v. Congreve, 1 Keen, 410, p. 2321.
Douglas v. Cruger, 80 N. Y. 15, p. 1850.
Douglas v. Culverwell, 3 Giff. 251, p. 2379.
Douglas v. Douglas, Kay, 400, 404, p. 2212.
Douglas v. Douglas, L. R. 12 Eq. 617, 637, p. 848, 858, 859.
Douglas v. Feay, 1 W. Va. 26, p. 811, 821.
Douglas v. Haberstro, 25 Hun, 262, p. 2722.
Douglas v. Moody, 80 Ala. 61, p. 2373.
Douglas v. Russell, 4 Sim. 524, 1 Mylne & K. 488, p. 2473, 2581, 2582.
Douglas v. Wallace, 11 Ohio, 42, 45, p. 570.
Douglas v. Witterwrongs, (cited) 16 Ves. 253, p. 1047.
Douglas Co. v. Union Pac. R. R., 5 Kan. 615, p. 605, 606, 612.
Douglas Mdse. Co. v. Laird, 37 W. Va. 687, 17 S. E. 188, p. 1332.
Douglass v. Bishop, 24 Kan. 749, p. 2749.

Douglass v. Blount, 22 Tex. Civ. App. 493, 55 S. W. 526, p. 2396.
Douglass v. Harrisville, 9 W. Va. 1621, 27 Am. Rep. 548, p. 2678.
Douglass v. McCrackin, 52 Ga. 596, p. 1064, 1076.
Douglass v. Nuzum, 16 Kan. 515, p. 2749, 2750.
Douglass v. Scott, 5 Ohio, 194, p. 2750.
Douglass v. Stephenson, 75 Va. 747, p. 2077.
Douglass v. Wells, 18 Hun, 88, 57 How. Pr. 378, p. 2409.
Douglass v. Wiggins, 1 Johns. Ch. 435, p. 2682.
Douse, In re, 50 L. J. Ch. 285, 286, p. 874.
Dow v. Dow, 36 Me. 211, p. 824.
Dow v. Gould etc. Min. Co., 31 Cal. 629, p. 2242.
Dow v. Ker, 1 Speers Eq. 414, 417, p. 2475.
Dow v. Sutphin, 47 Minn. 479, 50 N. W. 604, p. 983.
Dowd v. Tucker, 41 Conn. 197, p. 2035.
Dowding's Settlements Trusts, In re, [1904] 1 Ch. 441, p. 2141.
Dowdy v. Blake, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88, p. 2522, 2526, 2527.
Dowell v. Dew, 1 Younge & C. 345, p. 1468, 1469.
Dowell v. Jacks, 5 Jones Eq. 417, p. 2623, 2624.
Dowell v. Mitchell, 105 U. S. 430, p. 342.
Dower v. Seeds, 28 W. Va. 113, 57 Am. Rep. 646, p. 1636, 2292.
Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56, p. 1739, 1780.
Dowin v. Smith, 35 Vt. 69, p. 2555.
Dowin v. Sprecher, 35 Md. 474, p. 2612.
Dowle v. Saunders, 2 Hem. & M. 242, 250, p. 1016, 1650.
Dowling v. Feeley, 72 Ga. 557, p. 2080.
Dowling v. Hudson, 17 Beav. 248, p. 2490.
Dowling v. Pontypool etc. R'y, L. R. 18 Eq. 714, p. 2677.
Down v. Down, 7 Taunt. 343, p. 1547.
Downer v. Bank, 39 Vt. 25, 29, 32, p. 1188, 1254, 1281, 1382.
Downer v. Button, 26 N. H. 338, p. 2417.
Downer v. Porter, (Ky.) 76 S. W. 135, p. 1172.
Downes v. Grazebrook, 3 Mer. 200, 208, p. 1755, 1758.
Downes v. Jennings, 32 Beav. 290, p. 2033, 2165.
Downey v. Tharp, 63 Pa. St. 322, p. 1230.
Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290.
Downing v. Risley, 15 N. J. Eq. 94, p. 615.
Downing v. Wherrin, 19 N. H. 991, 49 Am. Dec. 139, p. 530, 2756.
Downman v. Rust, 6 Rand. 660, p. 1391.
Downs v. Reily, 53 Me. 62, p. 550.
Downs v. Yonge, 17 Ga. 295, p. 1144.
Dows v. Chicago, 11 Wall. 108, 110, 111, p. 223, 403, 433.
Dowsett v. Sweet, Amb. 175, p. 1548.
Dowson v. Bell, 1 Keen, 761, p. 819, 831, 835.
Doye v. Carey, 3 Okl. 627, 41 Pac. 432, p. 1373.
Doyle v. Doyle, 26 Mo. 545, 549, p. 2176.
Doyle v. Kelly, 75 Ill. 574, p. 2191.
Doyle v. Peerless Pet. Co., 44 Barb. 239, p. 1134.
Doyle v. Stevens, 4 Mich. 87, p. 1021, 1096, 1127.
Doyle v. Teas, 4 Scam. 202, p. 980, 982, 1050, 1111.
Doyle v. Wade, 23 Fla. 90, 1 South. 516, 11 Am. St. Rep. 334, p. 1273, 1280.
Dozier, Ex parte, 4 Baxt. 81, p. 2624.
Drais v. Hogan, 50 Cal. 121, 128, p. 2190.
Drake v. Collins, 5 How. (Miss.) 253, p. 1609, 1615.
Drake v. Crowell, 40 N. J. L. 58, p. 1073, 1088.
Drake v. Drake, 3 Hare, 523, p. 271.
Drake v. Glover, 30 Ala. 382, p. 1447, 1724, 2189.
Drake v. Goodridge, 6 Blatchf. 531, p. 2663.
Drake v. Hudson River R. R., 7 Barb. 508, p. 2687.

Drake v. Jones, 27 Mo. 428, p. 2752, 2757.
Drake v. Lacoe, 157 Pa. St. 17, 27 Atl. 538, p. 760.
Drake v. Latham, 50 Ill. 270, p. 1561, 1590.
Drake v. Phillips, 40 Ill. 388, 393, p. 408.
Drake v. Root, 2 Colo. 685, p. 2357.
Drake v. Storr, 2 Freem. 205, p. 183, 2131.
Drake v. Symes, Johns. 647, p. 283.
Drake v. Thyng, 37 Ark. 228, p. 1198, 2018.
Drake v. Wild, 70 Vt. 52, 39 Atl. 248, p. 499, 773, 844, 1479, 1482, 1484.
Drake v. Wise, 36 Iowa, 476, p. 1448.
Drakeford v. Wilks, 3 Atk. 539, p. 2035.
Drane v. Gunter, 19 Ala. 731, p. 1863.
Drane v. Newsom, 73 Miss. 422, 19 South. 200, p. 1101.
Drant v. Vause, 1 Younge & C. Ch. 580, p. 2314.
Draper v. Brown, 115 Wis. 361, 91 N. W. 1001, p. 424.
Draper v. Bryson, 26 Mo. 108, 69 Am. Dec. 483, p. 1276, 1381.
Draper v. Saxton, 118 Mass. 427, p. 1230.
Draper v. Stone, 71 Me. 175, p. 2059.
Draper's Adm'r v. Draper, 64 Ala. 545, p. 2256.
Draughon v. Quillen, 23 La. Ann. 237, p. 1760.
Drenkler v. Adams, 20 Vt. 415, p. 753.
Dresbach v. Minnis, 45 Cal. 223, p. 1435.
Dressel v. Jordan, 104 Mass. 407, p. 2778.
Dresser v. Dresser, 46 Me. 48, p. 1864, 1926.
Dresser v. Wood, 15 Kan. 344, p. 1067, 1078, 1088.
Dressler, Ex parte, L. R. 9 Ch. Div. 252, p. 2056.
Dreutzer v. Lawrence, 58 Wis. 594, 17 N. W. 423, p. 630.
Drew v. Hagerty, 81 Me. 231, 17 Atl. 63, 10 Am. St. Rep. 255, 3 L. R. A. 230, p. 2239.
Drew v. Lockett, 32 Beav. 499, p. 2796.
Drew v. Lord Norbury, 3 Jones & L. 267, 9 Ir. Eq. 171, p. 1093.
Drew v. Martin, 2 Hem. & M. 130, p. 1997.
Drew v. Pedlar, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257, p. 760.
Drew v. Rust, 36 N. H. 335, p. 1402, 1411.
Drewry v. Barnes, 3 Russ. 94, p. 1476, 1503, 1510.
Drexel v. Berney, 122 U. S. 241, 252, 7 Sup. Ct. 1200, 30 L. ed. 1219, p. 516.
Drey v. Doyle, 99 Mo. 459, 12 S. W. 287, p. 971.
Dreyfus v. Hirt, 82 Cal. 621, 23 Pac. 193, p. 1023, 1029.
Dreyfus v. Peruvian Guano Co., L. R. 41 Ch. Div. 151, p. 256.
Drinkale v. Movius State Bank, 11 N. Dak. 10, 88 N. W. 724, 95 Am. St. Rep. 693, 57 L. R. A. 341, p. 1710.
Drinkwater v. Combe, 2 Sim. & St. 340, 345, p. 1407, 1411.
Drinkwater v. Falconer, 2 Ves. Sr. 623, 625, p. 2212.
Drinkwater v. Moreman, 61 Ga. 395, p. 2503, 2509.
Driscoll, In re, 1 I. R. Eq. 285, 2 Lead. Cas. Eq., note of English editor, 4th Am. ed. 119, p. 1093.
Driver v. Hudspeth, 16 Ala. 348, p. 2530.
Driver's Settlement, In re, L. R. 19 Eq. 352, p. 2109.
Drovers' Nat. Bk. v. O'Hare, 119 Ill. 646, 10 N. E. 360, p. 1915.
Drown v. Ingels, 3 Wash. St. 424, 28 Pac. 759, p. 760.
Drown v. Smith, 52 Me. 141, p. 2681.
Druce v. Denison, 6 Ves. 385, p. 789.
Druid Park etc. Co. v. Oettinger, 53 Md. 46, p. 1905.
Druiff v. Parker, L. R. 5 Eq. 131, 137, p. 1515, 2727.
Druke v. Heiken, 61 Cal. 346, 44 Am. Rep. 553, p. 2236.
Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25, p. 739.
Druon v. Sullivan, 66 Vt. 609, 30 Atl. 98, p. 219, 310, 311, 381, 527, 1636, 1639.
Drury v. Hayden, 111 U. S. 223, 4 Sup. Ct. 405, 28 L. ed. 408, p. 2406.

Drury v. Holden, 121 Ill. 130, 13 N. E. 547, p. 1410, 2401, 2451.
Drury v. Hooke, 1 Vern. 412, p. 1678.
Drury v. Inhabitants of Natick, 10 Allen, 169, 175, p. 535, 538.
Drury v. Molins, 6 Ves. 328, p. 2676.
Drury v. Natick, 10 Allen, 169, p. 1978.
Drury v. Roberts, 2 Md. Ch. 157, p. 2656.
Drury v. Smith, 1 P. Wms. 404, p. 2236, 2242.
Drury v. Tremont etc. Co., 13 Allen, 168, p. 2404, 2406.
Drusadow v. Wilde, 63 Pa. St. 170, p. 961.
Dryden v. Frost, 3 Mylne & C. 670, p. 1016, 1152, 1159, 1163, 1292, 2519.
Drysdale v. Mace, 5 De Gex, M. & G. 103, 2 Smale & G. 225, 230, p. 1053, 1440, 1597, 1609, 1619.
Dublin Case, 38 N. H. 459, p. 1975.
Dubois v. Barker, 4 Hun, 80, 86, 6 Thomp. & C. 349, p. 986.
Dubois v. Hull, 43 Barb. 26, p. 2502.
Du Bois v. Ray, 35 N. Y. 162, p. 1544.
Dubost, Ex parte, 18 Ves. 140, p. 943.
Dubs v. Dubs, 31 Pa. St. 149, p. 1847, 1849, 2161.
Dubuque Nat. Bank v. Weed, 57 Fed. 513, p. 2374.
Duchess of Kingston's Case, 2 Smith's Lead. Cas., 7th Am. ed., 609, p. 1651.
Ducie v. Ford, 138 U. S. 587, 11 Sup. Ct. 417, 34 L. ed. 1091, p. 1995, 2000.
Ducker v. Burnham, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135, 25 L. R. A. 746, p. 2309.
Duckett v. Bank, 86 Md. 400, 38 Atl. 983, 63 Am. St. Rep. 513, 39 L. R. A. 84, p. 2087, 2088.
Duckett v. Gover, L. R. 6 Ch. Div. 82, p. 2121, 2125.
Duckett v. National Bk. of Baltimore, 88 Md. 8, 41 Atl. 161, 1062, p. 2018.
Duckett v. National Mechanics' Bank, 86 Md. 400, 403, 63 Am. St. Rep. 513, 516, 38 Atl. 983, 39 L. R. A. 814, p. 2086.
Ducktown S. C. & S. Co. v. Barnes, (Tenn.) 60 S. W. 593, p. 337.
Ducktown Sulphur, Copper & Iron Co. v. Fain, 109 Tenn. 56, 70 S. W. 813, p. 252, 380, 427, 431.
Duckworth v. Duckworth's Ad'mr, 35 Ala. 70, p. 2702.
Ducland v. Rousseau, 2 La. Ann. 168, p. 2359.
Ducommun's Appeal, 17 Pa. St. 268, p. 2095.
Dudgeon v. Dudgeon, 87 Mo. 218, p. 2489.
Dudley v. Cadwell, 19 Conn. 218, 227, p. 2346.
Dudley v. Dudley, 176 Mass. 34, 56 N. E. 1011, p. 1996.
Dudley v. Dudley, Prec. Ch. 241, 244, p. 49.
Dudley v. Little, 2 Ohio, 508, 15 Am. Dec. 575, p. 1692.
Dudley v. Matlack, 14 N. J. Eq. 2512, p. 2501.
Dudley v. Trustees of Frankfort, 12 B. Mon. 610, p. 2749.
Dudley v. Witter, 46 Ala. 664, 694, p. 1143, 1050, 1157, 1158.
Duff v. Fisher, 15 Cal. 375, 381, p. 2761, 2776.
Duff v. McDonough, 155 Pa. St. 10, 25 Atl. 608, p. 1034, 1048, 1068.
Duff v. Randall, 116 Cal. 226, 48 Pac. 66, 58 Am. St. Rep. 158, p. 1191.
Duffield v. Elwes, 1 Bligh, N. S., 497, 530, 534, p. 2246.
Duffield v. Elwes, 1 Sim. & St. 239, 1 Bligh, N. S., 497, 527, 542, p. 2232, 2236.
Duffy v. McGuinness, 13 R. I. 595, p. 2424.
Duffy v. Masterson, 44 N. Y. 557, p. 1902.
Duffy v. O'Donovan, 46 N. Y. 223, 227, p. 2722, 2776.
Duffy v. Orr, 1 Clark & F. 253, 5 Bligh, N. S., 620, p. 1790.
Duffy v. Shockey, 11 Ind. 70, 71 Am. Dec. 348, p. 730, 737.
Duffy's Trust, In re, 28 Beav. 386, p. 2171, 2172.
Dufphey v. Frenaye, 5 Stew. & P. 215, p. 1334.
Dugan v. Cureton, 1 Ark. (1 Pike) 31, 31 Am. Dec. 727, p. 341.

Dugan v. Hollins, 4 Md. Ch. 439, p. 896, 909.
Dugan v. Lyman, (N. J. Eq.) 23 Atl. 657, p. 1424.
Dugan v. O'Donnell, 68 Fed. 983, 992, p. 1787.
Dugan v. Vattier, 3 Blackf. (Ind.) 245, 25 Am. Dec. 105, p. 1333.
Duggan v. Kelly, 10 I. R. Eq. 295, p. 1681.
Duggan v. Lamar, (Ga.) 29 S. E. 19, p. 2265.
Duggan v. Slocum, 83 Fed. 244, affirmed in 92 Fed. 806, 34 C. C. A. 676, p. 1942, 1946, 1954, 1972.
Dugger v. Tayloe, 60 Ala. 504, p. 2498, 2516.
Dugger's Children v. Dugger, 84 Va. 130, 144, 4 S. E. 171, p. 2142.
Du Hourmelin v. Sheldon, 4 Mylne & C. 525, 1 Beav. 79, p. 1834, 2316.
Duke v. Balme, 16 Minn. 306, p. 1157, 2501.
Duke v. Clark, 58 Miss. 465, p. 1257, 1276.
Duke v. Duke, 81 Ky. 308, p. 2144.
Duke v. Fuller, 9 N. H. 536, 32 Am. Dec. 392, p. 1975.
Duke v. Markham, 105 N. C. 131, 10 S. E. 1003, 1017, 18 Am. St. Rep. 889, p. 1097, 1147.
Duke of Ancaster v. Mayer, 1 Brown Ch. 454, p. 2221.
Duke of Beaufort v. Berty, 1 P. Wms. 703, p. 2654.
Duke of Beaufort v. Neeld, 12 Clark & F. 248, 286, p. 755, 1466, 1476, 1509.
Duke of Beaufort v. Patrick, 17 Beav. 60, p. 1451.
Duke of Bedford v. Ellis, [1901] App. Cas. (H. of L.) 1, p. 396.
Duke of Bedford v. Trustees, 2 Mylne & K. 552, p. 1199.
Duke of Bolton v. Williams, 4 Brown Ch. 297, 309, p. 2219, 2637.
Duke of Bolton v. Williams, 2 Ves. 138, p. 670, 1680.
Duke of Brunswick v. Duke of Cambridge, 12 Beav. 281, p. 2784.
Duke of Buccleuch v. Cowan, 5 Macph. 214, p. 2746.
Duke of Buckingham v. Ward, 3 Atk. 385, p. 2764.
Duke of Cleveland's Settled Estates, In re, [1893] 3 Ch. 244, p. 2317.
Duke of Cumberland v. Codrington, 3 Johns. Ch. 229, 8 Am. Dec. 492, p. 2402.
Duke of Leeds v. Amherst, 2 Phill. Ch. 117, 123, p. 1785, 1786.
Duke of Leeds v. Earl of Strafford, 4 Ves. 180, p. 2737, 2738.
Duke of Leeds v. New Radnor, 2 Brown Ch. 388, 519, p. 316, 2738.
Duke of Leeds v. Powell, 1 Ves. Sr. 171, p. 2738.
Duke of Marlborough, In re, [1894] 2 Ch. 133, p. 2039.
Duke of New Castle v. Countess of Lincoln, 3 Ves. 387, 12 Ves. 218, p. 1887.
Duke of Norfolk v. Myers, 4 Madd. 83, 117, p. 363, 455.
Duke of Queensberry v. Shebbeare, 2 Eden, 329, p. 2688.
Duke of St. Albans v. Beauclerk, 2 Atk. 638, p. 885.
Duke of Somerset v. Cookson, 3 P. Wms. 389, p. 2763.
Duke of Somerset v. Duchess of Somerset, 1 Brown Ch. 309, note, p. 917.
Dukes v. Spangler, 35 Ohio St. 119, p. 2142.
Dulaney v. Willis, 95 Va. 606, 64 Am. St. Rep. 815, 29 S. E. 324, p. 2475.
Dulany v. Rogers, 50 Md. 524, p. 1541.
Dulin v. Hunter, 98 Ala. 539, 13 South. 301, p. 1304.
Dullaghen v. Fitch, 42 Wis. 679, p. 743.
Dumars v. City of Denver, (Colo. App.) 65 Pac. 580, p. 403, 404, 445, 453, 454.
Dumas, Ex parte, 1 Atk. 232, 233, p. 2029.
Dummer v. Corp'n of Chippenham, 14 Ves. 245, 252, 254, p. 264, 265, 275.
Dummer v. Pitcher, 2 Mylne & K. 262, 5 Sim. 35, p. 785, 789, 791, 809, 810, 811, 812, 2002.
Dumond v. Magee, 4 Johns. Ch. 318, 322, p. 2175.
Dumper v. Dumper, 3 Giff. 583, p. 2001.
Dunaway v. Robertson, 95 Ill. 419, p. 1641, 1646.

Dunbar v. Dunbar, 80 Me. 152, 6 Am. St. Rep. 166, 13 Atl. 578, p. 2239.
Dunbar v. Tredennick, 2 Ball & B. 304, 316, 317, 319, p. 1198, 1785.
Dunbar v. Woodcock, 10 Leigh, 628, p. 1872.
Duncan's Appeal, 43 Pa. St. 67, p. 2166.
Duncan v. Campbell, 12 Sim. 616, p. 2162.
Duncan v. Cashin, L. R. 10 Com. P. 554, p. 2638.
Duncan v. Drury, 9 Pa. St. 332, 49 Am. Dec. 565, p. 1403.
Duncan v. Duncan, 4 Abb. N. C. 275, p. 181, 2300.
Duncan v. Duncan, 27 Beav. 386, p. 2209.
Duncan v. Duncan, 2 Yeates, 302, p. 820.
Duncan v. Findlater, 6 Clark & F. 894, p. 2101.
Duncan v. Forrer, 6 Binn. 193, 196, p. 680.
Duncan v. Hawn, 104 Cal. 10, 37 Pac. 626, p. 2417.
Duncan v. Hays, 22 N. J. Eq. 25, p. 2687.
Duncan v. Jaudon, 15 Wall. 165, p. 2030.
Duncan v. Johnson, 13 Ark. 190, p. 1348.
Duncan v. Louisville, 13 Bush, (76 Ky.) 378, 26 Am. Rep. 201, p. 1227.
Duncan v. Luntley, 2 Macn. & G. 30, 2 Hall & T. 78, p. 543.
Duncan v. Lyon, 3 Johns. Ch. 351, 355, 8 Am. Dec. 513, p. 261, 2710.
Duncan v. Matula, (Tex. Civ. App.) 26 S. W. 638, p. 1034, 1048.
Duncan v. Miller, 64 Iowa, 223, 20 N. W. 161, p. 1272.
Duncan v. Smith, 31 N. J. L. 325, p. 1403, 1406.
Duncomb v. New York etc. R. R., 84 N. Y. 190, 198, p. 2080, 2083, 2114, 2121.
Duncombe v. Greenacre, 29 Beav. 578, p. 2173.
Duncombe v. Greenacre, 2 De Gex, F. & J. 509, 517, p. 2167, 2168, 2170.
Duncombe v. Mayes, 8 Ves. 320, p. 2727, 2763.
Duncuft v. Albrecht, 12 Sim. 189, p. 2764.
Dundas v. Chrisman, 25 Nebr. 495, 41 N. W. 449, p. 2066.
Dundas v. City of Lansing, 75 Mich. 499, 13 Am. St. Rep. 457, 42 N. W. 1011, p. 1159.
Dundas's Appeal, 73 Pa. St. 474, 479, p. 573, 2286.
Dundee Chemical Works v. Connor, 46 N. J. Eq. 576, 20 Atl. 50, p. 1729.
Dungan v. Am. etc. Ins. Co., 52 Pa. St. 253, p. 1107.
Dungey v. Angove, 2 Ves. 304, 310, 312, p. 2646.
Dunham v. Dey, 15 Johns. 555, 8 Am. Dec. 282, p. 1142.
Dunham v. Presby, 120 Mass. 285, p. 543.
Dunham v. Siglin, 39 Oreg. 291, 64 Pac. 661, p. 2020.
Dunham v. Waterman, 17 N. Y. 9, 72 Am. Dec. 406, p. 1858.
Dunklee v. Adams, 20 Vt. 421, 50 Am. Dec. 44, p. 754, 763.
Dunkley v. Dunkley, 2 De Gex, M. & G. 390, p. 646, 2167, 2173.
Dunklin v. Wilson, 64 Ala. 162, p. 1649.
Dunlap v. Burnett, 5 Smedes & M. 702, 45 Am. Dec. 269, p. 1269.
Dunlap v. Green, 60 Fed. 242, 8 C. C. A. 600, p. 1331.
Dunlap v. Hawkins, 59 N. Y. 342, 2 Thomp. & C. 292, p. 1798, 1799, 1800, 1803, 2004.
Dunlap v. Wilson, 32 Ill. 517, p. 1019, 1021, 1036, 1045, 1145, 1168.
Dunlevy v. Tallmadge, 32 N. Y. 457, p. 2789.
Dunlop v. Gregory, 10 N. Y. (6 Seld.) 241, 61 Am. Dec. 746, p. 787.
Dunlop v. Richards, 2 E. D. Smith, 181, p. 2028.
Dunman v. Coleman, 59 Tex. 199, 67 Tex. 390, 3 S. W. 319, p. 1195, 1197, 1198.
Dunn, In re, [1904] 1 Ch. 648, p. 2098.
Dunn v. Amos, 14 Wis. 106, p. 1733.
Dunn v. Barnum, 2 C. C. A. 265, 269, 51 Fed. 355, 359, 360, 10 U. S. App. 86, p. 986, 1324, 1325, 1338.
Dunn v. Chambers, 4 Barb. 376, p. 1667, 1670.
Dunn v. Coates, 1 Atk. 288, p. 258.
Dunn v. Commercial Bank, 11 Barb. 580, p. 1219.

Dunn v. Dunn, 7 De Gex, M. & G. 25, p. 2728.
Dunn v. Dunn, 42 N. J. Eq. 431, 7 Atl. 842, p. 1770, 1784.
Dunn v. Green, 3 P. Wms. 9, p. 1396.
Dunn v. Hastings, 54 N. J. Eq. 503, 34 Atl. 256, p. 2497.
Dunn v. Raley, 58 Mo. 134, p. 2475.
Dunn v. Record, 63 Me. 17, p. 1769.
Dunn v. Rodgers, 43 Ill. 260, p. 2404.
Dunn v. Sargent, 101 Mass. 336, p. 2147, 2172.
Dunn v. Shannon, 21 Ky. Law Rep. 138, 51 S. W. 14, p. 2411.
Dunnage v. White, 1 Jacob & W. 583, p. 1986, 1988.
Dunnage v. White, 1 Swanst. 137, 151, 152, p. 1508.
Dunne v. Dunne, 3 Smale & G. 22, p. 2483.
Dunning v Crane, 61 N. J. Eq. 634, 47 Atl. 420, p. 1088.
Dunning v. Leavitt, 85 N. Y. 30, 39 Am. Rep. 617, p. 2413.
Dunning v. Ocean Nat. Bank, 6 Lans. 296, p. 2046.
Dunnington v. Elston, 101 Ind. 375, p. 1070.
Dunphy v. Kleinsmith, 11 Wall. 610, 614, p. 494, 516.
Dunphy v. Riddle, 86 Ill. 22, p. 1403, 1406.
Dunphy v. Traveller Newspaper Union, 146 Mass. 495, 16 N. E. 426, p. 2121.
Dunscomb v. Dunscomb, 1 Johns. Ch. 508, 7 Am. Dec. 504, p. 621.
Dunston v. Paterson, 2 Com. B. N. S. 495, p. 1445.
Dunton v. Outhouse, 64 Mich. 419, 31 N. W. 411, p. 2500.
Dunton v. Sharpe, 70 Mass. 850, 12 So. 800, p. 2059.
Dupee v. Salt Lake Valley etc. Co., 20 Utah, 103, 57 Pac. 845, 77 Am. St. Rep. 902, p. 1052.
Du Pont v. Davis, 35 Wis. 631, 639, p. 2715.
Dupre v. Thompson, 4 Barb. 279, p. 1487.
Dupree v. Frank, (Tex. Civ. App.) 39 S. W. 988, p. 1342.
Dupuy v. Gibson, 36 Ill. 197, p. 189, 2463.
Durand v. Higgins, (Kan.) 72 Pac. 567, p. 664.
Durand v. Lord, 115 Ill. 610, 4 N. E. 483, p. 1069.
Durant v. Bacot, 13 N. J. Eq. 201, 15 N. J. Eq. 411, p. 1487, 1517, 1524.
Durant v. Crowell, 97 N. C. 367, 2 S. E. 541, p. 987, 1292.
Durant v. Davis, 10 Heisk. 522, p. 1644, 2502, 2520.
Durant v. Einstein, 5 Rob. (N. Y.) 423, p. 2798.
Durber Watch-Case Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455, p. 691, 1218, 1223, 1245, 1254, 1286, 1290.
Durell v. Pritchard, L. R. 1 Ch. 244, p. 345, 2698.
Duren v. Getchell, 55 Me. 241, p. 2193.
Durette v. Briggs, 47 Mo. 356, p. 2512, 2514.
Durfee v. McClurg, 6 Mich. 223, p. 2194.
Durfee v. Pavitt, 14 Minn. 424, p. 2004.
Durfee's Petition, 14 R. I. 47, p. 821, 837.
Durham v. Bischof, 47 Ind. 211, p. 2752.
Durham v. Crackles, 32 L. J. Ch. 111, p. 2169.
Durham v. Heirs of Daugherty, 30 La. Ann., pt. 2, 1255, p. 2514.
Durham v. Wadlington, 2 Strob. Eq. 258, p. 1508.
Durham etc. Soc., In re, L. R. 12 Eq. 516, p. 2539.
Durkee v. Durkee, 59 Vt. 70, 8 Atl. 490, p. 1510.
Durkee v. Stringham, 8 Wis. 1, p. 2478.
Durkin v. Cranston, 7 Johns. 442, p. 1477.
Durlacher v. Frazier, 8 Wyo. 58, 55 Pac. 306, 80 Am. St. Rep. 918, p. 2014.
Durour v. Motteux, 1 Ves. Sr. 320, 3 P. Wms. 22, note 1, p. 2327.
Durr v. Bowyer, 2 McCord Eq. 368, 372, p. 646.
Durrant v. Friend, 5 De Gex & S. 343, p. 2213.
Durrence v. Northern Nat. Bank, 117 Ga. 385, 43 S. E. 726, p. 1104, 1116.
Dursley v. Fitzhardinge, 6 Ves. 251, 260, 263, 264, p. 262, 267, 270, 294, 295, 1368.

Durst v. Burton, 47 N. Y. 167, 7 Am. Rep. 428, 2 Lans. 137, p. 1625.
Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388, p. 1060, 1335.
Durst v. Swift, 11 Tex. 274, p. 738.
Duryea v. Harvey, 183 Mass. 429, 67 N. E. 351, p. 2242.
Dusenbury v. Hulbert, 2 Thomp. & C. 177, p. 1263, 1265, 1285.
Dussol v. Bruguiere, 50 Cal. 456, p. 2609, 2794, 2795.
Dutton v. McReynolds, 31 Minn. 66, p. 1027, 1028, 1273.
Dutton v. Pool, 1 Vent. 318, p. 1653.
Dutton v. Pugh, 45 N. J. Eq. 426, 18 Atl. 207, p. 2312.
Dutton v. Warschauer, 21 Cal. 609, 621, 623, 82 Am. Dec. 765, p. 1007, 1023, 2354, 2356, 2364.
Duval v. Duval, 153 Ill. 49, 38 N. E. 944, p. 2267.
Du Val v. Marshall, 30 Ark. 230, p. 1993, 2658.
Duval v. Wellman, 124 N. Y. 158, 26 N. E. 343, p. 671, 1677, 1717.
Du Val v. Wilmer, 88 Md. 66, 41 Atl. 122, p. 1020.
Duvall v. Farmers' Bank, 4 Gill & J. 283, 290, 23 Am. Dec. 558, p. 646.
Duvall v. Myers, 2 Md. Ch. 401, p. 2769.
Duvall v. Waters, 1 Bland, 569, 576, 577, 18 Am. Dec. 350, p. 2681, 2682, 2694.
Duvals v. Ross, 2 Munf. 290, 296, p. 324, 326.
Dwen v. Blake, 44 Ill. 135, p. 2376, 2477.
Dwenger v. Branigan, 95 Ind. 221, p. 2499, 2509.
Dwight v. Hamilton, 113 Mass. 175, p. 542.
Dwight v. Newell, 3 N. Y. 185, p. 1272.
Dwight v. Pomeroy, 17 Mass. 302, 324, 327, 9 Am. Dec. 148, p. 534, 536, 1507.
Dwinal v. Smith, 25 Me. 379, p. 275, 551.
Dwinel v. Brown, 54 Me. 458, p. 731, 747.
D'Wolf v. Pratt, 42 Ill. 198, p. 1702, 1712.
Dwyer v. O'Connor, 206 Ill. 52, 65 N. E. 668, p. 1994.
Dwyer, A. J., Pine Land Co. v. Whiteman, (Minn.) 99 N. W. 362, p. 2380.
Dyckman v. Valiente, 42 N. Y. 549, 563, p. 2800.
Dye v. Beaver Creek Church, 48 S. C. 444, 59 Am. St. Rep. 724, 26 S. E. 717, p. 1905, 1944, 1947, 1956, 1960, 1977.
Dye v. Dye, 9 Colo. App. 320, 48 Pac. 313, p. 2176.
Dyer v. Arnold, 37 Ark. 17, p. 2190.
Dyer v. Dyer, 34 Beav. 504, p. 2320.
Dyer v. Dyer, 2 Cox, 92, 1 Lead. Cas. Eq., 4th Am. ed., 314, 319, 333, 350, 364, p. 1992, 1997, 2033.
Dyer v. Hargrave, 10 Ves. 505, 506, p. 1015, 1585, 1590, 1591, 1596, 1598.
Dyer v. Jacoway, 42 Ark. 186, 190, 50 Ark. 222, 6 S. W. 902, p. 2258.
Dyer v. Martin, 4 Scam. 146, p. 2499.
Dyer v. School District, 61 Vt. 96, 17 Atl. 788, p. 433.
Dyer v. Shurtleff, 112 Mass. 165, 17 Am. Dec. 77, p. 1753.
Dyer v. Taylor, 50 Ark. 314, 7 S. W. 258, p. 983.
Dyer's Appeal, 107 Pa. St. 446, p. 1910.
Dyers's Co. v. King, L. R. 9 Eq. 438, p. 2687.
Dyett v. North Am. Coal Co., 20 Wend. 570, 32 Am. Dec. 598, 7 Paige, 9, 14, p. 2152, 2196.
Dyke v. Rendall, 2 De Gex, M. & G. 209, p. 2512.
Dyke v. Taylor, 3 De Gex, F. & J. 467, p. 2676.
Dykers v. Leather Man. Bank, 11 Paige, 612, p. 2569.
Dyke's Estate, In re, L. R. 7 Eq. 337, p. 1468.
Dysart v. Crow, 170 Mo. 275, 70 S. W. 689, p. 466.
Dyson v. Morris, 1 Hare, 413, 422, p. 2462.
Dyson and Fawke, In re, [1896] 2 Ch. 720, p. 1850.

E.

Eade v. Eade, 5 Madd. 118, p. 1925.
Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395, p. 673, 1718, 1736.
Eads v. Williams, 4 De Gex, M. & G. 674, p. 2779.
Eager v. Barnes, 31 Beav. 579, p. 2094.

Eagle Fire Ins. Co. v. Globe, L. & T. Co., 44 Nebr. 380, 62 N. W. 895, p. 1158.
Eaglesfield v. Marquis of Londonderry, L. R. 4 Ch. Div. 693, 702, 703, 709, p. 1490, 1497, 1560.
Eakin v. Scott, 70 Tex. 442, 7 S. W. 777, p. 730.
Eakin v. Shultz, 61 N. J. Eq. 156, 47 Atl. 274, p. 2414.
Eakle v. Ingram, 142 Cal. 15, 100 Am. St. Rep. 99, 75 Pac. 566, p. 1851.
Eames v. Hardin, 111 Ill. 634, p. 2373.
Eames v. Manley, (Mich.) 80 N. W. 15, p. 696.
Earl v. Halsey, 14 Pa. St. 332, p. 2775.
Earl v. Matheney, 60 Ind. 202, p. 2710.
Earl v. Stocker, 2 Vern. 251, p. 1652.
Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901, p. 1504, 1541.
Earl Brook v. Bulkeley, 2 Ves. Sr. 498, p. 1293.
Earl Cowper v. Baker, 17 Ves. 128, p. 2693.
Earl of Aylesford v. Morris, L. R. 8 Ch. 484, p. 1742, 1743, 1744, 1745, 2704.
Earl of Bandon v. Becher, 3 Clark & F. 479, p. 2717.
Earl of Bath v. Sherwin, Prec. Ch. 261, 10 Mod. 1, 3, 4, 1 Brown Parl. Cas. 266, 270, 2 Brown Parl. Cas., Tomlins's ed., 217, p. 55, 364, 385, 451, 1457.
Earl of Belfast v. Chichester, 2 Jacob & W. 451, 452, p. 295.
Earl of Bradford v. Earl of Romney, 30 Beav. 431, p. 1516.
Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125, 1 Atk. 301, 1 Lead. Cas. Eq., Eng. ed., 773, 809–825, 4th Am. ed., 825–836, p. 1556, 1742.
Earl of Clarendon v. Barham, 1 Younge & C. Ch. 688, p. 1405.
Earl of Clarendon v. Hornby, 1 P. Wms. 446, p. 2741.
Earl of Darlington v. Bowes, 1 Eden, 270, 271, 272, p. 364, 385, 452.
Earl of Darlington v. Pulteney, Cowp. 260, p. 1469.
Earl of Darnley v. London etc. R'y, 3 De Gex, J. & S. 24, L. R. 2 H. L. 43, p. 1521, 2773, 2775.
Earl of Derby v. Duke of Athol, 1 Ves. Sr. 202, 205, p. 256.
Earl of Dundonald v. Masterman, L. R. 7 Eq. 504, p. 1625.
Earl of Glengall v. Barnard, 1 Keen, 769, 794, p. 931.
Earl of Glengall v. Frazer, 2 Hare, 99, 105, p. 259.
Earl of Granard v. Dunkin, 1 Ball & B. 207, p. 2689.
Earl of Jersey v. Briton etc. Dock Co., L. R. 7 Eq. 409, p. 2529.
Earl of Lindsey v. Great Northern R'y, 10 Hare, 664, 700, p. 2601.
Earl of Mexborough v. Bower, 7 Beav. 127, 133, p. 2698.
Earl of Newburg v. Wren, 1 Vern. 220, p. 2718.
Earl of Northumberland v. Earl of Aylesford, Amb. 540, 657, p. 856.
Earl of Oldborough v. Trye, 7 Clark & F. 436, 462, 464, p. 1745.
Earl of Oxford's Case, 1 Ch. Rep. 1, 2 Lead. Cas. Eq., 4th Am. ed., 1291, 1337, 1550–1553, p. 151, 162, 302, 304, 307, 1470, 1637.
Earl of Portarlington v. Damer, 4 De Gex, J. & S. 161, p. 2488.
Earl of Portarlington v. Soully, 7 Sim. 28, p. 1390.
Earl of Portmore v. Taylor, 4 Sim. 182, p. 1742.
Earl of Ripon v. Hobart, 3 Mylne & K. 169, 179, p. 2683.
Earl of Salisbury v. Newton, 1 Eden, 370, p. 2170.
Earl of Shrewsbury v. North Staffordshire R'y, L. R. 1 Eq. 593, p. 1698.
Earl of Stamford, In re, [1896] 1 Ch. 288, p. 2106.
Earl of Stamford v. Hobart, 3 Brown Parl. C. 31, p. 1884, 1885, 1886.
Earl of Suffolk v. Green, 1 Atk. 450, p. 257, 295.
Earl of Thomond v. Earl of Suffolk, 1 P. Wms. 461, p. 2214.
Earl of Westmeath v. Countess of Westmeath, Jacob, 126, 141, p. 1680.
Earle v. Couch, 3 Met. (Ky.) 453, p. 1071.
Earle v. Earle, 27 Nebr. 277, 43 N. W. 118, p. 2177.
Earle v. Earle, 93 N. Y. 104, 113, p. 2045, 2061.

Earle v. Hopwood, 9 Com. B., N. S., 566, 7 Jur., N. S., 775, p. 1702.
Earle v. N. & N. B. H. Co., 36 N. J. Eq. 188, p. 1739.
Earle v. Wood, 8 Cush. 430, p. 1979.
Earlom v. Saunders, Amb. 241, p. 2310.
Earl St. Germains v. Crystal Palace R'y, L. R. 11 Eq. 568, p. 2529.
Earl Spencer v. Peek, L. R. 3 Eq. 415, p. 296.
Earl Talbot v. Hope Scott, 4 Kay & J. 96, p. 2654, 2657.
Early v. Benbow, 2 Coll. 342, p. 889.
Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649, p. 2742, 2800.
Early v. Garrett, 9 Barn. & C. 928, p. 1601.
Early v. Middleton, 14 Beav. 453, p. 889.
Earnest v. Hoskins, 100 Pa. St. 551, p. 1297.
Earnest's Appeal, 106 Pa. St. 310, p. 2001.
Earp v. Lloyd, 3 Kay & J. 549, p. 273.
Earp's Appeal, 75 Pa. St. 119, p. 1830.
East v. Dolihite, 72 N. C. 562, p. 1444.
East v. East, 5 Hare, 343, p. 290.
East v. Pugh, 71 Iowa, 162, 32 N. W. 309, p. 1347.
Eastabrook v. Earle, 97 Mass. 302, p. 2193.
Eastabrook v. Scott, 3 Ves. 456, p. 672, 1716, 1790.
East & West India Dock Co. v. Littledale, 7 Hare, 57, 60, p. 2636, 2648.
East Birmingham Land Co. v. Denison, 85 Ala. 565, 5 So. 317, 7 Am. St. Rep. 73, 2 L. R. A. 836, p. 1242.
Easterbrooks v. Tillinghast, 5 Gray 17, p. 1978, 1985.
Easterly v. Kenney, 36 Conn. 18, 22, p. 1840, 1843.
Eastern R. R., In re, 120 Mass. 412, p. 538.
East I. Co. v. Atkyns, Comyn, 346, p. 2370.
East India Co. v. Boddam, 9 Ves. 464, 466–469, p. 227, 462, 463, 1463.
East India Co. v. Campbell, 1 Ves. Sr. 246, p. 257, 274.
East India Co. v. Donald, 9 Ves. 275, p. 290, 1477, 1550.
East India Co. v. Evans, 1 Vern. 307, p. 257.
East India Co. v. Henchman, 1 Ves. 287, p. 1760, 1764.
East India Co. v. Kynaston, 3 Bligh, 153, p. 285.
East I. Co. v. Neave, 5 Ves. 173, 181, 184, p. 1477, 1550, 1711.
East India Co. v. Vincent, 2 Atk. 83, p. 304, 1434.
Eastland v. Jordan, 3 Bibb, 186, p. 1844.
East Lewisburg etc. Co. v. Marsh, 91 Pa. St. 96, 99, p. 2575, 2584.
Eastman v. Amoskeag etc. Co., 47 N. H. 71, 78, 79, 80, p. 308, 383, 425, 451, 529, 530, 2684.
Eastman v. Plumer, 46 N. H. 464, 478, p. 524, 525, 662, 1668, 2767.
East Moline Plow Co. v. Weir Plow Co., 95 Fed. 250, p. 743.
Easton v. Cressey, 100 Cal. 75, 34 Pac. 622, p. 760.
Easton v. German-American Bank, 127 U. S. 532, 8 Sup. Ct. 1297, p. 1756.
East Rome Town Co. v. Cothran, 81 Ga. 359, 8 S. E. 737, p. 1850.
East Tenn. R. R. v. Gammon, 5 Sneed, 567, p. 1625.
Eastwood v. Vincke, 2 P. Wms. 613, 614, 617, p. 873, 874, 875.
Eaton v. Bennett, 34 Beav. 196, p. 15, 16.
Eaton v. Benton, 2 Hill, 576, 578, p. 873, 874, 875, 878.
Eaton v. Burns, 31 Ind. 390, p. 683, 2608.
Eaton v. Cook, 25 N. J. Eq. 55, p. 1879, 1906, 1912.
Eaton v. Giles, 5 Kan. 24, p. 2749.
Eaton v. Green, 22 Pick. 526, 529, 531, p. 535, 538.
Eaton v. Hasty, 6 Nebr. 419, 29 Am. Rep. 265, p. 2796.
Eaton v. Lyon, 3 Ves. 690, 692, 693, p. 753, 755, 758, 1466.
Eaton v. Nason, 47 Me. 132, p. 2193.
Eaton v. New England Tel. Co., 68 Me. 523, p. 1435, 1441, 1444, 1445.
Eaton v. Simonds, 14 Pick. 98, p. 1409.
Eaton v. Watts, L. R. 4 Eq. 151, p. 1925, 1929.
Eaton v. Whitaker, 18 Conn. 222, 44 Am. Dec. 586, p. 2780.
Eaton, Cole & B. Co. v. Avery, 83 N. Y. 31, 38 Am. Rep. 389, p. 1567, 1570, 1577.
Eaton's Appeal, 66 Pa. St. 483, p. 290.
Eaves v. Gillespie, 1 Swan, 128, p. 2144.

Eaves v. Hickson, 30 Beav. 591, p. 2059, 2067.
Eavestaff v. Austin, 19 Beav. 591, p. 2225.
Ebbett's Case, L. R. 5 Ch. 302, p. 1435.
Eberly v. Shirk, 206 Pa. St. 414, 55 Atl. 1071, p. 2381.
Eberly's Appeal, 110 Pa. St. 95, 1 Atl. 330, p. 1846.
Ebert v. Gerding, 116 Ill. 216, 5 N. E. 591, p. 2424.
Ebert v. Wood, 1 Binn. 217, 2 Am. Dec. 436, p. 559.
Eberts v. Eberts, 55 Pa. St. 110, p. 325, 332.
Ebner v. Goundie, 5 Watts & S. 49, p. 1107.
Ebrand v. Daucer, 2 Cas. Ch. 26, p. 1998.
Ebrington v. Ebrington, 5 Madd. 117, p. 846.
Eby's Appeal, 84 Pa. St. 241, p. 2306, 2315.
Ecclesiastical Comm'rs v. Kino, L. R. 14 Ch. Div. 213, p. 2685.
Echelkamp v. Schrader, 45 Mo. 505, p. 2693, 2695.
Echliff v. Baldwin, 16 Ves. 267, p. 2670, 2671.
Echols v. Hammond, 30 Miss. 177, p. 148, 215, 219, 568.
Eck v. Hatcher, 58 Mo. 235, p. 978, 982, 987, 1147.
Ecker v. Bohn, 45 Md. 278, p. 1701, 1704.
Ecker v. McAllister, 45 Md. 290, p. 1701.
Eckerly v. McGhee, 85 Tenn. 661, 4 S. W. 386, p. 2182, 2183, 2198.
Eckles v. Ray & Lawyer, 13 Okl. 541, 75 Pac. 286, p. 2576.
Eckman v. Eckman, 55 Pa. St. 269, 273, p. 2753.
Economy Sav. Bank v. Gordon, 90 Md. 486, 45 Atl. 176, 48 L. R. A. 63, p. 695, 1374.
Eddy v. Hartshorne, 34 N. J. Eq. 420, p. 1929.
Edelen v. Dent, 2 Gill & J. 185, p. 873, 874, 875.
Edelsten v. Edelsten, 1 De Gex, J. & S. 185, p. 2690.
Eden v. Smith, 5 Ves. 341, p. 882.
Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 33 Am. St. Rep. 557, 16 L. R. A. 94, p. 357, 2166, 2177.
Edgerton v. Peckham, 11 Paige, 352, 359, p. 761, 2778.
Edgerton v. Young, 43 Ill. 464, p. 1400, 1403, 1406.
Edgeworth v. Edgeworth, 16 Ir. Ch. Rep. 348, p. 2163.
Edinger v. Heiser, 62 Mich. 598, 29 N. W. 367, p. 1906.
Edington v. Fitzmaurice, 29 Ch. Div. 459, p. 1561, 1567, 1573.
Edison Electric Light Co. v. U. S. Electric Light Co., 45 Fed. 55, 58, p. 272.
Edmands, Ex parte, 4 De Gex, F. & J. 488, p. 2103.
Edmeston v. Lyde, 1 Paige, 637, 19 Am. Dec. 454, p. 1079.
Edminster v. Higgins, 6 Nebr. 265, 269, p. 1102, 2503.
Edmonds v. Crenshaw, 14 Pet. 166, p. 2096.
Edmonds v. Foley, 30 Beav. 282, p. 287.
Edmonds v. Termehr, 60 Iowa, 92, 14 N. W. 197, p. 1324.
Edmonds v. Torrence, 48 Ala. 38, p. 1341.
Edmond's Appeal, 59 Pa. St. 220, p. 1517.
Edmunds v. Bird, 1 Ves. & B. 542, p. 2655.
Edmunds v. Low, 3 Kay & J. 318, 321, p. 875, 876, 877.
Edmundson v. Roberts, 2 How. 822, p. 2277.
Edsell v. Briggs, 20 Mich. 429, 432, p. 149, 223.
Edson v. Angell, 58 Mich. 336, 25 N. W. 307, p. 1912.
Edward v. Grand Junc. R'y, 1 Mylne & C. 650, p. 1699.
Edward Lee, The, 3 Ben. 114, Fed. Cas. No. 4,292, p. 2574, 2588.
Edward Thompson Co. v. American Law Book Co. (C. C. A.), 122 Fed. 923, p. 663.
Edwards, In re, L. R. 9 Ch. 97, p. 2141.
Edwards v. Banksmith, 35 Ga. 213, p. 1065, 1075.
Edwards v. Bennett, 10 Ired. 363, p. 2744.
Edwards v. Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87, p. 1373.
Edwards v. Browne, 2 Coll. C. C. 100, p. 1742.

Edwards v. Burt, 2 De Gex, M. & G. 55, p. 1742.
Edwards v. Countess of Warwick, 2 P. Wms. 171, 175, 176, p. 634, 2305, 2316.
Edwards v. Edwards, L. R. 2 Ch. Div. 291, p. 2661.
Edwards v. Edwards, 14 Tex. Civ. App. 87, 36 S. W. 1080, p. 2626.
Edwards v. Estell, 48 Cal. 194, p. 1699, 2782.
Edwards v. Freeman, 2 P. Wms. 435, 447, p. 1471.
Edwards v. Hall, 11 Hare, 1, 23, p. 2216.
Edwards v. Hill, 59 Fed. 723, 19 U. S. App. 493, p. 499.
Edwards v. Hillier, 70 Miss. 803, 13 South. 692, p. 1155.
Edwards v. Jones, 1 Mylne & C. 226, 235, 238, p. 1872, 1878, 2232, 2235.
Edwards v. McKernan, 55 Mich. 521, 22 N. W. 20, p. 1096, 1111.
Edwards v. McLeay, 2 Swanst. 287, Coop. & Eld. 308, p. 1605, 1609, 1618.
Edwards v. Martin, L. R. 1 Eq. 121, p. 1211, 1214.
Edwards v. Meyrick, 2 Hare, 60, 75, p. 1752, 1768, 1788.
Edwards v. Morgan, 1 Bligh, N. S., 401, p. 853.
Edwards v. Morgan, 100 Pa. St. 330, p. 559.
Edwards v. Morgen, McClel. 541, 13 Price, 782, 1 Bligh, N. S., 401, p. 854.
Edwards v. Parkhurst, 21 Vt. 472, p. 2549, 2552.
Edwards v. Peterson, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207, p. 2584.
Edwards v. Rainier's Ex'rs, 17 Ohio St. 597, p. 884, 886, 889.
Edwards v. Roberts, 7 Smedes & M. 544, p. 1788.
Edwards v. Thompson, 71 N. C. 177, 179, p. 1007, 1019, 1021, 1033, 1036, 1045.
Edwards v. Trumbull, 50 Pa. St. 509, p. 1123.
Edwards v. Tuck, 23 Beav. 268, p. 2324, 2326.
Edwards v. Varick, 1 Hoff. Ch. 382, 11 Paige, 290, 5 Denio, 664, 679, p. 304.
Edwards v. Wall, 79 Va. 321, p. 2379.
Edwards v. Weil, 99 Fed. 822, 40 C. C. A. 105, p. 1265.
Edwards v. West, L. R. 7 Ch. Div. 858, 862, 863, p. 2314.
Edwards' Ex'rs v. Trumbull, 50 Pa. St. 509, p. 2539, 2542.
Eedes v. Eedes, 11 Sim. 569, p. 645, 2173, 2175.
Effinger v. Hall, 81 Va. 94, p. 2482.
Effinger v. Ralston, 21 Gratt. 430, p. 2515.
Efland v. Efland, 96 N. C. 493, 1 S. E. 858, p. 464.
Egan v Raynor, (S. C.) 27 S. E. 475, p. 1328.
Ege v. Koontz, 3 Pa. St. 109, p. 1503.
Egerton v. Earl of Brownlow, 4 H. L. Cas. 1, 210, p. 1882, 1885, 1886.
Eggeman v. Eggeman, 37 Mich. 436, p. 1264, 1285, 1293.
Eggert v. Beyer, 43 Nebr. 711, 62 N. W. 57, p. 1102, 1227, 1301.
Ehert v. Chapman, 8 Baxt. 27, p. 2376.
Ehle v. Brown, 31 Wis. 405, 414, p. 1276, 1381.
Ehrichs v. De Mill, 75 N. Y. 370, p. 2561.
Eichelberger v. Gitt, 104 Pa. St. 64, p. 2522, 2525.
Eichelberger v. Hawthorne, 33 Md. 588, p. 2273.
Eidson v. Huff, 29 Gratt. 338, p. 1272.
Eiffert v. Craps, 58 Fed. 470, 7 C. C. A. 319, 8 U. S. App. 436, p. 212.
Eipper v. Bennet, 113 Mich. 75, 71 N. W. 511, p. 1906.
Eitel v. Bracken, 38 N. Y. Sup. Ct. 7, p. 1444.
Eitelgeorge v. Mutual etc. Ass'n, 69 Mo. 52, p. 1862.
Eker v. McAllister, 45 Md. 290, p. 1704.
Elbert v. O'Neill, 102 Pa. St. 302, p. 559, 849.
Elder v. Allison, 45 Ga. 13, p. 1583.
Elder v. Derby, 98 Ill. 228, p. 1135, 1283.
Elder v. Elder, 10 Me. 80, 25 Am. Dec. 205, p. 1532.
Elder v. Elder, 50 Me. 535, p. 553, 2272.

Elder v. First Nat. Bank, 12 Kan. 238, p. 2670.
Elder v. Jones, 85 Ill. 384, p. 2191.
Elder v. Maclean, 3 Jur., N. S., 284, p. 1213.
Elderton, In re, 25 Ch. Div. 220, p. 2616.
Eldred v. Hazlett's Adm'r, 33 Pa. St. 307, p. 1432.
Eldred v. Meek, 183 Ill. 26, 75 Am. St. Rep. 86, 55 N. E. 536, p. 1850.
Eldridge v. Dexter & P. R. R. Co., 88 Me. 191, 33 Atl. 974, p. 1486.
Eldridge v. Eldridge, 14 N. J. Eq. 195, p. 2735.
Eldridge v. Hill, 2 Johns. Ch. 261, 281, 282, p. 162, 226, 364, 385, 425, 452, 2704.
Eldridge v. Preble, 34 Me. 148, p. 2193.
Eldridge v. See Yup Co., 17 Cal. 44, p. 1910.
Eldridge v. Smith, 34 Vt. 484, p. 2757.
Eldridge v. Stenger, 19 Wash. 697, 54 Pac. 541, p. 1081, 1082.
Eldridge v. Walker, 60 Ill. 230, p. 1761.
Eldridge v. Walker, 80 Ill. 270, p. 1071, 1294, 1372.
Elfe v. Cole, 26 Ga. 197, p. 2358.
Elfelt v. Snow, 2 Saw. 94, p. 1791.
Elizabeth Cordage Co. v. Whitlock, 37 Fla. 190, 20 South. 255, p. 1065.
Eliot's Appeal, 74 Conn. 586, 51 Atl. 558, p. 1940, 1942, 1958, 1973.
Eliott v. Gower, 12 R. I. 79, p. 2197.
Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. 839, p. 351.
Elkins v. C. & A. R. R. Co., 36 N. J. Eq. 5, p. 2118.
Ellard v. Lord Llandaff, 1 Ball & B. 241, p. 1619.
Ellcock v. Mapp, 3 H. L. Cas. 492, 2 Phill. Ch. 793, p. 1988.
Ellenborough, In re [1903] 1 Ch. 697, p. 2547.
Ellice v. Roupell, 32 Beav. 299, p. 296.
Ellicott v. Barnes, 31 Kan. 170, 1 Pac. 767, p. 1912.
Ellicott v. Chamberlin, 38 N. J. Eq. 604, 48 Am. Rep. 327, p. 1711.
Ellicott v. Kuhl, 60 N. J. Eq. 333, 46 Atl. 945, p. 2022.
Ellig v. Naglee, 9 Cal. 683, 684, 695, p. 2066, 2067, 2070, 2077, 2101, 2102.
Ellinger v. Crowl, 17 Md. 361, p. 1801.
Elliot v. Ince, 7 De Gex, M. & G. 475, p. 1726.
Elliot v. Lane, 82 Iowa, 484, 48 N. W. 720, 31 Am. St. Rep. 504, p. 1037.
Elliot's Trusts, In re, L. R. 15 Eq. 194, p. 2098.
Elliott v. Buffington, 149 Mo. 663, 51 S. W. 408, p. 1343.
Elliott v. Carter, 9 Gratt. 541, p. 2065, 2087.
Elliott v. Cordell, 5 Madd. 149, 156, 1 Russ. 71, note, p. 646, 2170, 2171, 2172.
Elliott v. Davenport, 1 P. Wms. 83, p. 2228.
Elliott v. Dearsley, 16 Ch. Div. 322, p. 2490.
Elliott v. Elliott, (N. J.) 36 Atl. 951, p. 215.
Elliott v. Fisher, 12 Sim. 505, p. 620, 1854, 2315, 2332.
Elliott v. Horn, 10 Ala. 348, 44 Am. Dec. 488, p. 1833.
Elliott v. Lambert, 28 Ch. Div. 186, p. 2615.
Elliott v. Lawhead, 43 Ohio St. 171, 1 N. E. 577, p. 2197.
Elliott v. Sackett, 108 U. S. 140, 2 Sup. Ct. 375, 27 L. ed. 680, p. 2402.
Elliott v. Shuler, 50 Fed. 454, p. 501.
Elliott v. Sparrell, 114 Mass. 404, p. 2090.
Elliott v. Swartout, 10 Pet. 137, p. 1503.
Elliott v. Turner, 13 Sim. 477, p. 631, 632, 717.
Elliott v. Whitmore, 23 Utah, 342, 65 Pac. 70, 90 Am. St. Rep. 700, p. 1436.
Elliott v. Wood, 45 N. Y. 71, 53 Barb. 285, p. 1861.
Ellis v. Barker, L. R. 7 Ch. 104, p. 1738, 2085, 2090.
Ellis v. Boston, H. & E. R. R., 107 Mass. 1, p. 538.
Ellis v. Davis, 109 U. S. 485, 498, 3 Sup. Ct. 327, 335, 27 L. ed. 1006, affirming 4 Woods, 11 Fed. Cas. No. 4,402, p. 509, 2294.

Ellis v. Duke of Bedford, [1899] 1 Ch. 494, p. 396.
Ellis v. Eden, 23 Beav. 543, p. 2322.
Ellis v. Eden, 25 Beav. 482, p. 2215.
Ellis v. Ellis, 12 Pick. 178, p. 2099.
Ellis v. Ellis, 1 Schoales & L. 1, p. 900.
Ellis v. Ellis's Adm'rs, 15 Ala. 296, 50 Am. Dec. 132, p. 1926.
Ellis v. Horrman, 90 N. Y. 466, p. 982, 988.
Ellis v. Hussey, 66 N. C. 501, p. 2351.
Ellis v. Jones, 56 Ga. 504, p. 1690.
Ellis v. Kelly, 8 Bush, 621, 631, p. 1642, 2709.
Ellis v. Kreutzinger, 27 Mo. 311, 72 Am. Dec. 270, p. 1218, 1382.
Ellis v. Lamme, 42 Mo. 153, p. 2392, 2394, 2395.
Ellis v. Lewis, 3 Hare, 310, 315, p. 831, 838.
Ellis v. Messervie, 11 Paige, 467, p. 1229.
Ellis v. Northern Pac. R. R. Co., 77 Wis. 114, 45 N. W. 811, p. 421, 455.
Ellis v. Parker, L. R. 7 Ch. 104, p. 2080.
Ellis v. Secor, 31 Mich. 185, 18 Am. Rep. 178, p. 2233, 2234, 2237, 2244, 2247.
Ellis v. Selby, 1 Mylne & C. 286, 292, 293, 7 Sim. 352, p. 1933, 1949, 1986.
Ellis v. Temple, 4 Cold. 315, 94 Am. Dec. 200, p. 2502.
Ellis v. Ward, 137 Ill. 509, 25 N. E. 530, p. 2110, 2119.
Ellis v. Woods, 9 Rich. Eq. 19, p. 2139, 2144.
Ellis v. Young, 31 S. C. 322, 9 S. E. 955, p. 1333.
Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433, p. 960, 1106, 1145, 1468, 1478, 1506.
Ellison v. Daniels, 11 N. H. 274, p. 2350.
Ellison v. Ellison, 6 Ves. 656, 1 Lead. Cas. Eq., 4th Am. ed., 382, 389, 415, 423, p. 1468, 1856, 1864, 1871, 1886.
Ellison v. Elwin, 13 Sim. 309, p. 2172.
Ellison v. Moffatt, 1 Johns. Ch. 46, p. 697.
Ellison v. Torpin, 44 W. Va. 414, 30 S. E. 183, p. 1022, 1027, 1029, 1034, 1046, 1048, 1323.
Ellis's Trusts, In re, L. R. 17 Eq. 409, p. 2158.
Elliston v. Hughes, 1 Head, (Tenn.) 227, p. 250.
Ellithorpe v. Buck, 17 Ohio St. 72, p. 587, 2750.
Ells v. Tousley, 1 Paige, 280, p. 1269, 1279, 1333.
Ellsworth v. Lockwood, 42 N. Y. 89, 97, p. 2423, 2426.
Ellwell v. Chamberlain, 31 N. Y. 611, p. 1625.
Elmbank, The, 72 Fed. 610, p. 195, 1211, 1212, 1322, 1323, 1327, 2546, 2560, 2563, 2585.
Elmendorf v. Lansing, 4 Johns. Ch. 562, p. 2095.
Elmer v. Creasy, L. R. 9 Ch. 69, p. 283.
Elmer v. Loper, 25 N. J. Eq. 475, p. 2052, 2431, 2432.
Elmhirst v. Spencer, 2 Macn. & G. 45, 50, p. 2684.
Elmira etc. Co. v. Erie R'y, 26 N. J. Eq. 284, p. 2662.
Elmore v. Johnson, 143 Ill. 513, 36 Am. St. Rep. 401, 404, 406, 407, 32 N. E. 413, 21 L. R. A. 366, p. 1766, 1768, 1770.
Elmore v. Symonds, (Mass.) 67 N. E. 314, p. 2477.
Elmstedt v. Nicholson, 186 Ill. 580, 58 N. E. 381, p. 1729, 1738.
Elrod v. Cochran, 59 S. C. 467, 38 S. E. 122, p. 1994.
Elsey v. Lutyens, 8 Hare, 159, p. 1142.
Elston v. Roop, 133 Ala. 331, 32 South. 129, p. 749.
Elting v. First Nat. Bank, 173 Ill. 368, 50 N. E. 1095, p. 1651, 1753, 1780, 2018.
Elwell v. Chamberlain, 4 Bosw. 320, p. 1477.
Elwes v. Causton, 30 Beav. 554, p. 2210.
Elwes v. Elwes, 3 De Gex, F. & J. 667, p. 1543.
Elwood v. Deifendorf, 5 Barb. 398, p. 2796.
Elworthy v. Bird, 2 Sim. & St. 372, p. 1680.
Ely v. Crane, 37 N. J. Eq. 160, 564, p. 220.
Ely v. McKay, 12 Allen, 323, p. 2601.
Ely v. Pingry, 56 Kan. 17, 42 Pac. 330, p. 1283.
Ely v. Scofield, 35 Barb. 330, p. 1301.

Ely v. Wilcox, 20 Wis. 523, 530, 531, 551, 91 Am. Dec. 436, p. 1037, 1098, 1136, 1149, 1359.
Elyton Land Co. v. Dowdell, 113 Ala. 177, 20 South. 981, 59 Am. St. Rep. 105, p. 2118.
Emanuel College v. Evans, 1 Rep. Chan. 18, p. 186, 2338.
Embree v. Franklin, 23 Hun, 203, p. 2201.
Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776, p. 1676.
Embury v. Conner, 2 Sand. 98, p. 1132.
Emeric v. Alvarado, 90 Cal. 444, 471-474, 478, 27 Pac. 356, p. 1045, 1096, 1114.
Emerson v. Atwater, 7 Mich. 12, p. 2380.
Emerson v. Galloupe, 158 Mass. 146, 32 N. E. 118, p. 2040.
Emerson v. Staton, 3 T. B. Mon. 116, 118, p. 324.
Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604, p. 1653, 2703, 2708, 2710.
Emerson's Heirs v. Hall, 13 Pet. 409, p. 2555.
Emery v. Batchelder, 78 Me. 233, 3 Atl. 733, p. 2219.
Emery v. Boyle, 200 Pa. St. 249, 49 Atl. 779, p. 729, 736, 747.
Emery v. Clough, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796, p. 2232.
Emery v. Cochran, 82 Ill. 65, p. 2748.
Emery v. Erskine, 66 Barb. 9, p. 397.
Emery v. Lawrence, 8 Cush. 151, p. 2553.
Emery v. Lowe, 140 Cal. 379, 73 Pac. 981, p. 2380.
Emery v. Mohler, 69 Ill. 221, p. 2726.
Emery v. Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819, p. 1689.
Emery v. Owings, 7 Gill, 488, 48 Am. Dec. 580, p. 1653.
Emery v. Pease, 20 N. Y. 62, 64, p. 355.
Emery v. Vinall, 26 Me. 295, p. 1801.
Emigrant Co. v. County of Wright, 97 U. S. 339, p. 1639, 1750.
Emil Kiewert Co. v. Juneau, 78 Fed. 708, 24 C. C. A. 294, p. 2428.
Emley v. Mount, 32 N. J. Eq. 470, p. 2415.
Emmanuel v. Hunt, 2 Ala. 190, p. 2417.
Emma Silver Mining Co. v. Grant, L. R. 11 Ch. Div. 918, p. 2129.
Emmert v. Hays, 89 Ill. 11, p. 2191.
Emmert v. Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31, p. 2425.
Emmet v. Clark, 3 Giff. 32, 35, p. 2109.
Emmet v. Dewhurst, 3 Macn. & G. 587, p. 1521.
Emmons v. Cairns, 2 Sand. Ch. 369, p. 2299.
Emmons v. Kiger, 23 Ind. 483, 487, p. 585.
Emmons v. Moore, 85 Ill. 304, p. 1609, 1616.
Emmons v. Murray, 16 N. H. 385, p. 1021, 1045.
Emory v. Clough, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796, p. 2234.
Emperor of Austria v. Day, 3 De Gex, F. & J. 217, 238-241, p. 545, 2679, 2696.
Empire Land & Canal Co. v. Engley, 18 Colo. 388, 33 Pac. 153, p. 1086.
Empire State Sav. Bank v. Beard, 81 Hun, 184, 30 N. Y. Supp. 756, p. 2111, 2114, 2119.
Emuss v. Smith, 2 De Gex & S. 722, p. 2314.
Endel v. Leibrock, 33 Ohio St. 254, p. 2435.
Enders v. Enders, 2 Barb. 362, p. 2216, 2218.
Enders v. Williams, 1 Met. (Ky.) 346, p. 1801, 1804, 1806.
Endter v. Lennon, 46 Wis. 299, p. 2703.
Engelback v. Nixon, L. R. 10 Com. P. 645, p. 2638.
Engelhardt v. Batla, (Tex. Civ. App.) 31 S. W. 324, 40 S. W. 150, p. 738.
Engels v. Lubeck, 4 Cal. 31, p. 2716.
England v. Curling, 8 Beav. 129, p. 2771.
England v. Downs, 2 Beav. 522, p. 1678, 2165.
England v. Lavers, L. R. 3 Eq. 63, p. 794.
England v. Reynolds, 38 Ala. 370, p. 1856.
England v. Russell, 71 Fed. 818, 821, 824, p. 505.

England v. Tredegar, L. R. 1 Eq. 344, p. 1463.
England v. Vestry of Prince George's Parish, 53 Md. 466, p. 2216.
Engle v. Haines, 5 N. J. Eq. 186, 632, 43 Am. Dec. 624, p. 2457.
Englefield etc. Co., In re, L. R. 8 Ch. Div. 388, p. 2059, 2065, 2090.
English v. English, 3 N. J. Eq. 504, 29 Am. Dec. 730, p. 827.
English v. Lindley, 194 Ill. 181, 62 N. E. 522, affirming 89 Ill. App. 538, p. 1347.
English v. McIntyre, 29 App. Div. 439, 51 N. Y. Supp. 697, p. 2078.
English v. Russell, 1 Hamp. 35, p. 2498, 2528.
English v. Smock, 34 Ind. 115, 7 Am. Rep. 215, p. 408.
English v. Waples, 13 Iowa, 57, p. 1100, 1358, 1359.
English-Am. L. & T. Co. v. Hiers, 112 Ga. 823, 38 S. E. 103, p. 1177.
English & Scottish Mercantile Co. v. Brunton, [1892] 2 Q. B. 700, p. 1059.
Englund v. Lewis, 25 Cal. 337, p. 2757.
Ennison v. Risque, 9 Bush, 24, p. 2500.
Eno v. Calder, 14 Rich. Eq. 154, p. 565, 571, 2288.
Enochs-Harris Lumber Co. v. Newcomb, 79 Miss. 462, 30 South. 608, p. 1212.
Enos v. St. Paul etc. Ins. Co., 4 S. Dak. 639, 46 Am. St. Rep. 796, 57 N. W. 919, p. 1159.
Enos v. Sanger, 96 Wis. 151, 70 N. W. 1069, 65 Am. St. Rep. 38, 37 L. R. A. 862, p. 2414.
Enright v. Grant, 5 Utah, 334, 340, 15 Pac. 268, 270, p. 411, 412, 416, 453, 465.
Ensign v. Batterson, 68 Conn. 298, 36 Atl. 51, p. 652, 2481, 2482.
Ensign v. Colburn, 11 Paige, 503, p. 2682.
Ensminger v. Ensminger, 75 Iowa, 89, 39 N. W. 208, 9 Am. St. Rep. 462, p. 2380.
Entreken v. Howard, 16 Kan. 551, p. 2749.
Eoff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609, 18 S. W. 907, p. 1343, 1771.
Epley v. Witherow, 7 Watts, 163, 167, p. 974, 977, 981, 984, 994, 1011, 1017, 1105.
Eppinger v. Canepa, 20 Fla. 262, p. 2089.
Eppinger v. McGreal, 31 Tex. 147, p. 2779.
Equitable B. & L. Ass'n v. King, (Fla.) 37 South. 181, p. 2189.
Equitable Guarantee & T. Co. v. Donahoe, (Del.) 45 Atl. 583, p. 381, 426, 427, 434, 450, 565.
Equitable Life Assur. Soc. v. Wetherill, (C. C. A.) 127 Fed. 947, p. 1712.
Equitable Loan & Security Co. v. Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 176, p. 760.
Equitable Securities Co. v. Talbert, 49 La. Ann. 1393, 22 South. 762, p. 1228.
Equitable Sureties Co. v. Sheppard, 78 Miss. 217, 28 South. 842, p. 1170, 1171, 1347.
Equitable Trust Co. v. Garis, 190 Pa. St. 544, 70 Am. St. Rep. 644, 42 Atl. 1022, 44 Wkly. Notes. Cas. 41, p. 234, 235, 2624.
Erhardt v. Baltimore Monthly Meeting of Friends, 93 Md. 669, 49 Atl. 561, p. 1971.
Erickson v. Rafferty, 79 Ill. 209, 212, p. 977, 982, 1018, 1145, 2347.
Erickson v. Smith, 79 Iowa, 374, 44 N. W. 681, p. 2500.
Erickson v. Willard, 1 N. H. 217, p. 1926.
Erie Co. Sav. Bank v. Roop, 80 N. Y. 591, p. 2451, 2452.
Erie R. R. v. Vanderbilt, 5 Hun, 123, p. 1642, 1646, 1719.
Erie Ry. v. Ramsey, 45 N. Y. 637, p. 93, 229, 467, 592, 2716.
Errington v. Arnesly, 2 Brown Ch. 341, 343, p. 717, 2765.
Errington v. Aynesly, 2 Brown Ch. 341, 343, p. 717, 2765.
Erkens v. Nicolin, 39 Minn. 461, 40 N. W. 567, p. 1503.
Erlanger v. New Sombrero Phosphate Co., L. R. 3 App. Case, 1218, p. 1614.
Erlinger v. Boul, 7 Ill. App. 40, p. 2446, 2451.
Ernest v. Croysdill, 2 De Gex, F. & J. 175, p. 2016, 2029, 2032 2082, 2670.
Ernst v. Estey Wire Works Co., 45 N. Y. Supp. 932, 20 Misc. Rep. 365, p. 1231.

Erskine v. Decker, 39 Me. 467, p. 1384.
Erskine v. Forest Oil Co., 80 Fed. 583, p. 212.
Erskine v. La Baum, 3 Tex. 417, p. 1754.
Erskine v. Townsend, 2 Mass. 493, 495, 3 Am. Dec. 71, p. 2367.
Erskine's Trusts, In re, 1 Kay & J. 302, p. 2174.
Erste Sokolower Congregation v. First United etc. Verein, 32 Misc. Rep. 269, 66 N. Y. Supp. 356, p. 220.
Erwin v. Hamner, 27 Ala. 293, p. 1544.
Erwin v. Hedrick, 52 W. Va. 537, 44 S. E. 165, p. 1666, 1739.
Erwin v. Henry, 5 Mo. 469, p. 2279.
Erwin v. Lewis, 32 Wis. 276, p. 1098, 1136, 1360.
Erwin v. Lowry, 7 How. 172, 181, p. 511.
Erwin v. Parham, 12 How. 197, p. 1665, 1666.
Esbach v. Lightner, 31 Md. 528, p. 293.
Escher v. Simmons, 54 Iowa, 269, p. 2500, 2513.
Eschweiler v. Stowell, 78 Wis. 316, 47 N. W. 361, 23 Am. St. Rep. 411, p. 2128.
Eshbach's Estate, 197 Pa. St. 153, 46 Atl. 905, p. 1910.
Eskridge v. McClure, 2 Yerg. 84, p. 2502.
Espey v. Lake, 10 Hare, 260, 262, p. 1775, 1776.
Espin v. Pemberton, 3 De Gex & J. 547, 554, 555, 556, 4 Drew. 333, p. 998, 1005, 1008, 1009, 1011, 1016, 1045, 1150, 1162, 1172, 1295.
Espinosa v. Gregory, 40 Cal. 58, p. 2381.
Esrow v. Nicholas, 1 De Gex & S. 118, p. 1448.
Essex v. Atkins, 14 Ves. 542, p. 2149.
Essex v. Baugh, 1 Younge & C. Ch. 620, p. 1142.
Essex Co. Bank v. Harrison, 57 N. J. Eq. 91, 40 Atl. 209, p. 1020, 1107, 1147.
Estates Investment Co., In re, L. R. 4 Ch. 497, p. 1573.
Estates Investment Co., In re, L. R. 10 Eq. 503, p. 1788.
Estcourt v. Estcourt etc. Co., L. R. 10 Ch. 276, p. 2690.
Estep v. Armstrong, 69 Cal. 536, 11 Pac. 132, p. 1587.
Esterly v. Rua, 122 Fed. 609, 58 C. C. A. 548, p. 2285.
Estes v. Furlong, 59 Ill. 298, 300, p. 2779.
Estes v. Gunter, 122 U. S. 450, 7 Sup. Ct. Rep. 1275, 30 L. ed. 1228, p. 1857.
Estevez v. Purdy, 66 N. Y. 446, p. 1625.
Estis v. Jackson, 111 N. C. 145, 32 Am. St. Rep. 784, 16 S. E. 7, p. 1424, 1438.
Etheridge v. Vernoy, 74 N. C. 800, p. 2563.
Ettenheimer v. Northgraves, 75 Iowa, 28, 39 N. W. 120, p. 1277.
Etting v. Bank of U. S., 11 Wheat. 59, p. 1622.
Etting v. Marx, 4 Fed. 673, 4 Hughes, 312, p. 2078.
Eureka & K. R. R. Co. v. Cal. & N. R. Co., 109 Fed. 509, 48 C. C. A. 517, p. 387.
Eureka Light & Ice Co. v. City of Eureka, (Kan. App.) 48 Pac. 935, p. 763.
European & N. A. R'y v. Poor, 59 Me. 277, p. 2121.
European Bank, In re, L. R. 5 Ch. 358, 361, 362, p. 1160, 1174, 1246, 2016.
Eutaw Place Baptist Church v. Shively, 67 Md. 493, 10 Atl. 244, 1 Am. St. Rep. 412, p. 1955, 1971.
Eva v. McMahon, 77 Cal. 467, 19 Pac. 872, p. 738.
Evangelical Association's Appeal, 35 Pa. St. 316, p. 1960, 1977.
Evangelical Synod v. Schoeneich, 143 Mo. 652, 45 S. W. 647, p. 2023.
Evans, Ex parte, L. R. 13 Ch. Div. 252, p. 2661.
Evans, In re, L. R. 21 Ch. Div. 297, p. 2622.
Evans v. Bagshaw, L. R. 8 Eq. 469, L. R. 5 Ch. 340, p. 2740.
Evans v. Battle, 19 Ala. 398, p. 1873.
Evans v. Bear, L. R. 10 Ch. 76, p. 2053, 2090, 2095.
Evans v. Bicknell, 6 Ves. 173, 174, 182, 183, 191, 192, p. 1001, 1016, 1194, 1294, 1427, 1430, 1431, 1581, 1586, 1605, 1630, 1633, 1655.
Evans v. Brandon, 53 Tex. 56, p. 2121, 2125.

Evans v. Bremridge, 8 De Gex, M. & G. 100, p. 2704, 2713.
Evans v. Carrington, 2 De Gex, F. & J. 481, p. 1543, 1613, 2162.
Evans v. Chew, 71 Pa. St. 47, p. 2046.
Evans v. Collins, 5 Q. B. 820, reversing 5 Q. B. 804, p. 1575, 1576.
Evans v. Coventry, 5 De Gex, M. & G. 911, 916, 917, p. 2654, 2656, 2658.
Evans v. Curtis, 190 Ill. 197, 60 N. E. 56, p. 1994, 1997, 2000.
Evans v. Davis, L. R. 10 Ch. Div. 747, p. 2673.
Evans v. Duke, 140 Cal. 22, 73 Pac. 732, p. 1450, 1602.
Evans v. Edmonds, 13 Com. B. 777, 786, p. 1577.
Evans v. Enloe, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22.
Evans v. Evans, 2 Cold. 143, p. 2288.
Evans v. Goodlet, 1 Blackf. 246, p. 2499.
Evans v. Hunter, 86 Iowa, 413, 41 Am. St. Rep. 503, 53 N. W. 277, 17 L. R. A. 308, p. 2209.
Evans v Iglehart, 6 Gill & J. 171, 192, p. 2077.
Evans v. Johnson, 39 W. Va. 299, 45 Am. St. Rep. 912, 19 S. E. 623, 23 L. R. A. 737, p. 2528, 2530.
Evans v. Keeland, 9 Ala. 42, p. 1622.
Evans v. Kelly, 49 W. Va. 181, 38 S. E. 497, p. 352.
Evans v. Kimball, 1 Allen, 240, 242, p. 1402.
Evans v. Knorr, 4 Rawle, 66, p. 2144.
Evans v. Laughton, 69 Wis. 138, 33 N. W. 573, p. 2382.
Evans v. Llewellyn, 2 Brown Ch. 150, 1 Cox, 333, 340, p. 1494, 1667, 1671, 1734.
Evans v. McConnell, (Iowa) 63 N. W. 570, p. 354.
Evans v. McGlasson, 18 Iowa, 150, p. 1270.
Evans v. Merriken, 8 Gill & J. 39, 47, p. 2344.
Evans v. Moore, [1891] 3 Ch. 119, p. 1834.
Evans v. Odom, 30 Ind. App. 207, 65 N. E. 755, p. 1444.
Evans v. Richardson, 3 Mer. 469, p. 1714.
Evans v. Robertson, 54 Miss. 683, p. 577, 2276.
Evans v. Rosser, 2 Hem. & M. 190, p. 1684.
Evans v. Smallcombe, L. R. 3 H. L. 249, L. R. 3 Eq. 769, p. 1453.
Evans v. Templeton, 69 Tex. 375, 6 S. W. 843, 5 Am. St. Rep. 71, p. 1333.
Evans v. Thompson, 89 Minn. 202, 94 N. W. 692, p. 2379.
Evans v. Wall, 159 Mass. 164, 38 Am. St. Rep. 406, 34 N. E. 183, p. 1844, 1845.
Evans v. Walborn, 74 Tex. 530, 15 Am. St. Rep. 858, p. 1066.
Evans v. Webb, 1 Yeates, 424, 1 Am. Dec. 308, p. 820, 828.
Evans's Appeal, 51 Conn. 435, p. 849.
Evans's Appeal, 63 Pa. St. 183, p. 2325.
Evans's Appeal, 81 Pa. St. 278, p. 1789.
Evansville v. Pfisterer, 34 Ind. 36, 7 Am. Rep. 214, p. 1452.
Evansville Gas-light Co. v. State, 73 Ind. 219, 38 Am. Rep. 129, p. 2447, 2451.
Evants v. Strode, 11 Ohio, 480, 38 Am. Dec. 744, p. 1478, 1487.
Evarts v. Steger, 5 Oreg. 147, p. 2725, 2726.
Eveleth v. Little, 16 Me. 374, 377, p. 550, 632, 766, 1466.
Evelle v. Parker, 41 Miss. 520, p. 2749.
Evelyn v. Evelyn, 2 Dick. 800, p. 2657.
Everest v. Ferris, 16 Minn. 26, (Gil. 14) p. 1338.
Everett v. Carr, 59 Me. 325, p. 553.
Everett v. Peyton, 167 N. Y. 117, 60 N. E. 423, p. 1845.
Everett v. Railway Co., 67 Tex. 430, 3 S. W. 678, p. 2018.
Everett v. Stone, 3 Story, 446, 455, p. 1268.
Everett v. Todd, 19 Colo. 322, 35 Pac. 544, p. 1203.
Everett Land Co. v. Maney, 16 Wash. 552, 48 Pac. 243, p. 735, 743.
Everitt v. Everitt, L. R. 10 Eq. 405, p. 1738, 1751, 1773.
Everitt v. Everitt, 29 N. Y. 39, p. 1895.
Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641, p. 1391, 1392, 1393.

Eversfield v. Mid-Sussex R'y, 3 De Gex & J. 286, p. 2677.
Everson v. Equitable Life Assur. Co., 68 Fed. 258, p. 263.
Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314, 6 Wis. 453, p. 1323, 1334, 1371, 1391.
Evertson v. Booth, 19 Johns. 486, 491, 492, 493, p. 655, 2417, 2786, 2787.
Evertson v. Evertson, 5 Paige, 644, p. 1330.
Evins v. Cawthon, 132 Ala. 184, 31 South. 441, p. 352.
Evroy v. Nicholas, 2 Eq. Cas. Abr. 488, p. 663.
Ewart v. Cochrane, 4 Macq. 117, p. 1014.
Ewart v. Walling, 42 Ill. 453, p. 2309.
Ewell v. Greenwood, 26 Iowa, 377, p. 2683.
Ewell v. Tidwell, 20 Ark. 136, p. 1635.
Ewelme Hospital v. Corp'n of Andover, 1 Vern. 266, p. 362, 393, 455.
Ewer v. Hobbs, 5 Met. 1, 3, p. 2348.
Ewing v. Arthur, 1 Humph. 537, p. 2393.
Ewing v. Beauchamp, 6 B. Mon. 422, p. 2774.
Ewing v. Bibb, 7 Bush, 654, p. 2005.
Ewing v. City of Webster City, 103 Iowa, 226, 72 N. W. 511, p. 389, 452.
Ewing v. Moses, 50 Ga. 264, p. 2264.
Ewing v. Osbaldiston, 2 Mylne & C. 53, 88, p. 2536.
Ewing v. St. Louis, 5 Wall. 413, 418, 419, p. 403, 433.
Ewing v. Smith, 3 Desaus. Eq. 417, 5 Am. Dec. 557, p. 2154.
Ewins v. Gordon, 49 N. H. 444, p. 524, 525, 749, 2761, 2769.
Exchange & Deposit Bank v. Bradley, 15 Lea. 279, p. 2525, 2526.
Exchange & Deposit Bank v. Stone, 80 Ky. 109, p. 1332, 2500, 2516.
Exchange Bank v. Monteath, 26 N. Y. 505, p. 1421, 1626.
Exch. Bank v. Rice, 107 Mass. 37, 41, 9 Am. Rep. 1, p. 2413.
Exchange Bank v. Russell, 50 Mo. 531, p. 2726.
Exley v. Berryhill, 37 Minn. 182, 33 N. W. 567, p. 648.
Exon v. Dancke, 24 Oreg. 110, 32 Pac. 1045, p. 1030.
Express Co. v. Seibert, 44 Fed. 315, p. 434.
Express Co. v. Western N. C. Railroad Co., 99 U. S. 191, p. 2663.
Eykyn's Trusts, In re, L. R. 6 Ch. Div. 115, p. 2142.
Eyre v. Dolphin, 2 Ball & B. 290, p. 1001.
Eyre v. Everitt, 2 Russ. 381, 382, p. 459, 461.
Eyre v. McDowell, 9 H. L. Cas. 619, 642, 652, p. 1091, 1207.
Eyre v. Marsden, 2 Keen, 564, p. 179.
Eyre v. Potter, 15 How. 42, 60, p. 1665, 1668.
Eyrick v. Hetrick, 13 Pa. St. 488, 493, p. 1840, 1904.
Eyster v. Gaff, 2 Colo. 228, p. 2357.
Eyster v. Gaff, 91 U. S. 521, p. 1065.
Eystra v. Capelle, 61 Mo. 578, p. 2194.
Eyton v. Eyton, 4 Brown Parl. C. 149, 153, p. 1654.
Ezelle v. Parker, 41 Miss. 520, 526, 527, p. 331, 332.
Eylar v. Eylar, 60 Tex. 315, p. 1030. 1031.
Eyre v. Burmester, 10 H. L. Cas. 90, 106, p. 1785.
Eyre v. Countess of Shaftsbury, 2 P. Wms. 103, 118, 119, 2 Lead. Cas. Eq., 4th Am. ed., 1416, 1446, 1487, p. 2611, 2621, 2622.

F.

F. v. F., [1902] 1 Ch. 688, p. 2616, 2618.
Faber v. Wagner, (N. Dak.) 86 N. W. 963, p. 1224.
Fabrique v. Cherokee & P. C. & M. Co., (Kan.) 77 Pac. 584, p. 2376.
Factors' etc. Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679, p. 1406.
Faddis v. Woollomes, 10 Kan. 56, p. 2192.
Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84, p. 1970.
Fagg's Case, cited in 2 Vern. 701, 1 Cas. Ch. 68, p. 1365.
Fahie v. Lindsay, 8 Oreg. 474, p. 2647, 2649.
Fahn v. Bleckley, 55 Ga. 81, p. 1372.
Fahnestock v. Fahnestock, 152 Pa. St. 56, 25 Atl. 313, 34 Am. St. Rep. 623, p. 2310.
Fahnestock's Appeal, 104 Pa. St. 46, p. 2100.

Fahrney v. Kelly, 102 Fed. 403, p. 1221, 1672.
Fahy v. Fahy, 58 N. J. Eq. 210, 42 Atl. 726, p. 2281, 2300.
Fain v. Inman, 6 Heisk. 5, p. 1264, 1266.
Fair, Estate of, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 453, 64 Pac. 1000, p. 1835, 1895.
Fair v. Stevenot, 29 Cal. 486, p. 1045, 1095, 1144, 1357.
Fairbairn v. Middlemiss, 47 Mich. 372, 11 N. W. 203, p. 2004.
Fairbanks v. Belknap, 135 Mass. 181, p. 2054.
Fairbanks v. Lamson, 99 Mass. 533, p. 1940, 1954, 1978.
Fairbanks v. Sargent, 104 N. Y. 108, 117, 9 N. E. 870, 58 Am. Rep. 490, s. c., 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475, p. 1212, 1218, 1249, 1254, 2585.
Fairburn v. Pearson, 2 Macn. & G. 144, p. 2656.
Fairchild v. Edson, 154 N. Y. 199, 61 Am. St. Rep. 609, 48 N. E. 541, p. 1953, 1969.
Fairchild v. Fairchild, 64 N. Y. 471, p. 2318.
Fairchild v. Hunt, 14 N. J. Eq. 367, p. 1858.
Fairchild v. Lynch, 14 Jones & S. 1, p. 2408.
Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701, affirming 65 Hun, 621, 20 N. Y. Supp. 31, p. 1624.
Fairer v. Park, L. R. 3 Ch. Div. 309, p. 879, 917, 2216.
Fairfield v. Fairfield, 15 Gray, 596, p. 2274.
Fairfield v. Lawson, 50 Conn. 501, 47 Am. Rep. 669, p. 1951, 1972.
Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319, p. 1152, 1164, 1169.
Fairland v. Percy, L. R. 3 P. & D. 217, Ames' Cas. on Trusts, 423, p. 2103.
Fairman v. Peck, 87 Ill. 156, p. 1862.
Falconer v. Freeman, 4 Sand. Ch. 565, p. 2791.
Faleke v. Gray, 4 Drew. 651, p. 1517, 1667, 2763.
Falk v. Turner, 101 Mass. 494, p. 1751.
Falk v. Wittram, 120 Cal. 479, 52 Pac. 707, 65 Am. St. Rep. 184, p. 2380.
Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76, p. 2691.
Falkner v. O'Brien, 2 Ball & B. 220, p. 1671.
Fall v. Elkins, 9 Week. Rep. 861, p. 2740.
Fall v. Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278, p. 2776, 2780.
Fallass v. Pierce, 30 Wis. 443, p. 1135, 1149, 1345, 1358, 1359, 1360, 1361.
Fallis v. Keys, 35 Ohio St. 265, p. 2197.
Fallon v. McAlonen, 15 R. I. 223, 2 Atl. 213, p. 2197.
Fallon v. R. R. Co., 1 Dill. 121, p. 2764, 2765.
Fall River Nat. Bank v. Buffington, 97 Mass. 498, p. 1562.
Fall's Estate, In re, 31 Misc. Rep. 658, 66 N. Y. Supp. 47, p. 1910.
Falls Village etc. Co. v. Tibbetts, 31 Conn. 165, p. 2684.
Fame Ins. Co.'s Appeal, 83 Pa. St. 396, 405, p. 2793.
Fane v. Fane, L. R. 20 Eq. 698, p. 1494.
Fanning v. Dunham, 5 Johns. Ch. 122, 142, 143, 144, 9 Am. Dec. 283, p. 229, 305, 461, 465, 644, 648, 1704, 1705, 2704.
Fanning v. Kerr, 7 Iowa, 450, p. 1861.
Fant v. Miller, 17 Gratt. 187, p. 289, 290.
Fant v. Wright, (Tex. Civ. App.) 61 S. W. 514, p. 2406.
Farabee v. McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734, overruling Luch's Appeal, 44 Pa. St. 140, p. 1108, 1116, 1117, 1118.
Farber v. Farber, 64 Iowa, 362, 20 N. W. 472, p. 2177.
Farebrother v. Gibson, 1 De Gex & J. 602, p. 1450, 1590.
Farewell v. Coker, 2 Mer. 353, p. 1494, 1499.
Fargason v. Edrington, 49 Ark. 207, 4 S. W. 763, p. 1347.
Fargo v. Arthur, 43 How. Pr. 193, p. 2639.

Faribault v. Sater, 13 Minn. 223, p. 1565.
Farina v. Silverlock, 6 De Gex, M. & G. 214, 217, p. 2689, 2690.
Farington v. Parker, L. R. 4 Eq. 116, p. 2149.
Farish v. State, 4 How. 170, 175, 2 How. 826, 829, p. 568.
Farleigh v. Cadman, 159 N. Y. 169, 53 N. E. 808, p. 1866.
Farley v. Bateman, 40 W. Va. 540, 22 S. E. 72, p. 983.
Farley v. Blood, 30 N. H. 354, p. 2635, 2636, 2637, 2647, 2648, 2649, 2650.
Farley v. Bryant, 32 Me. 474, p. 553, 1516.
Farley v. Turner, 26 L. J. Ch. 710, p. 1915.
Farley v. Vaughn, 11 Cal. 227, p. 761.
Farmer v. Dean, 32 Beav. 327, p. 1754.
Farmer v. Farmer, 1 H. L. Cas. 724, p. 1731.
Farmer v. Farmer, 39 N. J. Eq. 211, p. 1781, 2195.
Farmer v. Fisher, 197 Pa. St. 114, 46 Atl. 892, p. 1108.
Farmer v. Grose, 42 Cal. 169, p. 2373, 2377.
Farmer v. Martin, 2 Sim. 502, 511, p. 1657.
Farmer v. Russell, 1 Bos. & P. 296, p. 673, 1713.
Farmers & Drovers' Bk. v. German Ins. Bank, 23 Ky. Law Rep. 2008, 66 S. W. 280, p. 1051.
Farmers & Drovers' Bank v. Sherley, 12 Bush, 304, p. 2796.
Farmers & Drovers' Sav. Bank v. Kansas etc. Co., 3 Dill. 287, p. 2562.
Farmers & Mechanics' Bank v. Butchers' etc. Bank, 16 N. Y. 125, 69 Am. Dec. 678, 14 N. Y. 623, p. 1421, 1626.
Farmers & Mechanics' Bank v. Polk, 1 Del. Ch. 167, p. 2799.
Farmers & Merchants' Bank v. Copsey, 134 Cal. 287, 66 Pac. 324, p. 2405.
Farmers & Merchants' Bank v. Farwell, 58 Fed. 633, 7 C. C. A. 391, 19 U. S. App. 256, p. 1207.
Farmers & Merchants' Bank v. Robinson, 96 Mo. App. 385, 70 S. W. 372, p. 1941, 1975.
Farmers & Merchants' Bank v. Stockdale, (Iowa) 96 N. W. 732, p. 1100, 1114, 1124.
Farmers & Merchants' Nat. Bank v. Waco Elect. R. & L. Co., (Tex. Civ. App.) 36 S. W. 131, p. 1079.
Farmers & Millers' Bank v. Luther, 14 Wis. 96, p. 2719.
Farmers & Traders' Bk. v. Fidelity etc. Co. of Md., 108 Ky. 384, 56 S. W. 671, p. 2020, 2031.
Farmers & Traders' Bk. v. Fidelity etc. Co. of Md., 22 Ky. Law Rep. 22, 56 S. W. 671, p. 2015.
Farmers & Traders' Bk. v. Kimball M. Co., 1 S. Dak. 388, 36 Am. St. Rep. 739, 47 N. W. 402, p. 1391, 1995, 2007, 2020.
Farmers' Bank v. Bronson, 14 Mich. 361, p. 1358.
Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St. 367, 64 N. E. 518, 90 Am. St. Rep. 586, 58 L. R. A. 620, p. 1212, 1242, 1254.
Farmers' Bank v. First Nat. Bank, 30 Ind. App. 520, 66 N. E. 503, p. 1062, 1070.
Farmers' Bank v. Groves, 12 How. 51, p. 1646.
Farmers' Bank v. Payne, 25 Conn. 444, p. 1164.
Farmers' Bank v. Saling, 33 Oreg. 394, 54 Pac. 190, p. 1156.
Farmers' L. & T. Co. v. Denver, L. & G. R. Co., 126 Fed. 46, 60 C. C. A. 588, p. 641, 651, 2473.
Farmers' Loan etc. Co. v. Hendrickson, 25 Barb. 484, p. 2583.
Farmers' Loan etc. Co. v. Hughes, 18 N. Y. Sup. Ct. 130, p. 2106.
Farmers' L. & T. Co. v. Maltby, 8 Paige, 361, p. 1021, 1045, 1132, 1134, 1202, 1334, 1363, 2447.
Farmers' L. & T. Co. v. New York & N. R'y Co., 150 N. Y. 410, 44 N. E. 1043, 55 Am. St. Rep. 689, 34 L. R. A. 76, p. 2128.
Farmers' Loan & Trust Co. v. Pendleton, 37 Misc. Rep. 256, 75 N. Y. Supp. 294, p. 1837.
Farmers' L. & T. Co. v. Penn. Plate Glass Co., 103 Fed. 132, 151, 43 C. C. A. 114, 56 L. R. A. 710, p. 2471.

Farmers' Loan & Tr. Co. v. Suydam, (Nebr.) 95 N. W. 867, p. 1540.
Farmers' Loan & T. Co. v. Young, 54 Fed. 759, 772, 4 C. C. A. 561, 6 U. S. App. 469, p. 1079.
Farmers' Nat. Bank v. Fletcher, 44 Iowa, 252, p. 1067, 1081, 1088, 1249, 1372, 1374, 1384.
Farmers' Nat. Bank v. Gates, 33 Oreg. 388, 54 Pac. 205, 72 Am. St. Rep. 724, p. 2406.
Farmers' Nat. Bank v. James, 13 Tex. Civ. App. 550, 36 S. W. 288, p. 1330.
Farmers' Nat. Bank v. Moran, 30 Minn. 165, 14 N. W. 805, p. 1836, 1894.
Farmers' Nat. Bank v. Sperling, 113 Ill. 373, p. 1026.
Farmers' Savings & B. & L. Ass'n v. Kent, 117 Ala. 624, 23 South. 757, p. 2401, 2446.
Farmers' Sav. Bank v. Brewer, 27 Conn. 600, p. 1843.
Farmington Corp. v. Bank, 85 Me. 46, 52, 26 Atl. 965, p. 381, 420, 445, 456, 1636, 1637.
Farnam v. Brooks, 9 Pick. 212, p. 1763.
Farnham v. Campbell, 34 N. Y. 480, p. 2755, 2757.
Farnham v. Campbell, 10 Paige, 598, p. 1079.
Farnham v. Clements, 51 Me. 426, p. 2039, 2040.
Farnham v. Milward & Co., [1895] 2 Ch. 730, p. 2626.
Farnham v. Phillips, 2 Atk. 215, p. 903.
Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, p. 1593, 1594, 1645.
Farnsworth v. Jackson, 32 Me. 419, p. 2553.
Farnum v. Bascom, 122 Mass. 282, p. 2207, 2209.
Farnum v. Burnett, 21 N. J. Eq. 87, p. 2383, 2387, 2388.
Farnum v. Metcalf, 8 Cush. 46, p. 2437.
Faroe's Heirs v. Graves, 4 Smedes & M. 707, p. 2251.
Farquhar v. Hadden, L. R. 7 Ch. 1, p. 2210.
Farquharson v. Cave, 2 Coll. C. C. 356, 367, p. 1872, 2242, 2243.
Farr v. Sherman, 11 Mich. 33, p. 2194.
Farrand v. Yorkshire Banking Co., L. R. 40 Ch. Div. 182, p. 1196, 1296.
Farrant v. Blanchforce, 1 De Gex, J. & S. 107, 119, 120, p. 1778, 1785, 2096, 2097.
Farrant v. Lovel, 3 Atk. 723, p. 2431, 2682.
Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, p. 1587, 1594.
Farrar v. Earl of Winterton, 5 Beav. 1, p. 1854, 2315.
Farrar v. Farrars, Ltd., 40 Div. 409, p. 1756.
Farrar v. McCue, 89 N. Y. 140, p. 2109.
Farrar v. Patton, 20 Mo. 81, p. 2780.
Farrar v. Payne, 73 Ill. 82, 91, p. 331, 345, 1861, 1862.
Farrar v. Winterton, 5 Beav. 1, 8, p. 614.
Farrell v. Bouck, 60 Nebr. 771, 84 N. W. 260, p. 1504.
Farrell v. Lloyd, 69 Pa. St. 239, p. 1997.
Farrer v. St. Catharine's College, L. R. 16 Eq. 19, p. 1544, 2225.
Farrington v. Barr, 36 N. H. 86, p. 1989.
Farrington v. Knightly, 1 P. Wms. 544, 549, 554, p. 2203, 2204.
Farrington v. Putnam, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339, p. 1960, 1974.
Farrington v. Woodward, 82 Pa. St. 259, p. 1153, 1157.
Farris v. Houston, 78 Ala. 250, p. 2345, 2431.
Farris v. McCurdy, 78 Ala. 250, p. 240.
Farrow v. Holland Trust Co., 74 Hun, 585, 26 N. Y. Supp. 502, p. 663.
Farrow v. Rees, 4 Beav. 18, p. 1016.
Farthing v. Shields, 106 N. C. 295, 10 S. E. 998, p. 2196.
Farve's Heirs v. Graves, 4 Smedes & M. 707, p. 2277, 2278.
Farwell v. Cotting, 8 Allen, 211, p. 2735.
Farwell v. Sturdivant, 37 Me. 308, p. 548, 550.
Fash v. Ravesies, 32 Ala. 451, p. 1279, 1291, 1348, 1351.
Fasler v. Beard, 39 Minn. 32, 38 N. W. 755, p. 727.

Fassett v. Smith, 23 N. Y. 252, p. 1385.
Fast v. McPherson, 98 Ill. 496, p. 2080, 2085.
Faucett v. Currier, 109 Mass. 79, p. 2193.
Faucett v. Currier, 115 Mass. 20, p. 1693.
Faucett v. Faucett, 1 Bush, 511, 89 Am. Dec. 639, p. 1754.
Faulder v. Stuart, 11 Ves. 296, p. 284.
Faulk v. Dashiel, 62 Tex. 642, 50 Am. Rep. 542, p. 2051.
Faulkner v. Brockenbrough, 4 Rand. 245, p. 2353.
Faulkner v. Daniel, 3 Hare, 199, p. 2437.
Faulkner v. Davis, 18 Gratt. 651, 98 Am. Dec. 698, p. 2619.
Faulkner's Adm'r v. Harwood, 6 Rand. 125, p. 261.
Faulks v. Dimock, 27 N. J. Eq. 65, p. 1404.
Faunce v. Burke, 16 Pa. St. 469, 55 Am. Dec. 519, 19 N. J. L. 469, p. 741, 763.
Fawcett v. Fawcett, 85 Wis. 332, 55 N. W. 405, 39 Am. St. Rep. 844, p. 1993.
Fawcett v. Whitehouse, 1 Russ. & M. 132, 149, p. 2032.
Faxon v. Falvey, 110 Mass. 392, p. 1901.
Fay v. Howe, 136 Cal. 599, 69 Pac. 423, p. 1942, 1955, 1972.
Fay v. Taft, 12 Cush. 448, p. 1921.
Fay v. Valentine, 12 Pick. 40, 22 Am. Dec. 397, p. 1294.
Fazakerley v. Gillibrand, 6 Sim. 591, p. 921.
Fearey v. O'Neill, 149 Mo. 467, 73 Am. St. Rep. 440, 50 S. W. 918, p. 1904.
Fearon, Ex parte, 5 Ves. 633, 647, p. 1635.
Fears v. Brooks, 12 Ga. 195, 197, 198, 200, p. 1847, 2139, 2146, 2153, 2161.
Featherstone v. Carr, 132 N. C. 800, 44 S. E. 592, p. 388, 452.
Featherstone v. Cooke, L. R. 16 Eq. 298, p. 2660, 2677.
Featherstonhaugh v. Fenwick, 17 Ves. 298, 311, p. 2027.
Federal Mfg. & Printing Co. v. International Bank Note Co., 119 Fed. 385, p. 282.
Feeley v. Bryan, (W. Va.) 47 S. E. 307, p. 2470.
Feeney v. Howard, 79 Cal. 525, 530, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826, p. 1991, 2040.
Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375, p. 1076.
Feilden v. Slater, L. R. 7 Eq. 523, p. 1041, 1047, 1199, 2673, 2676.
Fejervary v. Langer, 9 Iowa, 159, p. 2749.
Felch v. Hooper, 119 Mass. 52, p. 538, 1046.
Feldman v. Gamble, 26 N. J. Eq. 494, p. 1791.
Felino v. Newcomb Lumber Co., 64 Nebr. 335, 89 N. W. 755, 97 Am. St. Rep. 646, p. 2428.
Felkner v. Tighe, 39 Ark. 357, p. 2536.
Fell v. Brown, 2 Brown Ch. 276, p. 2436.
Fellowes v. Lord Gwydyr, 1 Sim. 63, 1 Russ. & M. 83, p. 1603, 1604.
Fellows v. Dow, 58 N. H. 21, p. 1407.
Fellows v. Fellows, 4 Cow. 682, 15 Am. Dec. 412, p. 379.
Fellows v. Fellows, 69 N. H. 339, 46 Atl. 474, p. 1911.
Fellows v. Heermans, 4 Lans. 230, p. 1486.
Fellows v. Herrmans, 13 Abb. Pr., N. S., 1, 6, p. 570.
Fellows v. Miner, 119 Mass. 541, p. 1943, 1954, 1978.
Fellows v. Ripley, 69 N. H. 410, 45 Atl. 138, p. 1828.
Fellows v. Smith, 40 Mich. 689, p. 1801.
Fellows v. Spaulding, 141 Mass. 92, 6 N. E. 548, 549, p. 381, 434.
Fellows v. Tann, 9 Ala. 999, 1003, p. 1847, 2161.
Fellows v. Wise, 55 Mo. 413, 415, p. 1147.
Fells v. Read, 3 Ves. 70, p. 2671, 2763.
Felt v. Bell, (Ill.) 68 N. E. 794, p. 1639.
Feltham v. Clark, 1 De Gex & S. 307, p. 1211.
Felton v. Pitman, 14 Ga. 530, 536, p. 1104, 1134.
Fenn v. Holme, 21 How. 484, 16 L. ed. 199, p. 495.

Fenner v. Taylor, 2 Russ. & M. 190, p. 2173.
Fenno v. Sayre, 3 Ala. 458, 478, 1132, 2477.
Fenton v. Browne, 14 Ves. 144, p. 1590, 1591.
Fenton v. Fenton, (Pa.) 57 Atl. 758, p. 1403.
Fenton v. Hughes, 7 Ves. 287, 288–291, p. 264, 265.
Fenton v. Lord, 128 Mass. 466, p. 2415.
Fenwick v. East London R'y, L. R. 20 Eq. 544, p. 2687.
Fenwick v. Reed, 1 Mer. 114, p. 265.
Ferchen v. Arndt, 26 Oreg. 121, 46 Am. St. Rep. 603, 37 Pac. 161, 29 L. R. A. 664, p. 2022, 2043.
Fereday v. Wightwick, 1 Russ. & M. 45, p. 2657.
Ferguson v. Davidson, 147 Mo. 664, 49 S. W. 859, p. 1231.
Ferguson v. Fisk, 28 Conn. 501, p. 310, 312, 2670, 2707, 2729.
Ferguson v. Glassford, 68 Mich. 36, 35 N. W. 820, p. 1197.
Ferguson v. Kimball, 3 Barb. Ch. 616, p. 2447.
Ferguson v. Lee, 9 Wend. 258, p. 2461.
Ferguson v. Lowery, 54 Ala. 510, 25 Am. Rep. 718, p. 2086.
Ferguson v. McCrary, 20 Tex. Civ. App. 529, 50 S. W. 472, p. 1155.
Ferguson v. Paschall, 11 Mo. 267, p. 2764.
Ferguson v. Reed, 45 Tex. 574, p. 2198.
Ferguson v. Soden, 111 Mo. 208, 19 S. W. 727, 33 Am. St. Rep. 512, p. 648.
Ferguson v. Stuart's Ex'rs, 14 Ohio, 140, 146, p. 2315.
Ferguson v. Tarbox, 3 Kan. App. 656, 44 Pac. 905, p. 1341.
Ferguson v. Waters, 3 Bibb, 303, p. 321, 325, 331.
Ferguson v. Wilson, L. R. 2 Ch. 77, p. 345, 2772.
Fernwood Lumber Co. v. Meehan-Rounds Lumber Co., (Miss.) 37 South. 502, p. 1087.
Ferrand v. Howard, 3 Ired. Eq. 381, p. 2285, 2300, 2303.
Ferrars v. Cherry, 2 Vern. 383, p. 1001, 1198, 1293, 1346.
Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128, p. 2686.
Ferrell v. Ferrell, 53 W. Va. 515, 44 S. E. 187, p. 1510.
Ferrier v. Knox County, (Tex. Civ. App.) 33 S. W. 896, p. 739.
Ferrior, In re, L. R. 3 Ch. 175, 719, p. 2655.
Ferris v. Adams, 23 Vt. 136, p. 1697, 1700.
Ferris v. Ferris, 28 Barb. 29, p. 725, 726.
Ferris v. Goodburn, 27 L. J., N. S., 574, p. 904, 905.
Ferris v. Irving, 28 Cal. 645, 647, p. 2748, 2750.
Ferris v. Udell, 139 Ind. 579, 38 N. E. 180, p. 1082.
Ferris v. Van Vechten, 73 N. Y. 113, reversing 9 Hun, 12, p. 701, 958, 2024, 2486.
Ferron v. Errol, 59 N. H. 234, p. 1020.
Ferry v. Henry, 4 Pick. 75, p.
Ferry v. Laible, 27 N. J. Eq. 146, p. 2103.
Ferry v. Laible, 31 N. J. Eq. 566, p. 1911, 1912, 1918.
Ferson v. Sanger, Daveis, 252, 259, 261, p. 148, 217, 1637, 1643.
Ferson v. Sanger, 1 Wood. & M. 138, p. 1510, 1588.
Ferussac v. Thorn, 1 Barb. 42, p. 1520.
Fery v. Pfeiffer, 18 Wis. 510, p. 1098, 1149.
Fesmire's Estate, 134 Pa. St. 67, 19 Am. St. Rep. 676, 19 Atl. 502, p. 2066, 2093.
Fessler's Appeal, 75 Pa. St. 483, p. 2380, 2477, 2779.
Fessman v. Seeley, (Tex. Civ. App.) 30 S. W. 268, p. 763.
Festorazzi v. St. Joseph's Catholic Church, 104 Ala. 327, 18 South. 394, 53 Am. St. Rep. 48, 25 L. R. A. 360, p. 1935, 1938, 1972.
Fetridge v. Wells, 4 Abb. Pr. 144, 13 How. Pr. 385, p. 1695, 2691.
Fettiplace v. Gorges, 1 Ves. 46, 3 Brown Ch. 8, p. 2148.
Feusier v. Sneath, 3 Nev. 120, p. 2780.

Fiacre v. Chapman, 32 N. J. Eq. 463, p. 2424.
Fidelity Ins., Trust & Deposit Co.'s Appeal, 99 Pa. St. 443, p. 558.
Fidelity Tr. & G. Co. v. Fowler Water Co., 113 Fed. 560, p. 352.
Fiedler v. Darrin, 50 N. Y. 437, 441, 59 Barb. 651, p. 2376.
Field v. Ashley, 79 Mich. 231, 44 N. W. 602, p. 766.
Field v. Barber Asphalt Co., 117 Fed. 925, p. 503.
Field v. Boland, 1 Dru. & Walsh, 37, p. 1198.
Field v. Brown, 27 Beav. 90, p. 2320.
Field v. City of New York, 6 N. Y. (2 Seld.) 179, 57 Am. Dec. 435, p. 1231.
Field v. Drew Theological Seminary, 41 Fed. 371, p. 1931, 1940, 1954, 1960, 1973.
Field v. Evans, 15 Sim. 375, p. 2157.
Field v. Field, [1894] 1 Ch. 425, p. 2060.
Field v. Herrick, 5 Ill. App. 54, p. 1640, 2729.
Field v. Holzman, 93 Ind. 205, p. 330, 354.
Field v. Lord Donoughmore, 1 Dru. & War. 227, p. 1855, 1856.
Field v. Maghee, 5 Paige, 539, p. 2557.
Field v. Mayor etc., 6 N. Y. 179, 57 Am. Dec. 435, p. 1234, 2552, 2553.
Field v. Moore, 7 De Gex, M. & G. 691, p. 2621.
Field v. Peckett, 29 Beav. 568, 573, 575, p. 2215, 2490.
Field v. Soule, 4 Russ. 112, p. 183, 2133, 2185.
Field v. Stearns, 42 Vt. 106, p. 1385.
Field v. Thistle, 58 N. J. Eq. 339, 43 Atl. 1072 (affirmed, 60 N. J. Eq. 444, 46 Atl. 1099), p. 2409.
Field v. Wilson, 6 B. Mon. 479, p. 1647.
Fielding v. Preston, 1 De Gex & J. 438, p. 2209, 2216, 2222, 2224.
Fields v. Clayton, 117 Ala. 538, 67 Am. St. Rep. 189, 23 South. 530, p. 2345.
Fierce v. Houghton, (Iowa) 98 N. W. 306, p. 1542.
Fiero v. Fiero, 5 Thomp. & C. 151, p. 2233, 2241, 2244, 2247.
Fife v. Clayton, 13 Ves. 546, p. 1519.
Fifield v. Gaston, 12 Iowa, 218, p. 1804.
Fifield v. Van Wyck, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745, p. 785, 800, 1685, 1953, 1971, 2325.
Fifth Nat. Bk. v. Armstrong, 40 Fed. 46, p. 1913, 1914.
Filby v. Miller, 25 Pa. St. 264, p. 1346.
Filler v. Tyler, 91 Va. 458, 22 S. E. 235, p. 462, 463, 2179.
Filley v. Duncan, 1 Nebr. 134, 93 Am. Dec. 337, p. 1389.
Filley v. Fassett, 44 Mo. 168, 100 Am. Dec. 275, p. 2690.
Filley v. Register, 4 Minn. 391, 77 Am. Dec. 522, p. 1801.
Filmer v. Gott, 4 Brown Parl. C. 230, p. 1673.
Finch v. Beal, 68 Ga. 594, p. 1024.
Finch v. Brown, 3 Beav. 70, p. 2432.
Finch v. Earl of Winchelsea, 1 P. Wms. 277, p. 1268.
Finch v. Finch, 1 Ves. 534, 2 Ves. 491, 492, 10 Ohio St. 501, 507, 15 Ves. 43, 50, 51, p. 245, 264, 273, 643, 917, 922, 961, 1997.
Finch v. Hull, 24 Hun, 226, p. 2486, 2492, 2493.
Finch v. Marks, 76 Va. 207, p. 2153.
Finch v. Newnham, 2 Vern. 216, p. 1654.
Finch v. Parker, 49 N. Y. 1, p. 2779.
Finch v. Shaw, 19 Beav. 500, 511, 5 H. L. Cas. 905, p. 1016, 1017, 1166, 1315, 1317, 1319, 1369.
Finch v. Trent, 3 Tex. Civ. App. 568, 22 S. W. 132, 24 S. W. 679, p. 1342, 1343.
Fincher v. Harregan, 59 Ark. 151, 26 S. W. 821, 24 L. R. A. 543, and note, p. 1099, 1121.
Finden v. Stephens, 2 Phill. Ch. 142, p. 2050.
Findley v. Armstrong, 23 W. Va. 113, p. 2522.
Findley v. Cowles, 93 Iowa, 389, 61 N. W. 998, p. 1175.
Finger v. Finger, 64 N. C. 183, p. 2284.
Fink v. Ex'r of Fink, 12 La. Ann. 301, p. 1974.
Fink v. Umscheid, 40 Kan. 271, 19 Pac. 623, 2 L. R. A. 146, p. 2005.

Finlay v. Merriman, 39 Tex. 56, 62, p. 2066.
Finley v. Babb, 173 Mo. 257, 73 S. W. 180, p. 1102, 1114, 1147.
Finn v. Finn, 62 Iowa, 482, 17 N. W. 739, p. 2177.
Finnegan v. Fernandina, 15 Fla. 379, 21 Am. Rep. 292, p. 215, 219, 703.
Finucane v. Kearney, 1 Freem. (Miss.) 65, 69, p. 1659.
Firebaugh v. Ward, 51 Tex. 409, p. 1272.
Firemen's Ins. Co. v. Bay, 4 Barb. 407, p. 2139.
Firmstone v. De Camp, 17 N. J. Eq. 317, p. 1515, 1541.
First Baptist Church v. Robberson, 71 Mo. 326, p. 2302.
First Congregational Society v. Trustees etc., 23 Pick. 148, p. 538.
First Nat. Bank v. Ackerman, 70 Tex. 315, 8 S. W. 45, p. 2421, 2424.
First Nat. Bank v. Albertson, (N. J. Ch.) 47 Atl. 818, p. 465.
First National Bank v. Allen, 100 Ala. 476, 14 South. 335, 46 Am. St. Rep. 80, 27 L. R. A. 426, p. 1176.
First National Bank v. Andrews, 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885, p. 2392, 2393.
First Nat. Bank v. Armstrong, 39 Fed. 231, p. 1913.
First Nat. Bk. v. Armstrong, 42 Fed. 193, p. 1913, 1914.
First Nat. Bank v. Babbidge, 160 Mass. 563, 36 N. E. 462, p. 1165.
First Nat. Bank v. Balcom, 35 Conn. 351, p. 2234.
First Nat. Bank v. Binninger, 26 N. J. Eq. 345, p. 212, 2645.
First Nat. Bank v. Briggs' Assignee, 70 Vt. 594, 41 Atl. 580, p. 1176.
First Nat. Bank v. Caldwell, 4 Dill. 314, Fed. Cas. No. 4,798, p. 2540.
First Nat. Bank v. Chafee, 98 Wis. 42, 73 N. W. 318, p. 1035.
First Nat. Bank v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 262, p. 1177.
First Nat. Bank v. Clark, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580, p. 2570.
First Nat. Bank v. Connecticut Mut. Life Ins. Co., 129 Ind. 241, 28 N. E. 695, p. 1328.
First Nat. Bank v. Dickson, (Colo.) 36 Pac. 618, p. 1221.
First Nat. Bank v. Dovetail etc. Co., 143 Ind. 550, 40 N. E. 810, 52 Am. St. Rep. 435, p. 2013.
First Nat. Bank v. Dubuque etc. R'y, 52 Iowa, 378, 35 Am. Rep. 280, p. 2568.
First Nat. Bank v. Elliott, 125 Ala. 646, 27 South. 7, 82 Am. St. Rep. 268, 47 L. R. A. 742, p. 2435.
First Nat. Bank v. Flath, 10 N. Dak. 281, 86 N. W. 867, p. 1227.
First Nat. Bk. v. Fries, 121 N. C. 241, 61 Am. St. Rep. 663, 28 S. E. 350, p. 1910.
First Nat. Bank v. Ft. Wayne Artificial Ice Co., 105 La. 133, 29 South. 379, p. 1274.
First Nat. Bank v. Gibson, 60 Nebr. 767, 84 N. W. 259, p. 1355.
First Nat. Bank v. Gough, 61 Ind. 147, p. 2726.
First Nat. Bank v. Haire, 36 Iowa, 443, p. 2200.
First Nat. Bank v. Hastings, 7 Colo. App. 129, 42 Pac. 691, p. 1221.
First Nat. Bank v. Hayzlett, 40 Iowa, 659, p. 1270.
First Nat. Bank v. Honeyman, 6 Dak. 275, 42 N. W. 771, p. 2404.
First Nat. Bank v. Lamont, 5 N. Dak. 393, 67 N. W. 145, p. 1330.
First Nat. Bank v. Ledbetter, (Tex. Civ. App.) 34 S. W. 1042, p. 1156.
First Nat. Bank v. Leech, 207 Ill. 215, 69 N. E. 890, p. 1198, 2024.
First Nat. Bank v. Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64, p. 1444.
First Nat. Bank v. Miller, 24 App. Div. 551, 49 N. Y. Supp. 981, p. 1839.
First National Bank v. Nashville Trust Co., (Tenn. Ch. App.) 62 S. W. 392, p. 1847.
First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181, p. 2062.
First National Bank v. Peavey, 69 Fed. 455, p. 502.
First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45, p. 1257.
First Nat. Bank v. Phillips, 71 Miss. 51, 15 South. 29, p. 260.

First National Bank v. Prager, 91 Fed. 689, 692, 63 U. S. App. 709, p. 495, 505.
First Nat. Bank v. Randall, 20 R. I. 319, 78 Am. St. Rep. 867, 38 Atl. 1055, p. 1323.
First Nat. Bank v. Reid, 122 Iowa, 280, 98 N. W. 107, p. 2403.
First Nat. Bank v. Reno Co. Bank, 3 Fed. 257, p. 1913.
First Nat. Bank v. Salem C. F. M. Co., 39 Fed. 89, p. 2497, 2504, 2505, 2519, 2520.
First Nat. Bank v. Sarlls, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434, 13 L. R. A. 401, p. 398, 453.
First Nat. Bank v. Schween, 127 Ill. 573, 11 Am. St. Rep. 174, 20 N. E. 681, p. 1910.
First Nat. Bank v. Skinner, 10 Kan. App. 517, 62 Pac. 705, p. 1177.
First Nat. Bank v. Steinway, 77 Fed. 661, p. 499.
First National Bank v. Tighe, 49 Nebr. 299, 68 N. W. 490, p. 2360.
First National Bank v. Tompkins, 57 Fed. 20, 6 C. C. A. 237, p. 1176, 2516.
First Nat. Bank v. Town of New Milford, 36 Conn. 93, p. 1159, 1175.
First Nat. Bank v. West River R. R., 46 Vt. 633, p. 2646.
First Nat. Bank of C. P. v. First Nat. Bank of R., 76 Ind. 561, 40 Am. Rep. 261, p. 1914.
First Nat. Bank of Milford v. Town of Milford, 36 Conn. 93, p. 1153, 1156, 1178.
First Nat. Bank of Salem v. Salem C. F. M. Co., 39 Fed. 89, p. 2502.
First Nat. Bank of Salisbury v. Fries, 121 N. C. 241, 61 Am. St. Rep. 663, 28 N. E. 350, p. 1902.
First Nat. Bank of Scranton v. Higbee, 109 Pa. St. 130, p. 1916.
First Orthodox Church v. Walrath, 27 Mich. 232, p. 743.
First Presbyterian Church v. Logan, 77 Iowa, 328, 42 N. W. 310, p. 1516.
Firth v. Midland R'y, L. R. 20 Eq. 100, p. 2766.
Fischbeck v. Gross, 112 Ill. 208, p. 2039.
Fischer v. Lee, 98 Va. 159, 35 S. E. 441, p. 981, 994.
Fischer v. Woodruff, 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742, p 1299, 1301.
Fischer-Hansen v. Brooklyn Heights R. Co., 173 N. Y. 492, 66 N. E. 395, p. 2544.
Fischli v. Fischli, 1 Blackf. 360, 12 Am. Dec. 251, p. 2176.
Fish v. Benson, 71 Cal. 429, 12 Pac. 454, p. 987, 1344, 1345, 1384.
Fish v. Carter, 48 Hun, 64, p. 2060.
Fish v. Cleland, 33 Ill. 238, 243, p. 1561, 1590, 1594, 1779.
Fish v. Dodge, 4 Denio, 311, 47 Am. Dec. 254, p. 2684.
Fish v. Howland, 1 Paige, 20, 30, p. 2513.
Fish v. Leser, 69 Ill. 394, 395, p. 662, 1672, 1731, 2767, 2770.
Fish v. Lightner, 44 Mo. 268, 272, p. 2767.
Fish v. Miller, 1 Hoff. Ch. 267, p. 1775.
Fishback v. Green, 87 Ky. 107, 7 S. W. 881, p. 2039.
Fishback v. Weaver, 34 Ark. 569, p. 2796.
Fisher v. Apollinaris Co., L. R. 10 Ch. 297, 302, 303, p. 670, 2696.
Fisher v. Banta, 66 N. Y. 468, p. 2309, 2310, 2312, 2315.
Fisher v. Bishop, 108 N. Y. 25, 2 Am. St. Rep. 357, 15 N. E. 331, p. 1737, 1782.
Fisher v. Board of Trade, 80 Ill. 85, p. 2677.
Fisher v. Boody, 1 Curt. 206, p. 1625.
Fisher v. Budlong, 10 R. I. 525, p. 1616.
Fisher v. Bush, 133 Ind. 315, 32 N. E. 924, p. 1106, 1127.
Fisher v. Cowles, 41 Kan. 418, 22 Pac. 228, p. 1227.
Fisher v. Essex Bank, 5 Gray, 373, p. 1220.
Fisher v. Fobes, 22 Mich. 454, p. 2004.
Fisher v. Hampton Transp. Co., (Mich.) 98 N. W. 1012, p. 1865.
Fisher v. Hepburn, 48 N. Y. 41, 55, p. 2750, 2752.
Fisher v. Hersey, 78 N. Y. 387, p. 1639, 2730.
Fisher v. Johnson, 5 Ind. 492, p. 2515.

Fisher v. Kay, 2 Bibb, 434, p. 345.
Fisher v. Keane, L. R. 11 Ch. Div. 353, p. 2677.
Fisher v. Knox, 13 Pa. St. 622, 53 Am. Dec. 503, p. 1195, 1216, 1293.
Fisher v. Keithley, 142 Mo. 244, 64 Am. St. Rep. 560, 43 S. W. 350, p. 892.
Fisher v. Krutz, 9 Kan. 501, p. 1760, 1763, 1764.
Fisher v. Mellen, 103 Mass. 503, p. 1582, 1584.
Fisher v. Mossman, 11 Ohio St. 42, p. 1438, 1439.
Fisher v. Otis, 3 Chand. 83, p. 1227.
Fisher v. Owen, L. R. 8 Ch. Div. 646, p. 274.
Fisher v. Shaw, 42 Me. 32, 40, p. 548, 551, 749.
Fisher v. Shropshire, 147 U. S. 133, 13 Sup. Ct. 201, 37 L. ed. 109, p. 1068, 1082, 2500, 2516.
Fisher v. Taylor, 2 Rawle, 33, p. 1840, 1846.
Fisher v. Tunnard, 25 La. Ann. 179, p. 1116.
Fisher v. Walsh, (Wis.) 78 N. W. 437, p. 736.
Fisher v. Wister, 154 Pa. St. 65, 25 Atl. 1009, p. 1881, 2055.
Fisher v. Witham, 132 Pa. St. 488, 19 Atl. 276, p. 2380.
Fisher v. Wood, 65 Tex. 199, p. 2289.
Fisher v. Worrall, 5 Watts & S. 478, 483, p. 1577.
Fisher's Appeal, 34 Pa. St. 29, p. 1763.
Fishkill Savings Inst. v. National Bank of Fishkill, 80 N. Y. 162, 36 Am. Rep. 595, p. 1625.
Fishmonger's Co. v. East India Co., 1 Dick. 163, p. 2684.
Fisk v. Att'y-Gen., L. R. 4 Eq. 521, p. 1941, 1964, 1985.
Fisk v. Osgood, 58 Nebr. 486, 78 N. W. 924, p. 1323.
Fisk v. Potter, 2 Abb. App. 138, 2 Keyes, 64, p. 2502, 2510, 2516.
Fisk v. Sarber, 6 Watts & S. 18, p. 1754.
Fisk v. Wilber, 7 Barb. 395, p. 2686.
Fiske v. Gould, 11 Biss. 297, 12 Fed. 372, 374, p. 508.
Fiske v. McGregory, 34 N. H. 414, p. 1405.
Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659, p. 240.
Fisken v. Milwaukee Bridge & Iron Works, 87 Mich. 591, 49 N. W. 873 (affirming 86 Mich. 199, 49 N. W. 133), p. 1230.
Fisler v. Reach, 202 Pa. St. 74, 51 Atl. 599, p. 2402.
Fitch v. Cotheal, 2 Sand. Ch. 29, p. 1410.
Fitch v. Fitch, 8 Pick. 480, p. 1742, 1745.
Fitch v. Pinckard, 4 Scam. 69, p. 2347.
Fitch v. Reiser, 79 Iowa, 34, 44 N. W. 214, p. 1738.
Fitch v. Weber, 6 Hare, 145, p. 1986, 2326.
Fitch v. Wetherbee, 110 Ill. 475, p. 2437.
Fite v. Beasley, 12 Lea, 328, p. 1934, 1977.
Fithian v. Monks, 43 Mo. 502, 517, p. 586.
Fithin v. Corwin, 17 Ohio St. 118, p. 1406.
Fitts v. Davis, 42 Ill. 391, p. 1281.
Fitts v. McGhee, 172 U. S. 516, 531, 19 Sup. Ct. 269, 275, p. 494.
Fitz Roy v. Duke of Richmond, 27 Beav. 186, p. 2228.
Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198, p. 2499, 2511.
Fitzgerald, In re, 30 N. J. Eq. 59, p. 2624.
Fitzgerald, In re, 2 Schoales & L. 432, 438, p. 2622, 2623.
Fitzgerald, In re, 57 Wis. 508, 15 N. W. 794, p. 2099.
Fitzgerald v. Beebe, 7 Ark. 310, 46 Am. Dec. 285, p. 2345.
Fitzgerald v. Chapman, L. R. 1 Ch. Div. 563, p. 2162.
Fitzgerald v. Dorland, 27 Hun, 291, p. 2770.
Fitzgerald v. Fitzgerald, 168 Mass. 488, 47 N. E. 431, p. 2040.
Fitzgerald v. Reed, 9 Smedes & M. 94, p. 1726.
Fitzgerald v. Stewart, 2 Russ. & M. 457, p. 2566.
Fitzgerald v. Urton, 5 Cal. 308, p. 2686.
Fitzgerald v. Vestal, 4 Sneed, 258, p. 2574.

Fitzgibbon v. Blake, 3 Ir. Ch. Rep. 328, p. 2159.
Fitzhugh v. Barnard, 12 Mich. 105, p. 1050, 1146.
Fitzhugh v. Hubbard, 41 Ark. 64, p. 794.
Fitzhugh v. Lee, Amb. 65, p. 297.
Fitzhugh v. Maxwell, 34 Mich. 138, p. 632, 766.
Fitzhugh v. Smith, 62 Ill. 486, p. 2477.
Fitzmaurice v. Mozier, 116 Ind. 365, 16 N. E. 175, 19 N. E. 180, 9 Am. St. Rep. 854, p. 1636, 1637, 1639.
Fitzpatrick v. Weber, 168 Mo. 562, 68 S. W. 913, p. 1739.
Fitzsimmons v. Fitzsimmons, 28 Beav. 417, p. 811, 813, 854.
Fitzsimmons v. Joslin, 21 Vt. 129, 52 Am. Dec. 46, p. 1609, 1613, 1618, 1625.
Fitzsimmons v. Ogden, 7 Cranch, 2, 18, p. 267, 692, 694, 1184, 1188, 1287, 1291, 1382.
Fitzsimons v. Drought, 15 App. Div. 413, 44 N. Y. Supp. 453, p. 1086.
Flack v. Longmate, 8 Beav. 420, 424, p. 2339.
Fladland v. Delaplaine, 19 Wis. 459, p. 2362, 2364.
Flagg v. Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308, p. 1678.
Flagg v. Mann, 2 Sum. 486, 487, 518, 533, 534, 554, 557, 560, Fed. Cas. No. 4,847, p. 266, 986, 1004, 1008, 1033, 1045, 1048, 1157, 1202, 1315, 1333, 1380, 1782, 1901, 2373, 2473.
Flagg v. Munger, 9 N. Y. 483, 500, p. 763.
Flagler v. Blunt, 32 N. J. Eq. 518, p. 2655.
Flagler v. Pleiss, 3 Rawle, 345, p. 1529, 1533.
Flaherty v. Keyser, 62 N. J. Eq. 758, 48 Atl. 565, p. 2018.
Flaherty v. Kelly, 51 Cal. 145, p. 458, 2719.
Flanagan v. Great West. R'y, L. R. 7 Eq. 116, 123, p. 2084.
Flanary v. Kane, 102 Va. 547, 46 S. E. 312, 681, p. 640, 1052, 1994.
Flanders v. Blandy, 45 Ohio St. 108, 12 N. E. 321, p. 1873.
Flanders v. Chamberlain. 24 Mich. 305, p. 188, 2462.
Flanders v. Lamphear, 9 N. H. 201, p. 2554.
Flanders v. McClanahan, 24 Iowa, 486, p. 2752.
Flanders v. Thompson, 3 Woods, 9, p. 2024.
Flanner v. Butler, 131 N. C. 151, 92 Am. St. Rep. 773, 42 S. E. 557, p. 1997.
Flanner v. Fellows, 206 Ill. 136, 68 N. E. 1057, p. 1909.
Flannery v. Jones, 180 Pa. St. 338, 36 Atl. 856, 57 Am. St. Rep. 648, p. 1694.
Flash v. Gresham, 36 Ark. 529, p. 2258.
Flash v. Wilkerson, 22 Fed. 689, 691, p. 506.
Flaum v. Wallace, 103 N. C. 296, 9 S. E. 567, p. 2131, 2196.
Flavel v. Harrison, 10 Hare, 467, p. 1695, 2690.
Fleckenstein v. Baxter, 114 Mo. 493, 21 S. W. 852, p. 1101.
Fleece v. O'Rear, 83 Ind. 200, p. 2499, 2509.
Fleetwood, In re, L. R. 15 Ch. Div. 594, p. 2036, 2037.
Fleisher v. Greenwald, 20 Fed. 547, p. 499.
Fleishner v. Citizens' R. E. & I. Co., 25 Oreg. 119, 35 Pac. 174, p. 224, 340.
Fleitas v. Richardson, 147 U. S. 538, 545, 13 Sup. Ct. 429, 432, p. 494.
Fleming v. Buchanan, 3 De Gex, M. & G. 976, p. 2223.
Fleming v. Burgin, 2 Ired. Eq. 584, p. 1097, 1142, 1358.
Fleming v. Newton, 1 H. L. Cas. 363, 371, 376, p. 545.
Fleming v. Reed, 20 Ind. App. 462, 49 N. E. 1087, p. 2411.
Fleming v. Slocum, 18 Johns. 403, 9 Am. Dec. 224, p. 2706.
Fleming v. Snook, 5 Beav. 250, p. 2673.
Fleming v. Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504, p. 240.
Fleming v. Wilson, 6 Bush, 610, p. 2100.
Flemington Nat. Bank v. Jones, 50 N. J. Eq. 244, 486, 24 Atl. 928, 27 Atl. 636, p. 1107.
Fletcher, In re, L. R. 38 Ch. Div. 373, p. 872.

Fletcher v. Ashburner, 1 Brown Ch. 497, 500, 1 Lead. Cas. Eq., 4th Am. ed., 1118, 1120, 1123, 1157, p. 185, 615, 620, 621, 1853, 2305, 2332.
Fletcher v. Ashley, 6 Gratt. 332, 339, p. 2166.
Fletcher v. Chase, 16 N. H. 38, 42, p. 1409.
Fletcher v. Collier, 61 Ga. 653, p. 2265.
Fletcher v. Ferrell, 39 Ky. (9 Dana) 372, 35 Am. Dec. 143, p. 1078.
Fletcher v. Fletcher, 2 Cox, 99, p. 1679.
Fleming v. Grafton, 54 Miss. 79, p. 2790.
Fletcher v. Green, 33 Beav. 426, 513, 515, p. 2087, 2090, 2092.
Fletcher v. Holmes, 32 Ind. 497, 513, p. 2358.
Fletcher v. Holmes, 40 Me. 364, p. 548, 551, 2272.
Fletcher v. Hooper, 32 Md. 210, p. 215.
Fletcher v. Morey, 2 Story, 555, 566, 567, p. 494, 2586.
Fletcher v. Peck, 6 Cranch, 87, 133, 134, p. 1346, 1384.
Fletcher v. Warren, 18 Vt. 45, p. 2710.
Flickey v. Loney, 4 Baxt. 169, p. 1212.
Flickinger v. Hull, 5 Gill, 60, p. 237.
Flight v. Barton, 3 Mylne & K. 282, p. 1053, 1599.
Flight v. Bolland, 4 Russ. 298, p. 2769.
Flight v. Robinson, 8 Beav. 22, p. 282.
Flinn v. Barber, 61 Ala. 530, p. 2498, 2511.
Flinn v. Barber, 64 Ala. 193, p. 2536.
Flint v. Brandon, 8 Ves. 159, 164, p. 2765.
Flint v. Clinton Co., 12 N. H. 430, 432, p. 1904.
Flint v. Pattee, 33 N. H. 520, 66 Am. Dec. 742, p. 2238.
Flint v. Warren, 16 Sim. 124, p. 1986.
Flint v. Woodin, 9 Hare, 618, p. 1683, 1694.
Flint etc. R'y Co. v. Auditor-General, 41 Mich. 635, p. 1860.
Flook v. Armentrout's Adm'r, 100 Va. 628, 42 S. E. 686, p. 1671.
Florence v. Morien, 98 Va. 26, 34 S. E. 890, p. 1106, 1125.
Florence v. Paschal, 50 Ala. 28, p. 2756.
Florence v. Sands, 4 Redf. 206, p. 2218, 2224.
Florence M. Co. v. Brown, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. ed. 424, p. 2569.
Florida Southern R. R. Co. v. Hill, 40 Fla. 1, 74 Am. St. Rep. 124, 23 South. 566, p. 2528, 2530.
Flory v. Houck, 186 Pa. St. 263, 40 Atl. 482, p. 2141.
Flower v. Elwood, 66 Ill. 438, p. 2392, 2396.
Flower v. Flower, 20 Week. Rep. 231, p. 669.
Flower v. Lloyd, L. R. 10 Ch. Div. 327, p. 1634.
Flower v. Local Board etc., L. R. 5 Ch. Div. 347, 352, p. 2686.
Floyd v. Forbes, 71 Cal. 588, 12 Pac. 726, p. 2054.
Floyd v. Harding, 28 Gratt. 401, 414, 416, p. 1269.
Floyd v. Jayne, 6 Johns. Ch. 479, p. 2710.
Floyd v. Mackey, 112 Ky. 646, 66 S. W. 518, p. 2481.
Floyer v. Bankes, L. R. 8 Eq. 115, p. 2483.
Floyer v. Lavington, 1 P. Wms. 268, p. 2370.
Fluegel v. Henschel, 7 N. Dak. 276, 66 Am. St. Rep. 642, 74 N. W. 996, p. 983, 986, 1335.
Fluker v. Taylor, 3 Drew. 183, p. 2798.
Fly v. Brooks, 64 Ind. 50, p. 2726.
Flynt v. Arnold, 2 Met. 619, p. 1101, 1135, 1358, 1359.
Flynt v. Hubbard, 57 Miss. 471, p. 1998, 2006.
Foakes v. Webb, 28 Ch. Div. 287, p. 278.
Fobes v. Shattuck, 22 Barb. 568, p. 2743.
Fobey v. McAllister, 9 Wis. 463, p. 2511.
Fogal v. Pirro, 10 Bosw. 100, p. 2430.
Fogarties v. State Bank, 12 Rich. 518, 78 Am. Dec. 468, p. 2570.
Fogarty v. Sawyer, 17 Cal. 589, 592, p. 2354, 2357.
Fogarty v. Sawyer, 23 Cal. 570, p. 1095.
Fogg v. Blair, 133 U. S. 534, 10 Sup. Ct. 338, 33 L. ed. 721, p. 2012.
Fogg v. Griffin, 2 Allen, 1 p. 1625.

Fogg v. Holcomb, 64 Iowa, 621, 21 N. W. 111, p. 1338, 1356.
Fogg v. Nevada C. V. R. Co., 20 Nev. 429, 23 Pac. 840, p. 398.
Fogg v. Rogers, 2 Cold. 290, p. 2526.
Fogg v. Union Bank, 4 Baxt. 530, p. 1735.
Foley, In re, 176 Fed. 396, 80 Fed. 951, p. 495, 508, 511.
Foley v. Burnell, 1 Brown Ch. 274, 279, p. 2205.
Foley v. Crow, 37 Md. 51, p. 345, 649, 2775, 2782.
Foley v. Greene, 14 R. I. 618, 51 Am. St. Rep. 419, p. 673, 1715, 1718, 1735.
Foley v. Hill, 2 H. L. Cas. 28, 46, p. 1916, 2799, 2801.
Foley v. Hill, 1 Phill. Ch. 399, 2 H. L. Cas. 28, 37, p. 211, 319, 322, 542.
Foley v. McKeegan, 4 Iowa, (4 Clarke) 1, 66 Am. Dec. 107, p. 728, 729, 731.
Foley v. Parry, 2 Mylne & K. 138, p. 1924.
Folk v. Beidelman, 6 Watts, 339, p. 1194.
Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882, p. 2413.
Follen, In re, 14 N. J. Eq. 147, p. 1833.
Follett v. Heath, 15 Wis. 601, p. 2715.
Follett v. Jefferyes, 1 Sim., N. S., 1, p. 273, 289.
Follett v. Reese, 20 Ohio, 546, 55 Am. Dec. 472, p. 1231.
Follett v. Tyrer, 14 Sim. 125, p. 1849, 2162.
Follette v. Mutual Accident Ass'n, 110 N. C. 377, 14 S. E. 923, 28 Am. St. Rep. 693, 15 L. R. A. 668, p. 1159.
Folley v. Passaic, 26 N. J. Eq. 216, p. 2678, 2695.
Foll's Appeal, 91 Pa. St. 434, 36 Am. Rep. 671, p. 2770.
Folsom v. McCague, 29 Nebr. 124, 45 N. W. 269, p. 234.
Folsom v. Marsh, 2 Story, 100, 113, p. 2688, 2689.
Foltz v. Pourie, 2 Desaus. Eq. 40, p. 261.
Fonda v. Jones, 42 Miss. 792, 2 Am. Rep. 669, p. 2512.
Fonda v. Sage, 48 N. Y. 173, p. 2757.
Fonnereau v. Poyntz, 1 Brown Ch. 472, 478, p. 2228.
Fontain v. Ravenel, 17 How. 369, 384, p. 512, 515, 516, 1967, 1978.
Fontaine's Adm'r v. Thompson's Adm'r, 80 Va. 229, 56 Am. Rep. 588, p. 1953.
Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680, p. 1277.
Foose v. Whitmore, 82 N. Y. 405, 37 Am. Rep. 572, p. 1923, 1926, 1929.
Foot v. Bronson, 4 Lans. 47, p. 398.
Foot v. Ketchum, 15 Vt. 258, 40 Am. Dec. 678, p. 1232.
Foote v. Beecher, 78 N. Y. 155, p. 2729.
Foote v. Hambrick, 70 Miss. 157, 11 South. 567, 35 Am. St. Rep. 631, p. 1437.
Foote v. Utah Commercial & Sav. Bank, 17 Utah, 85, 283, 54 Pac. 104, p. 1170, 2018.
Foote & Davies Co. v. Maloney, 115 Ga. 985, 42 S. E. 413, p. 737.
Footman v. Pendergrass, 3 Rich. Eq. 33, p. 1806.
Forbes v. Adams, 9 Sim. 462, p. 2332.
Forbes v. Deniston, 4 Brown Parl. C. 189, p. 1357.
Forbes v. Lawrence, 1 Coll. 495, p. 885.
Forbes v. Limond, 4 De Gex, M. & G. 298, p. 1856.
Forbes v. McDonald, 54 Cal. 98, p. 2114.
Forbes v. Memphis etc. R. R., 2 Woods, 323, Fed. Cas. No. 4,926, p. 2114, 2121, 2125.
Forbes v. Moffatt, 18 Ves. 384, p. 1398, 1400, 1402.
Forbes v. Steven, L. R. 10 Eq. 178, 188, 189, p. 2318.
Force v. Brown, 32 N. J. Eq. 118, p. 1845.
Force v. City of Elizabeth, 27 N. J. Eq. 408, p. 228, 462, 464, 1463, 1464.
Force v. Force, (N. J. Eq.) 57 Atl. 973, p. 2109.
Ford, In re, 32 Beav. 621, p. 646, 2171, 2173.
Ford v. Belmont, 69 N. Y. 567, p. 2750.
Ford v. Burks, 37 Ark. 91, p. 1099, 1144.
Ford v. Dolphin, 1 Drew. 222, p. 287.
Ford v. Finney, 35 Ga. 258, p. 2780.

Ford v. Ford, 91 Ky. 572, 16 S. W. 451, p. 1934, 1980.
Ford v. Ford, 23 N. H. 212, p. 2207, 2208, 2211, 2214.
Ford v. Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117, p. 2309, 2311.
Ford v. Foster, L. R. 7 Ch. 611, p. 1695, 2690.
Ford v. Harrington, 16 N. Y. 285, p. 673, 1718.
Ford v. Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902, p. 2013.
Ford v. Jermon, 6 Phila. 6, p. 2773.
Ford v. Joyce, 78 N. Y. 618, p. 1541, 2725.
Ford v. Loomis, 33 Mich. 121, p. 1452.
Ford v. Lord Chesterfield, 19 Beav. 428, p. 724.
Ford v. Marcall, 107 Ill. 136, p. 1031.
Ford v. Peering, 1 Ves. 72, p. 2727.
Ford v. Smith, 1 McAr. 592, p. 2499.
Ford v. Ticknor, 169 Mass. 276, 47 N. E. 877, p. 1101, 1146.
Ford v. Unity Church Society, 120 Mo. 498, 25 S. W. 394, 41 Am. St. Rep. 711, 23 L. R. A. 561, p. 1101, 1135, 1363.
Ford v. White, 16 Beav. 120, 123, 124, p. 1108, 1137, 1139, 1261, 1357.
Fordyce v. Bridges, 2 Phill. Ch. 497, p. 1889.
Fordyce v. Willis, 3 Brown Ch. 577, 587, p. 1898.
Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94, p. 374, 397.
Forepaugh v. Appold, 17 B. Mon. 625, 631, p. 1101, 1145, 1358.
Forester v. Van Auken, (N. Dak.) 96 N. W. 301, p. 1516, 1522, 1542.
Forester v. Watford, 67 Ga. 508, p. 826, 855.
Forman v. Brewer, 62 N. J. Eq. 748, 48 Atl. 1012, 90 Am. St. Rep. 475, p. 1188.
Forman v. Proctor, 9 B. Mon. 124, p. 2472.
Forrest v. Forrest, 11 Jur., N. S., 317, p. 1998.
Forrester v. Boston & M. Consol. C. & S. Min. Co., (Mont.) 74 Pac. 1088, p. 2118.
Forrester v. Cotton, Amb. 388, 1 Eden, 531, 532, 535, p. 785, 792.
Forrester v. Lord Leigh, Amb. 171, p. 2209.
Forrester v. Wilson, 1 Duer, 624, p. 2709.
Forshaw v. Higginson, 20 Beav. 485, p. 2106.
Forshaw v. Higginson, 8 De Gex, M. & G. 827, 832, p. 2058, 2065.
Forsight v. Grant, 1 Ves. 298, p. 875.
Forster v. Civill, 20 Hun, 282, p. 2493, 2494.
Forster v. Davies, 4 De Gex, F. & J. 133, 138, p. 2106, 2146.
Forster v. Hale, 3 Ves. 696, p. 1901, 1903, 1905.
Forster v. Ridley, 4 De Gex, J. & S. 452, p. 2097.
Forsyth v. Day, 46 Me. 176, 197, p. 1444.
Forsyth v. Preer, 62 Ala. 443, p. 2383.
Forsythe v. Brandenburg, 154 Ind. 588, 57 N. E. 247, p. 1157.
Forsythe v. McCreight, 10 Rich. Eq. 308, p. 307.
Fort v. Burch, 6 Barb. 60, 78, p. 1095, 1354.
Fort v. Burch, 5 Denio, 187, p. 1299, 1303, 1358, 1374.
Ft. Dearborn Nat. Bank v. Seymour, 71 Minn. 81, 73 N. W. 724, p. 1175.
Fortescue v. Barnett, 3 Mylne & K. 36, p. 1872, 1878.
Forth v. Duke of Norfolk, 4 Madd. 503, p. 1839, 2789.
Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145, p. 1395, 1406, 1407, 1409, 1410.
Fortier v. Delgado & Co., 122 Fed. 604, 59 C. C. A. 180, p. 2570.
Ft. Madison Lumber Co. v. Batavian Bank, 71 Iowa, 270, 32 N. W. 336, 60 Am. Rep. 789, p. 1221.
Fort Smith v. Brogan, 49 Ark. 306, 5 S. W. 337, p. 1517.
Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572, p. 1212, 1254.
Forward v. Continental Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637, affirming 66 Hun, 546, 21 N. Y. Supp. 664, p. 1158.
Forwood v. Dehoney, 5 Bush, 174, p. 2397.
Fosbrooke v. Balguy, 1 Mylne & K. 226, p. 2028, 2032, 2079.

Foscue v. Lyon, 55 Ala. 440, p. 2056, 2066, 2070, 2077.
Fosdick v. Town of Hempstead, 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715, p. 1969.
Foshay v. Ferguson, 5 Hill, 154, p. 1736.
Foss v. Boston & M. R. Co., 66 N. H. 256, 21 Atl. 222, 49 Am. St. Rep. 609, 11 L. R. A. 367, p. 1155.
Foss v. Foss, 15 Ir. Ch. Rep. 215, p. 2163.
Foss v. Harbottle, 2 Hare, 461, 491, 493, 494, p. 2114, 2121.
Foss v. Haynes, 31 Me. 81, 89, p. 550, 551, 556.
Foss v. Lowell Bk., 111 Mass. 285, Ames' Cas. on Trusts, 155, note, p. 1878.
Foster v. Berkey, 8 Minn. 351, p. 2004.
Foster v. Blackstone, 1 Mylne & K. 297, 9 Bligh, N. S., 332, 376, p. 1210.
Foster v. Carson, 159 Pa. St. 477, 28 Atl. 356, 33 Week. Notes Cas. 517, 39 Am. St. Rep. 696, p. 1108, 1298, 1301.
Foster v. Cooke, 3 Brown Ch. 347, p. 819, 835.
Foster v. Elsley, 19 Ch. Div. 518, p. 2050.
Foster v. Foster, L. R. 1 Ch. Div. 588, p. 2320.
Foster v. Foster, 133 Mass. 179, p. 1844.
Foster v. Fox, 4 Watts & S. 92, p. 2558.
Foster v. Hilliard, 1 Story, 77, 90, Fed. Cas. No. 4,972, p. 1412, 2443.
Foster v. McGuire, 96 Ga. 447, 23 S. E. 398, p. 1228.
Foster v. Mix, 20 Conn. 395, p. 1212.
Foster v. Reynolds, 38 Mo. 553, p. 2383.
Foster v. Roberts, 24 Beav. 467, p. 1742.
Foster v. Swasey, 2 Wood. & M. 217, p. 321, 326, 514, 515.
Foster v. Walton, 5 Watts, 378, p. 1806.
Foster v. Watson, 16 B. Mon. 377, 387, p. 231, 355.
Foster v. Willson, 68 N. H. 241, 73 Am. St. Rep. 581, 38 Atl. 1003, p. 1926.
Foster v. Winchester, 92 Ala. 497, 9 South. 83, p. 660.
Foster v. Wood, 8 Johns. Ch. 87, 89, p. 307, 2708, 2710.
Foster's Appeal, 3 Pa. St. 79, p. 1107, 1281.
Foster's Appeal, 74 Pa. St. 391, 397, 15 Am. Rep. 553, p. 2318.
Foster's Estate, In re, 37 Misc. Rep. 581, 75 N. Y. Supp. 1067, p. 1897.
Foster's Estate, In re, 179 Pa. St. 610, 36 Atl. 343, p. 1838.
Foster's Will, In re, 15 Hun, 387, p. 2068.
Fothergill v. Fothergill, Freem. Ch. 256, p. 1468.
Fothergill v. Rowland, L. R. 17 Eq. 132, 141, p. 2674, 2676.
Fouch v. Wilson, 60 Ind. 64, 28 Am. Rep. 651, p. 2499, 2513.
Fouché v. Merchants' Nat. Bank, 110 Ga. 827, 36 S. E. 256, p. 1156.
Foulke v. Zimmerman, 81 U. S. (14 Wall.) 113, p. 1071.
Fountain Spring Park Co. v. Roberts, 92 Wis. 345, 53 Am. St. Rep. 917, 66 N. W. 399, p. 1783.
Fourdrin v. Gowdey, 3 Mylne & K. 409, p. 875, 876.
Fourth Nat. Bank v. Francklyn, 120 U. S. 755, 7 Sup. Ct. 757, 762, p. 502.
Fourth Nat. Bank's Appeal, 123 Pa. St. 484, 10 Am. St. Rep. 538, 16 Atl. 779, p. 2393.
Fourth Street Nat. Bank v. Yardley, 161 U. S. 634, 17 Sup. Ct. 439, 41 L. ed. 855, p. 2570.
Fouse v. Gilfillan, 45 W. Va. 213, 32 S. E. 178, 185, p. 1054, 1058.
Foust v. Moorman, 2 Ind. 17, p. 2741.
Fouverne v. New Orleans, 18 How. 470, 473, 15 L. ed. 399, p. 509, 515.
Foveaux, In re, [1895] 2 Ch. 501, 507, p. 1947, 1948.
Fowke v. Draycott, 29 Ch. Div. 996, p. 2173.
Fowkes v. Pascoe, L. R. 10 Ch. 343, p. 1998.
Fowle v. Lawrason, 5 Pet. 495, p. 542.
Fowle v. Torrey, 135 Mass. 90, p. 2193.
Fowler, In re, 27 Beav. 362, p. 794, 795.
Fowler, In re, L. R. 16 Ch. Div. 723, p. 2660.

Fowler v. Bell, 90 Tex. 150, 37 S. W. 1058, 59 Am. St. Rep. 788, 32 L. R. A. 825, p. 2014.
Fowler v. Black, 136 Ill. 363, 26 N. E. 596, p. 1486.
Fowler v. Bott, 6 Mass. 63, p. 1460.
Fowler v. City of St. Joseph, 37 Mo. 228, p. 2757.
Fowler v. Donovan, 79 Ill. 310, p. 1700.
Fowler v. Fay, 62 Ill. 375, p. 1398, 1403, 1410, 2404, 2407.
Fowler v. Fowler, 33 Beav. 616, p. 1934, 1949.
Fowler v. Fowler, 4 De Gex & J. 250, 265, 273, p. 1515, 1524, 1541.
Fowler v. Fowler, 3 P. Wms. 353, 355, 33 Beav. 616, p. 176, 872, 873, 879, 933, 937, 939, 2163.
Fowler v. Garlike, 1 Russ. & M. 232, p. 1910, 1933, 1985, 1986.
Fowler v. Heirs of Rust, 2 A. K. Marsh. 294, p. 2500.
Fowler v. Houston, 1 Nev. 469, 472, p. 683.
Fowler v. Jacob, 62 Md. 326, p. 2193.
Fowler v. Mutual Life Ins. Co., 28 Hun, 195, p. 2105.
Fowler v. Palmer, 62 N. Y. 533, p. 2730.
Fowler's Trusts, In re, 27 Beav. 362, p. 783.
Fox, In re, 52 N. Y. 530, 536, 537, 11 Am. Rep. 751, p. 2486.
Fox v. Fox, 27 Beav. 301, p. 1909, 1929.
Fox v. Gibbs, 86 Me. 87, 29 Atl. 940, p. 1955, 1957, 1974.
Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316, p. 1343.
Fox v. Hawkes, 13 Ch. Div. 822, p. 1878.
Fox v. Horsh, 1 Ir. Eq. 358, p. 1848.
Fox v. Mackreth, 2 Brown Ch. 400, 420, 2 Cox, 320, 322, 1 Lead. Cas. Eq. 188, 212, 237, 2 Dick. 689, p. 182, 1609, 1614, 1665, 1667, 1752, 1753, 2028, 2029, 2032.
Fox v. Palmer, 25 N. J. Eq. 416, p. 1287.
Fox v. People, 201 Pa. St. 9, 50 Atl. 226, p. 2000.
Fox v. Reeder, 28 Ohio St. 181, 22 Am. Rep. 370, p. 1070.
Fox v. Robbins, (Tex. Civ. App.) 70 S. W. 597, p. 2406.
Fox v. Scard, 33 Beav. 327, p. 749, 750.
Fox v. Wharton, 5 Del. Ch. 200, p. 2346.
Fox v. Wright, 6 Madd. 111, p. 1742, 1745.
Foxwell v. Lewis, 30 Ch. Div. 656, p. 2333.
Foxworth v. Bullock, 44 Misc. 457, p. 1566.
Foxworth v. White, 72 Ala. 224, p. 1755, 2103.
Foy v. Armstrong, 113 Iowa, 629, 85 N. W. 753, p. 2403.
Frail v. Ellis, 16 Beav. 350, p. 1174, 2516.
Fraim v. Frederick, 32 Tex. 294, p. 1334.
Fraley v. Peters, 12 Bush, 469, p. 2737, 2749.
Fraley's Appeal, 76 Pa. St. 42, p. 1216.
Frame v. Frame, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 323, p. 1025.
Frame v. Sliter, 29 Oreg. 121, 45 Pac. 290, 54 Am. St. Rep. 781, 34 L. R. A. 690, p. 2502, 2504, 2508, 2510.
Framlingham v. Brand, 3 Atk. 390, p. 1546.
Frampton v. Blume, 129 Mass. 152, p. 2488.
France v. Clark, L. R. 26 Ch. Div. 256, p. 1242.
France v. Thomas, 86 Mo. 80, p. 2472, 2576.
Francis v. Brooking, 19 Beav. 347, p. 2173.
Francis v. Evans, 69 Wis. 115, 33 N. W. 93, p. 1914, 2023.
Francis v. Francis, 2 De Gex, M. & G. 73, p. 2727.
Francis v. Francis, 5 De Gex, M. & G. 108, p. 2103.
Francis v. Porter, 7 Ind. 213, p. 2358.
Francis v. Wells, 2 Colo. 660, p. 2499, 2521.
Francis v. Wigzell, 1 Madd. 258, 264, p. 2184.
Francisco v. Shelton, 85 Va. 779, 8 S. E. 789, p. 2414.
Francke v. His Wife, 29 La. Ann. 302, p. 2624.

Franco v. Alvares, 3 Atk. 342, 346, p. 2203.
Franco v. Bolton, 3 Ves. 368, p. 667, 2728.
Franco v. Franco, 3 Ves. Jr. 75, p. 2017.
Frane v. Burlington Ins. Co., 87 Iowa, 288, 54 N. W. 237, p. 1158.
Frank v. Brunnemann, 8 W. Va. 462, p. 2676, 2682.
Frank v. Frank, 3 Mylne & C. 171, p. 2331.
Frank v. Heidenheimer, 84 Tex. 642, 19 S. W. 855, p. 1102, 1133.
Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025, p. 1271.
Frank v. Lilienfeld, 33 Gratt. 377, p. 2184, 2199.
Frank v. Morris, 9 W. Va. 664, p. 2704.
Franke v. Neisler, 97 Wis. 364, 72 N. W. 887, p. 2418.
Frankenfield's Appeal, 127 Pa. St. 369, p. 2058.
Franklin v. Armfield, 2 Sneed, 305, p. 1933, 1977.
Franklin v. Ayer, 22 Fla. 654, 661, p. 2372, 2378, 2379.
Franklin v. Cannon, 1 Root, 500, p. 1098, 1118.
Franklin v. Colley, 10 Kan. 260, p. 2005.
Franklin v. Green, 2 Allen, 519, 520, 522, p. 312, 2707.
Franklin Bank v. Cooper, 36 Me. 179, 195, p. 1622.
Franklin Institute v. People's Sav. Bank, 14 R. I. 632, p. 2045.
Franklin Ins. Co. v. McCrea, 4 G. Greene, 229, p. 223, 224, 346.
Franklin Min. Co. v. O'Brien, 22 Colo. 129, 43 Pac. 1016, 55 Am. St. Rep. 118, p. 1157.
Franklin Sav. Bank v. Taylor, 53 Fed. 854, 4 C. C. A. 55, 9 U. S. App. 406, p. 1331.
Franklin Sav. Bank v. Taylor, 131 Ill. 376, 23 N. E. 397, 53 Fed. 854, 4 C. C. A. 55, 9 U. S. App. 406, p. 1099, 1119.
Franklin's Estate, In re, 150 Pa. St. 437, 30 Am. St. Rep. 817, 24 Atl. 626, p. 1834.
Franklyn v. Thomas, 3 Mer. 225, 234, p. 2700.
Franklyn v. Tuton, 5 Madd. 469, p. 2766.
Franks v. Bollans, 37 L. J. Ch. 148, 155, p. 1753.
Franks v. Bollans, L. R. 3 Ch. 717, 718, p. 2317, 2332.
Frants v. Brown, 17 Serg. & R. 287, p. 1226.
Franz v. Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466, p. 737.
Frary v. Booth, 37 Vt. 78, p. 2152.
Fraser v. Byng, 1 Russ. & M. 90, p. 888.
Fraser v. Child, 4 E. D. Smith, 153, p. 2037.
Fraser v. Passage, 63 Mich. 551, 30 N. W. 334, p. 986.
Fraser v. Trustees, 124 N. Y. 480, 26 N. E. 1034, p. 2305.
Frayne v. Taylor, 10 Jur., N. S., 119, p. 2311.
Frazer, In re, Fed. Cas. No. 5,068, p. 509.
Frazer v. Frazer, 2 Del. Ch. 260, p. 1725.
Frazer v. Western, 1 Barb. Ch. 220, p. 1384.
Frazier v. Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666, p. 1845.
Frazier v. Brownlow, 3 Ired. Eq. 237, 42 Am. Dec. 165, p. 2196.
Frazier v. Butler Borough, 172 Pa. St. 407, 23 Atl. 691, 51 Am. St. Rep. 739, p. 1159, 1164.
Frazier v. Gelston, 35 Md. 298, p. 1447.
Frazier v. Hendren, 80 Va. 265, p. 2526.
Frazier v. Jenkins, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575, p. 1774, 2086.
Frecking v. Rolland, 53 N. Y. 422, 426, p. 2201.
Frederick v. Aynscombe, 1 Atk. 392, p. 2316.
Frederick v. Emig, 186 Ill. 319, 59 N. E. 883, 78 Am. St. Rep. 283, p. 1280.
Frederick v. Frederick, 1 P. Wms. 710, p. 603, 604.
Frederick v. Groshon, 30 Md. 436, 96 Am. Dec. 591, p. 2693.
Frederick v. Haas, 5 Nev. 389, p. 1994, 1999.

Free v. Buckingham, 57 N. H. 95, p. 1640.
Freeby v. Tupper, 15 Ohio, 467, p. 2399.
Freed v. Brown, 55 Ind. 310, p. 1725.
Freedley's Appeal, 60 Pa. St. 344, p. 1909.
Freeholders of Middlesex v. State Bank, 28 N. J. Eq. 166, p. 2660.
Freeland v. Dazey, 25 Ill. 294, p. 575, 2266.
Freemantle v. Bankes, 5 Ves. 79, p. 937.
Freeman v. Auld, 44 N. Y. 50, 37 Barb. 587, p. 2402, 2410, 2411.
Freeman v. Bishop, 2 Atk. 39, p. 1744.
Freeman v. Burnham, 36 Conn. 469, p. 1801.
Freeman v. Butler, 33 Beav. 289, p. 273, 289.
Freeman v. Cooke, 2 Ex. 654, 661, p. 1422, 1424, 1439, 1441.
Freeman v. Curtis, 51 Me. 140, 81 Am. Dec. 564, p. 1492, 1494.
Freeman v. Deming, 3 Sand. Ch. 327, p. 1336.
Freeman v. Dwiggins, 2 Jones Eq. 162, p. 1733.
Freeman v. Eacho, 79 Va. 43, p. 960, 961, 1468, 1469.
Freeman v. Fairlee, 3 Mer. 29, 30, p. 2763.
Freeman v. Fairlee, 3 Mer. 40, 42, p. 2052.
Freeman v. Freeman, 9 Mo. 772, p. 2139.
Freeman v. Freeman, 17 N. J. Eq. 44, p. 189, 2461, 2463.
Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657, p. 2780, 2781.
Freeman v. Guion, 11 Smedes & M. 58, 65, p. 568.
Freeman v. Hartman, 45 Ill. 57, 92 Am. Dec. 193, p. 2166.
Freeman v. Harwood, 44 Me. 195, p. 1753.
Freeman v. Laing, [1899] 2 Ch. 355, 68 Law J. (Ch.) 586, 81 Law T., N. S., 167, 48 Wkly. Rep. 9, p. 1375.
Freeman v. Parsley, 3 Ves. 421, p. 646.
Freeman v. Paul, 3 Me. 260, 14 Am. Dec. 237, p. 1406.
Freeman v. Pope, L. R. 5 Ch. 538, 544, p. 1796, 1797, 1800, 1801.
Freeman v. Pullen, 130 Ala. 653, 31 South. 451, p. 1334, 1371.
Freeman v. Reagan, 26 Ark. 373, 378, p. 574, 581, 1643, 2259, 2729.
Freeman v. Sedwick, 6 Gill, 28, 39, 46 Am. Dec. 650, p. 664.
Freeman v. Stewart, 41 Miss. 138, p. 683, 2606.
Freeman v. Tatham, 5 Hare, 329, p. 290.
Freeman v. Wilson, 51 Miss. 329, p. 2376, 2377.
Freemans v. Smith, 60 How. Pr. 311, p. 2315.
Freeman's Estate, In re, 181 Pa. St. 405, 59 Am. St. Rep. 659, 37 Atl. 591, p. 2049.
Freeman's Nat. Bank v. National Tube Works Co., 151 Mass. 413, 21 Am. St. Rep. 461, 24 N. E. 779, 8 L. R. A. 42, p. 1914.
Freemantle v. Banks, 5 Ves. 79, 85, p. 903, 933.
Freeport, Inhabs. of, v. Bartol, 3 Greenl. 340, p. 1908.
Freer v. Davis, 52 W. Va. 1, 59 L. R. A. 556, 43 S. E. 164, 94 Am. St. Rep. 895, p. 149, 200, 224, 330, 338, 340.
Freer v. Freer, 22 Ch. Div. 622, p. 2214.
Freer v. Hesse, 4 De Gex, M. & G. 495, p. 1089.
Freeson v. Bissell, 63 N. Y. 168, 170, p. 2535, 2777.
Freiberg v. Magale, 70 Tex. 116, 7 S. W. 684, p. 1117.
Freke v. Barrington, 3 Brown Ch. 274, 284, p. 782, 857.
Frels v. Little Black Farmers' Mut. Ins. Co., (Wis.) 98 N. W. 522, p. 2551.
Freme v. Brade, 2 De Gex & J. 582, p. 1745.
Fremoult v. Dedire, 1 P. Wms. 429, p. 2471.
French v. Baron, 2 Atk. 120, p. 2431.
French v. Burns, 35 Conn. 359, p. 2369, 2375, 2380.
French v. Davies, 2 Ves. 572, p. 819, 827, 831.
French v. Dickey, 3 Tenn. Ch. 302, p. 2508, 2523, 2525.
French v. First Nat. Bank, 7 Ben. 488, p. 243, 250, 259, 265.
French v. French, 6 De Gex, M. & G. 95, p. 1801.
French v. French, 3 N. H. 234, p. 1828.

French v. French, 8 Ohio, 214, 31 Am. Dec. 441, p. 1733.
French v. Gifford, 30 Iowa, 148, p. 2653, 2660.
French v. Griffin, 18 N. J. Eq. 279, p. 1563.
French v. Hay, 89 U. S. (22 Wall.) 231, p. 216.
French v. Harrison, 17 Sim. 111, p. 2024.
French v. Hobson, 9 Ves. 103, p. 2095.
French v. Macale, 2 Dru. & War. 269, 274, p. 721, 749, 750.
French v. Rainey, 2 Tenn. Ch. 640, p. 245, 270, 283.
French v. Raymond, 39 Vt. 623, p. 2242.
French v. Shoemaker, 14 Wall. 314, 2 Lead. Cas. Eq., 4th Am. ed., 1230, p. 1731.
French v. Snell, 29 N. J. Eq. 95, p. 2671, 2679.
French v. Sturdivant, 8 Me. 246, 251, p. 548, 549, 552, 2372.
French v. The Loyal Co., 5 Leigh, 627, p. 1060, 1080.
French v. Turner, 15 Ind. 59, p. 2417.
French v. Waterman, 79 Va. 619, p. 2199.
French v. Woodruff, 25 Colo. 239, 54 Pac. 1015, p. 1643, 1753, 1755.
French-Brewster's Settlements, In re, [1904] 1 Ch. 713, p. 1400.
Frend, Estate of, 131 Cal. 667, 63 Pac. 1080, 82 Am. St. Rep. 407, p. 1411, 2421, 2423.
Frenkel v. Hudson, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736, p. 1163, 1177.
Frenzel v. Miller, 37 Ind. 1, 10 Am. Dec. 62, p. 1581, 1583, 1616.
Frere v. Green, 19 Ves. 320, p. 297.
Frerking v. Thomas, 64 Nebr. 193, 89 N. W. 1005, p. 982.
Freshfield's Trusts, In re, L. R. 11 Ch. Div. 198, 200, 202, p. 1210.
Fresno C. & I. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275.
Fresno C. & I. Co. v. Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112, p. 988, 1007, 2470, 2596.
Frethey v. Durant, 24 App. Div. 58, 48 N. Y. Supp. 839, p. 2052.
Fretwell v. Branyon, (S. C.) 45 S. E. 157, p. 1409.
Fretz v. Roth, (N. J. Eq.) 59 Atl. 676, p. 1990, 2143.
Frey, Estate of, 52 Cal. 658, p. 841, 842.
Frey v. Clifford, 44 Cal. 335, p. 1095, 1328, 1343.
Frey v. Demarest, 16 N. J. Eq. 236, 238, 239, p. 575, 578, 582, 2206, 2281, 2282.
Frey v. Frey, 17 N. J. Eq. 71, 72, 74, p. 2068.
Frey v. Ramsour, 66 N. C. 466, p. 1899.
Frey v. Vanderhoof, 15 Wis. 397, p. 1405, 1410.
Frey v. Willoughby, 63 Fed. 865, 27 U. S. App. 417, 11 C. C. A. 463, p. 501.
Freytag v. Hoeland, 23 N. J. Eq. 36, 41, p. 2428.
Freyvogle v. Hughes, 56 Pa. St. 228, p. 1831, 2161.
Frick v. Christian Co., 1 Fed. 250, p. 1549.
Frick v. Godare, 114 Ind. 170, 42 N. E. 1015, p. 1106, 1125.
Frick v. White, 57 N. Y. 103, p. 1233.
Friedberg v. Parker, 50 Cal. 103, p. 2190.
Friedlander v. Johnson, 2 Woods, 675, p. 2030.
Friedlander v. T. & P. R'y, 130 U. S. 416, 9 Sup. Ct. 570, p. 1226, 1229.
Friedley v. Hamilton, 17 Serg. & R. 70, 17 Am. Dec. 638, p. 1123.
Friedman v. Janssen, 23 Ky. L. Rep. 2151, 66 S. W. 752, p. 1065.
Fries v. Griffin, 35 Fla. 212, 17 South. 66, p. 1338.
Fries v. Null, 154 Pa. St. 573, 26 Atl. 554, 32 Wkly. Notes Cas. 236, (affirmed, 158 Pa. St. 15, 27 Atl. 867) p. 1108.
Frietas v. Dos Santos, 1 Younge & J. 574, p. 2799.
Frink v. Adams, 36 N. J. Eq. 485, p. 1373, 2381.
Frink v. Buss, 45 N. H. 325, p. 1858.
Frink v. Lawrence, 20 Conn. 117, 50 Am. Dec. 274, p. 2683, 2686.
Frink v. Le Roy, 49 Cal. 314, p. 2354, 2357, 2364.
Frink v. Roe, 70 Cal. 276, 296, 312, 11 Pac. 820, p. 1096, 1751.
Fripp v. Fripp, 1 Rice Eq. 84, p. 1673.
Frith v. Cameron, L. R. 12 Eq. 169, p. 2619.
Frith v. Cartland, 2 Hem. & M. 417, p. 2082.

Frith v. Forbes, 4 De Gex, F. & J. 409, p. 2478, 2569.
Fritsch v. Klansing, 11 Ky. Law Rep. 788, 13 S. W. 241, p. 2070.
Fritz v. Fernandez, (Fla.) 34 South. 315, p. 2191.
Fritzler v. Robinson, 70 Iowa, 500, 31 N. W. 61, p. 1541.
Fritz's Estate, In re, 160 Pa. St. 156, 28 Atl. 642, p. 1742.
Frohlich v. Seacord, 180 Ill. 85, 54 N. E. 286, p. 2030.
Froman v. Froman, 13 Ind. 317, p. 2726.
Froneberger v. Lewis, 79 N. C. 426, p. 1754.
Fronty v. Fronty, 1 Bail. Eq. 517, 529, p. 1657.
Frost, In re, L. R. 5 Ch. 699, p. 2622.
Frost v. Beekman, 1 Johns. Ch. 288, 298, p. 1050, 1119, 1323, 1334, 1336, 1337, 1348.
Frost v. Butler, 7 Me. 225, 231, 22 Am. Dec. 199, p. 548.
Frost v. Clark, 82 Iowa, 298, 48 N. W. 82, p. 2544.
Frost v. Foote, (Tex. Civ. App.) 44 S. W. 1071, p. 743.
Frost v. Inhabitants of Belmont, 6 Allen, 152, p. 1699.
Frost v. Libby, 79 Me. 56, 8 Atl. 149, p. 2272.
Frost v. Pacific Sav. Co., (Oreg.) 78 Pac. 814, p. 1706.
Frost v. Saratoga Mut. Ins. Co., 5 Denio, 154, 158, 49 Am. Dec. 234, p. 1427.
Frost v. Walls, 93 Me. 405, 45 Atl. 287, p. 213, 1647, 1787.
Frost v. Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761, p. 635, 691, 1195.
Frost v. Yonkers Sav. Bank, 70 N. Y. 553, 26 Am. Rep. 627, p. 2437.
Frue v. Loring, 120 Mass. 501, p. 217, 535, 538, 542, 1643, 2014, 2799.
Frush v. Green, 86 Md. 494, 39 Atl. 863, p. 1729, 1738.
Fry v. Hammer, 50 Ala. 52, p. 2189.
Fry v. Lane, L. R. 40 Ch. Div. 315, p. 1742, 1744.
Fry v. Platt, 32 Kan. 62, 3 Pac. 781, p. 1761.
Fry v. Porter, 1 Cas. Ch. 138, 1 Mod. 300, 307, (22 Car. II) p. 62, 993, 1682.
Fry v. Prewett, 56 Miss. 783, p. 2529.
Fry v. Shehee, 55 Ga. 208, p. 284, 1163, 1171.
Fry v. Tapson, 28 Ch. Div. 268, p. 2059, 2060, 2066, 2073.
Fry v. Warfield etc. Co., 105 Iowa, 559, 75 N. W. 485, p. 984.
Frye v. Bank of Illinois, 11 Ill. 367, p. 2389.
Frye v. Patridge, 82 Ill. 267, 270, p. 1050, 1145.
Fryer v. Buttar, 8 Sim. 442, p. 2205.
Fryer v. Morris, 9 Ves. 360, p. 2209.
Fryer v. Rishell, 84 Pa. St. 521, p. 1446.
Fulham v. McCarthy, 1 H. L. Cas. 703, p. 1738, 1751.
Fulkerson v. Taylor, 100 Va. 426, 41 S. E. 863, p. 1402.
Fulkerson v. Taylor, (Va.) 46 S. E. 309, p. 1269.
Fullenwider v. Ferguson, 30 Tex. Civ. App. 156, 70 S. W. 222, p. 1133.
Fuller v. Abrahams, 3 Brod. & B. 116, 6 Moore, 316, p. 1693.
Fuller v. Acker, 1 Hill, 473, p. 2461.
Fuller v. Bennett, 2 Hare, 394, 402, p. 994, 1159, 1166, 1168.
Fuller v. Hasbrouck, 46 Mich. 78, 8 N. W. 697, p. 1856.
Fuller v. Hollander, 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456, p. 285.
Fuller v. Hunt, 48 Iowa, 163, p. 2402.
Fuller v. Little, 69 Ill. 229, p. 2710.
Fuller v. Melrose, 1 Allen, 166, p. 696, 1450, 1788.
Fuller v. O'Neil, 69 Tex. 349, 5 Am. St. Rep. 59, 6 S. W. 181, p. 2059.
Fuller v. Parmenter, 72 Vt. 362, 47 Atl. 1079, p. 1208, 2574.
Fuller v. Percival, 126 Mass. 381, [1879] p. 541, 542, 546, 1639, 2730.
Fuller v. Scribner, 76 N. Y. 190, p. 1080, 1088.
Fuller v. Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312, p. 1234.
Fuller v. Wilson, 3 Q. B. 58, 3 Q. B. 1009, p. 1575, 1625.
Fuller v. Yates, 8 Paige, 325, p. 809, 811, 820, 832, 841.

Fuller's Will, In re, 75 Wis. 431, 44 N. W. 304, p. 1970.
Fullerton v. McCurdy, 4 Lans. 132, p. 2772.
Fullwood v. Fullwood, L. R. 9 Ch. Div. 176, p. 1450, 2696.
Fulton v. Loftis, 63 N. C. 393, p. 1735.
Fulton v. Moore, 25 Pa. St. 468, p. 783, 787, 815, 820.
Fulton v. Whitney, 66 N. Y. 548, 5 Hun, 16, p. 1643, 1753, 2034, 2080, 2085.
Fulton v. Woodman, 54 Miss. 158, p. 1384.
Fulton Bank v. N. Y. & Sharon C. Co., 4 Paige, 127, p. 1156, 1160, 1164, 1169, 1174.
Fulton's Estate, In re, 51 Pa. St. 204, 211, p. 1331.
Funk v. Hensler, 31 Wash. 528, 72 Pac. 102, p. 2000.
Funk v. McReynold's Adm'rs, 33 Ill. 481, 495, p. 1409, 2392, 2393.
Funk v. Paul, 64 Wis. 35, 24 N. W. 419, 54 Am. Rep. 576, p. 1328.
Funk v. Seehorn, 99 Mo. App. 587, 74 S. W. 445, p. 2480, 2501, 2515.
Funk v. Voneida, 11 Serg. & R. 109, 115, p. 559.
Funkhousen v. Lay, 78 Mo. 458, p. 1347.
Furbush v. Goodwin, 29 N. H. 321, 332, p. 2351.
Furguson v. Waters, 3 Bibb, 303, p. 333.
Furman v. Clark, 11 N. J. Eq. 306, p. 2765.
Furman v. Fisher, 4 Cold. 626, 94 Am. Dec. 210, p. 1856, 1905.
Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341, p. 2414.
Furness, In re, [1901] 2 Ch. 346, p. 902.
Furnival v. Crew, 3 Atk. 83, 87, p. 2761.
Furry v. Ferguson, 105 Iowa, 231, 74 N. W. 903, p. 1069, 1155.
Fussell v. Dowding, L. R. 14 Eq. 421, p. 2162.
Fussell v. Gregg, 113 U. S. 550, 5 Sup. Ct. 631, p. 212.
Futrill v. Futrill, 5 Jones Eq. 61, p. 1733.
Fynn, In re, 2 De Gex & S. 457, p. 2616.
Fytche v. Fytche, L. R. 7 Eq. 494, p. 856.

G.

G———, In re [1899], 1 Ch. 719, p. 1920.
Gaas v. Wilhite, 2 Dana, 170, 26 Am. Dec. 446, p. 1980.
Gabbert v. Schwartz, 69 Ind. 450, p. 2419.
Gable v. Daub, 40 Pa. St. 217, p. 790.
Gadsden v. Whaley, 14 S. C. 210, p. 1877, 1905, 1912, 2662.
Gaffee, In re, 1 Macn. & G. 541, 545, 547, 1 Lead. Cas. Eq. 713–722, 735–748, 765–772, p. 1847, 2140, 2141, 2156, 2160, 2161.
Gaffey v. Northwestern Mut. Life Ins. Co., (Nebr.) 98 N. W. 826, p. 338.
Gafford v. Stearns, 51 Ala. 434, p. 1327.
Gafney v. Kenison, 64 N. H. 354, 10 Atl. 706, p. 1935, 1944, 1953, 1975.
Gage v. Abbott, 99 Ill. 366, p. 2748.
Gage v. Billings, 56 Ill. 268, p. 2753, 2754, 2756.
Gage v. Cameron, (Ill.) 72 N. E. 204, p. 2405, 2470.
Gage v. Chapman, 56 Ill. 311, p. 2757.
Gage v. Gates, 62 Mo. 412, p. 2195.
Gage v. Lister, 2 Brown Parl. C. 4, p. 2146.
Gage v. Mayer, 117 Ill. 632, 7 N. E. 97, p. 212.
Gage v. Parker, 178 Ill. 455, 53 N. E. 317, p. 1074.
Gage v. Rohrbach, 56 Ill. 262, p. 2753, 2754, 2757.
Gage v. Smith, 79 Ill. 219, p. 2659.
Gaines v. Brackerhoff, 136 Pa. St. 175, 19 Atl. 958, p. 2380.
Gaines v. Chew, 2 How. 619, 640, 642, 645, p. 419, 421, 1635, 1636, 2746.
Gaines v. Fuentes, 92 U. S. 10, 21, 23 L. ed. 528, p. 509.
Gaines v. Miller, 111 U. S. 395, 4 Sup. Ct. 426, p. 216.
Gaines v. New Orleans, 6 Wall. 642, 716, p. 1184.
Gaines v. Relf, 15 Pet. 9, p. 494.
Gaines v. Saunders, 50 Ark. 322, 7 S. W. 301, p. 986.
Gaines v. Smiley, 7 Smedes & M. 53, 45 Am. Dec. 295, p. 2277.
Gaines v. Summers, 50 Ark. 322, 7 S. W. 301, p. 1051.

Gainsford v. Dunn, L. R. 17 Eq. 405, 408, p. 2490.
Gainty v. Russell, 40 Conn. 450, p. 565, 2708.
Gaither v. Gaither, 3 Md. Ch. 158, p. 1653.
Galbraith v. Galbraith, 190 Pa. St. 225, 42 Atl. 683, p. 1907.
Galbraith v. Lunsford, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522, p. 1422, 1424, 1432, 1446.
Gale v. Archer, 42 Barb. 320, p. 2776.
Gale v. Burnell, 7 Q. B. 850, p. 2576.
Gale v. Gale, 21 Beav. 349, p. 2215.
Gale v. Hardy, 20 Fla. 171, p. 982, 1057.
Gale v. Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80, p. 1688.
Gale v. Lindo, 1 Vern. 475, p. 1561, 1678.
Gale v. Morris, 30 N. J. Eq. 289, p. 1007.
Gale v. Nixon, 6 Cow. 444, p. 1788, 1789.
Gale v. Southern B. & L. Assn., 116 Fed. 732, p. 1563.
Gale v. Wells, 12 Barb. 84, p. 1775.
Galesworthy v. Strutt, 1 Ex. 659, p. 737.
Gallagher v. Asphalt Co. of America, (N. J. Eq.) 55 Atl. 259, p. 2010.
Gallagher v. Fayette Co. R. R., 38 Pa. St. 102, p. 308, 560, 2675.
Gallagher v. Gallagher, 6 Watts, 473, p. 2218.
Gallagher v. Mars, 50 Cal. 23, p. 2499.
Gallagher v. Roberts, 1 Wash. C. C. 156, 328, p. 304.
Gallagher's Appeal, 48 Pa. St. 121, p. 2494.
Galland v. Galland, 38 Cal. 265, p. 2177.
Galland v. Jackman, 26 Cal. 79, 87, 85 Am. Dec. 172, p. 1144, 1354, 1357.
Gallatian v. Cunningham, 8 Cow. 361, p. 1754, 1773.
Gallatian v. Erwin, 1 Hopk. Ch. 48, p. 1345, 1346, 1773.
Gallego's Ex'rs v. Atty.-Gen., 3 Leigh 450, 24 Am. Dec. 650, p. 1954, 1966, 1971.
Galley v. Ward, 60 N. H. 331, p. 1022, 1024, 1036.
Gallimore v. Gill, 2 Smale & G. 158, 8 De G. M. & G. 567, p. 2489.
Galloway v. Chatham R. R. Co., 63 N. C. 147, 149, 150, p. 407.
Galloway v. Finley, 12 Pet. 264, 9 L. ed. 1079, p. 2504.
Galpin v. Abbott, 6 Mich. 17, p. 1113.
Galpin v. Wilson, 40 Iowa, 90, p. 1730.
Galsworthy v. Strutt, 1 Ex. 659, p. 747.
Galt v. Jackson, 9 Ga. 151, p. 1712, 2376.
Galton v. Emuss, 1 Coll. C. C. 243, p. 1692.
Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 441, p. 1734.
Galusha v. Wendt, 114 Iowa, 597, 87 N. W. 512, p. 217.
Galveston H. & S. A. Ry. Co. v. Blakeney, 73 Tex. 180, 11 S. W. 174, p. 651.
Galveston, H. & S. A. R'y Co. v. Dowe, 70 Tex. 5, 7 S. W. 368, p. 387, 388, 452.
Galveston H. & S. A. Ry. v. McDonald, 53 Tex. 510, p. 2788.
Galvin v. Newton, 19 R. I. 176, 36 Atl. 3, p. 1756.
Galway v. Malchow, 7 Nebr. 285, 289, p. 1102, 1124, 1264, 1270, 1271.
Gamage v. Harris, 79 Me. 531, 11 Atl. 422, p. 342.
Gamble v. Caldwell, 98 Ala. 577, 12 South. 424, p. 1756.
Gamble v. Gibson, 59 Mo. 585, p. 2098.
Gamble v. Jordan, 54 Ala. 432, p. 2255, 2257.
Gamble v. Linder, 76 Ill. 137, p. 732.
Gamble v. Loop, 14 Wis. 465, p. 2750, 2758.
Gamble v. Trippe, 75 Md. 252, 23 Atl. 461, 32 Am. St. Rep. 388, 15 L. R. A. 235, p. 1971.
Gamble's Succession, 23 La. Ann. 9, p. 2306.
Game, In re, [1897] 1 Ch. 881, p. 2322.
Gamet v. Simmons, 103 Iowa, 163, 72 N. W. 444, p. 983.
Gamewell Fire Alarm Tel. Co. v. City of Laporte, (C. C. A.) 102 Fed. 417, p. 705.
Gamewell Fire Alarm Tel. Co. v. Crane, 160 Mass. 50, 35 N. E. 98, 39 Am. St. Rep. 458, 22 L. R. A. 673, p. 1689.
Gammage v. Moore, 42 Tex. 170, p. 2726.

Gammill v. Johnson, 47 Ark. 335, 1 S. W. 610, p. 1558, 1559, 1590.
Gammon v. Howe, 14 Me. 250, p. 727, 738, 742.
Gandy v. Fortner, 119 Ala. 303, 24 South. 425, p. 1838.
Gann v. Chester, 5 Yerg. 205, p. 2518.
Gannett v. Albee, 103 Mass. 372, p. 659.
Gannon v. Merquire, 22 App. Div. 43, 47 N. Y. Supp. 870, p. 1865, 1871.
Gannon v. Northwestern Nat. Bank, 83 Tex. 274, 18 S. W. 573, p. 1079.
Gantt v. Grindall, 49 Md. 310, p. 1705.
Garber v. Gianella, 98 Cal. 527, 529, 33 Pac. 458, p. 1132.
Garcelon, In re, 104 Cal. 570, 584, 38 Pac. 414, 43 Am. St. Rep. 134, 953, 32 L. R. A. 595, p. 193, 1742, 2574.
Garcia y Perea v. Barela, 6 N. M. 239, 27 Pac. 507, p. 2282, 2294.
Garcie v. Freeland, 1 N. Y. 228, 232, 235, p. 570.
Garcie v. Sheldon, 3 Barb. 232, p. 570.
Gardenhire v. Hinds, 1 Head, 402, p. 2144, 2612.
Gardenville etc. Ass'n v. Walker, 52 Md. 452, p. 2486, 2488.
Gardiner v. Dering, 1 Paige, 573, p. 2681.
Gardiner v. Fell, 1 Jacob & W. 22, p. 798, 800.
Gardiner v. Gardiner, 34 N. Y. 155, p. 1738.
Gardiner v. Gerrish, 23 Me. 46, 48, p. 549, 551, 604.
Gardiner v. Morse, 25 Me. 140, p. 1692.
Gardiner v. Tyler, 2 Abb. App. 247, p. 2663.
Gardner, Ex parte, 2 Ves. Sr. 671, p. 2173.
Gardner v. Astor, 3 Johns. Ch. 53, 8 Am. Dec. 465, p. 1400, 1402, 1404.
Gardner v. Blane, 1 Hare, 381, p. 2654.
Gardner v. Boothe, 31 Ala. 186, p. 1806.
Gardner v. Butler, 30 N. J. Eq. 702, p. 2085, 2125.
Gardner v. Case, 111 Ind. 494, 13 N. E. 36, p. 1735.
Gardner v. Cole, 21 Iowa, 205, p. 1006, 1100.
Gardner v. Colin, 191 Ill. 553, 61 N. E. 492, p. 1100, 1126.
Gardner v. Commercial Nat. Bank, 13 R. I. 155, 173, p. 1332.
Gardner v. Diederichs, 41 Ill. 158, p. 2392.
Gardner v. Early, 72 Iowa, 518, 34 N. W. 311, p. 1357.
Gardner v. Gardner, 1 Giff. 126, p. 2139, 2147.
Gardner v. Gardner, 3 Mason, 178, p. 192.
Gardner v. Gardner, 7 Paige, 112, 126, p. 2152, 2196.
Gardner v. Hatton, 6 Sim. 93, p. 2213.
Gardner v. Hooper, 3 Gray, 398, p. 646.
Gardner v. McCutcheon, 4 Beav. 534, p. 2028.
Gardner v. McEwen, 19 N. Y. 123, p. 2586.
Gardner v. Mason, 130 Mich. 436, 9 Detroit Leg. N. 94, 90 N. W. 28, p. 1276.
Gardner v. Mayor etc., 26 Barb. 423, p. 1477.
Gardner v. Newburgh, 2 Johns. Ch. 162, 165, 7 Am. Dec. 526, p. 2686, 2693.
Gardner v. Ogden, 22 N. Y. 327, 332–339, 78 Am. Dec. 192, p. 155, 1761. 1764, 2032, 2085, 2633.
Gardner v. Parker, 3 Madd. 184, 185, p. 2232, 2234, 2237.
Gardner v. Peckham, 13 R. I. 102, p. 1066, 1073.
Gardner v. Printup, 2 Barb. 83, 88, 93, p. 2209, 2214.
Gardner v. Randell, 70 Tex. 453, 7 S. W. 781, p. 1995.
Gardner v. Rowe, 2 Sim. & St. 346, 5 Russ. 258, p. 1901, 1903.
Gardner v. Smith, 5 Heisk. 256, p. 2563.
Gardom v. Chester, 60 N. J. Eq. 238, 46 Atl. 602, p. 1039, 1275.
Garfield v. Hatmaker, 15 N. Y. 475, p. 2004.
Gargano v. Pope, (Mass.) 69 N. E. 343, p. 1703, 1715.
Garland, Ex parte, 10 Ves. 110, p. 2103.
Garland v. Beverley, L. R. 9 Ch. Div. 213, p. 1543.
Garland v. Garland, 50 Miss. 694, p. 2176.
Garland v. Garland, 87 Va. 758, 13 S. E. 478, 13 L. R. A. 212, 24 Am. St. Rep. 682, p. 1848.

Garland v. Harrington, 51 N. H. 409, p. 2549, 2552, 2553, 2567, 2584.
Garland v. Harrison, 17 Mo. 282, p. 1195, 1294.
Garland v. Hull, 21 Miss. (13 Smedes & M.) 76, 51 Am. Dec. 140, p. 217.
Garland v. Pamplin, 32 Gratt. 305, p. 2145, 2199.
Garland v. Plummer, 72 Me. 397, p. 1257.
Garland v. Scott, 3 Sim. 396, p. 282.
Garmire v. Willy, 36 Nebr. 340, 54 N. W. 562, p. 1333.
Garnar v. Bird, 57 Barb. 277, p. 1482, 2726.
Garner v. Boyle, (Tex. Civ. App.) 77 S. W. 987, p. 1348.
Garner v. Garner, 1 Desaus. Eq. 437, 444, p. 1493, 1886.
Garner v. Gordon, 41 Ind. 92, p. 2612.
Garner v. Reis, 25 Minn. 475, p. 2798.
Garnes v. Stiles, 14 Pet. 326, p. 1067.
Garnsey v. Garnsey, 49 Me. 167, p. 552.
Garr v. Redman, 6 Cal. 574, p. 2800.
Garnett v. Acton, 28 Beav. 333, p. 2311.
Garnsey v. Gothard, 90 Cal. 603, 27 Pac. 516, p. 1904.
Garnsey v. Mundy, 24 N. J. Eq. 243, p. 1887.
Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440, p. 2409, 2415.
Garrard, Ex parte, L. R. 5 Ch. Div. 61, L. R. 4 Ch. Div. 101, p. 1210, 1213, 2561.
Garrard v. Frankel, 30 Beav. 445, 451, p. 1515.
Garrard v. Grinling, 2 Swanst. 244, p. 1517.
Garrard v. Hull, 92 Ga. 787, 20 S. E. 357, p. 1038.
Garrard v. Lord Lauderdale, 3 Sim. 1, 2 Russ. & M. 451, p. 1855, 2564.
Garrard v. Pittsburgh etc. R. R., 29 Pa. St. 154, 159, p. 1327.
Garrell v. Alspaugh, 120 N. C. 362, 27 S. E. 85, p. 1994.
Garret v. Gault, 13 B. Mon. 378, 380, p. 585.
Garret v. Pretty, 2 Vern. 293, p. 1683.
Garretson v. Weaver, 3 Edw. Ch. 385, p. 2656.
Garrett v. Banstead etc. R'y, 4 De Gex, J. & S. 462, p. 2674.
Garrett v. Christopher, 74 Tex. 454, 12 S. W. 67, 15 Am. St. Rep. 850, p. 1342.
Garrett v. Kansas City Coal Min. Co., 113 Mo. 330, 20 S. W. 965, 35 Am. St. Rep. 713, p. 670, 1713.
Garrett v. Lynch, 45 Ala. 204, p. 1461, 1465
Garrett v. Parker, (Tex. Civ. App.) 39 S. W. 147, p. 1056.
Garrett v. Puckett, 15 Ind. 485, p. 1055.
Garrett v. Vaughan, 59 S. C. 516, 38 S. E. 166, p. 821.
Garrett's Appeal, 15 Pa. St. 212, p. 896, 903.
Garrick v. Taylor, 29 Beav. 79, 7 Jur., N. S., 1174, p. 1996, 2000.
Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69, p. 1383.
Garrison v. Haydon, 24 Ky. (1 J. J. Marsh.) 222, 19 Am. Dec. 70, p. 1101, 1120.
Garrison v. Sittle, 75 Ill. App. 402, p. 1947, 1958, 1968.
Garsed v. Sternberger, (N. C.) 47 S. E. 603, p. 1676.
Garson v. Green, 1 Johns. Ch. 308, p. 2501, 2511.
Garst v. Harris, 177 Mass. 72, 58 N. E. 174, p. 735, 736.
Garth v. Cotton, 1 Ves. Sr. 524, 526, 556, 1 Dick. 183, 3 Atk. 751, 1 Lead. Cas. Eq., 4th Am. ed., 955, 987-1027, p. 308, 1634, 2681, 2682.
Garth v. Meyrick, 1 Brown Ch. 30, p. 889.
Garth v. Townsend, L. R. 7 Eq. 220, p. 1468.
Garth v. Ward, 2 Atk. 174, p. 1062, 1065, 1083.
Garthshore v. Chalie, 10 Ves. 1, 12, p. 955, 956.
Gartland v. Nunn, 11 Ark. 721, p. 265.
Gartrell v. Stafford, 12 Nebr. 545, 41 Am. Rep. 767, p. 2762.
Gartside v. Gartside, 3 Anstr. 735, p. 1653.
Gartside v. Isherwood, 1 Brown Ch. 558, 559, 560, p. 1664, 1667, 1671.
Gartside v. Outram, 26 L. J. Ch. 113, p. 278.
Garver v. Graham, 6 Kan. App. 344, 51 Pac. 812, p. 1066, 1076, 1087.
Garver v. Kent, 70 Ind. 428, p. 2662.

Garvey v. Garvey, 150 Mass. 185, 22 N. E. 889, p. 2051.
Garvey v. McDevitt, 72 N. Y. 556, 562, p. 1896, 1918.
Garvin v. Stewart's Heirs, 59 Ill. 229, p. 2266, 2267.
Garvin v. Williams, 44 Mo. 465, 100 Am. Dec. 314, p. 1775.
Garvin's Adm'r v. Williams, 50 Mo. 206, p. 1774.
Garwood v. Eldridge, 2 N. J. Eq. 145, 34 Am. Dec. 195, p. 1487.
Garwood v. Garwood, 9 N. J. L. 193, p. 1274.
Gary v. Newton, 201 Ill. 170, 66 N. E. 267, p. 2574.
Garza v. Scott, 5 Tex. Civ. App. 289, 24 S. W. 89, p. 1391.
Gascoigne v. Thwing, 1 Vern. 366, p. 1999.
Gaskell v. Gaskell, 6 Sim. 643, p. 2740.
Gaskell's Trusts, In re, 11 Jur., N. S., 780, p. 2161.
Gaskill v. Davis, 63 Ga. 645, 2544.
Gaskill v. Green, 152 Mass. 526, 25 N. E. 969, p. 2110.
Gaskill v. Sine, 15 N. J. Eq. 400, 78 Am. Dec. 105, p. 2447, 2455.
Gaskin v. Balls, L. R. 13 Ch. Div. 324, p. 2698.
Gaslight Co. v. Turner, 5 Bing. N. C. 666, 6 Bing. N. C. 324, p. 1720.
Gason v. Wordsworth, 2 Ves. Sr. 336, p. 298.
Gasque v. Small, 2 Strob. Eq. 72, p. 1072, 1665, 1731.
Gass v. Ross, 3 Sneed, 211, p. 1977.
Gass v. Simpson, 4 Cold. 288, p. 2233.
Gass v. White, 2 Dana, 170, 26 Am. Dec. 440, p. 1938.
Gassett v. Grout, 4 Met. 486, 489, p. 646.
Gaston, In re, 35 N. J. Eq. 60, p. 2052.
Gaston v. Dashiell, 55 Tex. 516, p. 1102, 1127.
Gaston v. Drake, 14 Nev. 175, 33 Am. Rep. 548, p. 1698.
Gaston v. Hayden, 98 Mo. App. 683, 73 S. W. 939, p. 2106.
Gaston v. White, 46 Mo. 486, p. 2527.
Gates v. Adams, 24 Vt. 70, p. 2447.
Gates v. Boomer, 17 Wis. 455, p. 2788.
Gates v. Cornett, 72 Mich. 420, 40 N. W. 740, p. 1730.
Gates v. Dudgeon, 173 N. Y. 426, 92 Am. St. Rep. 608, 66 N. E. 116, p. 2060.
Gates v. Frazer, 9 Ill. App. 624, p. 2800.
Gates v. McClenahan, (Iowa) 100 N. W. 479, p. 2102.
Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739, p. 763.
Gates v. Paul, 117 Wis. 170, 94 N. W. 55, p. 1904.
Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139, p. 2740.
Gates v. Smith, 2 Minn. 30, 32, p. 568, 586.
Gates v. Treat, 17 Conn. 388, p. 2263.
Gates Iron Works v. Cohen, 7 Colo. App. 341, 43 Pac. 667, p. 1193, 1265, 1274.
Gatling v. Newell, 9 Ind. 572, p. 1451, 1605, 1628.
Gauch v. St. Louis etc. Ins. Co., 88 Ill. 255, 30 Am. Rep. 554, p. 823.
Gaullagher v. Caldwell, 22 Pa. St. (10 Harris) 300, 60 Am. Dec. 85, p. 1224.
Gaunt v. Fynney, L. R. 8 Ch. 8, p. 1450, 2687.
Gause v. Perkins, 3 Jones Eq. 177, 69 Am. Dec. 728, p. 308, 2694.
Gausen v. Tomlinson, 23 N. J. Eq. 405, p. 1262.
Gavagan v. Bryant, 83 Ill. 376, p. 1384.
Gavin v. Carling, 55 Md. 530, p. 2480, 2483.
Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776, p. 598, 704.
Gavitt v. Berry, 23 R. I. 14, 49 Atl. 99, p. 2287.
Gay v. Edwards, 30 Miss. 218, 230, p. 148, 149, 223.
Gay v. Ihm, 69 Mo. 584, p. 2194.
Gay v. Moss, 34 Cal. 125, p. 2461, 2464.
Gay v. Sharp, 1 Mylne & K. 589, p. 2207.
Gayle v. Singleton, 1 Stew. 566, p. 2256, 2258.
Gaylord v. City of Lafayette, 115 Ind. 423, 17 N. E. 899, p. 1886, 1903.
Gaylord v. Dodge, 31 Ind. 41, p. 2005.
Gaylord v. Knapp, 15 Hun, 87, p. 2502, 2513.

Gaylord v. Van Loan, 15 Wend. 308, p. 1426.
Gay Mfg. Co. v. Camp, 65 Fed. 794, 25 U. S. App. 134, 13 C. C. A. 137, 68 Fed. 67, 25 U. S. App. 376, 15 C. C. A. 226, p. 715, 730, 732, 734, 745.
Gaynon v. Wood, 1 Dick. 331, p. 872.
Gaynor v. Blewitt, 82 Wis. 313, 33 Am. St. Rep. 47, 52 N. W. 313, p. 1066.
Gayoso Sav. Inst. v. Fellows, 6 Cold. 467, p. 1212.
Gayre v. Gayre, 2 Vern. 538, p. 2208.
Gay's Estate, 138 Cal. 552, 71 Pac. 707, 94 Am. St. Rep. 70, p. 1934, 1972.
Gearns v. Baker, L. R. 10 Ch. 355, p. 2673, 2676.
Geast v. Barker, 2 Brown Ch. 61, p. 316.
Geaves, Ex parte, 8 De Gex, M. & G. 291, p. 2068, 2069, 2072, 2079, 2082, 2090, 2095.
Gebb v. Rose, 40 Md. 387, p. 1482.
Geddes v. Pennington, 5 Dow. 159, p. 1588.
Gee v. Bolton, 17 Wis. 604, p. 1098.
Gee v. McMillan, 14 Oreg. 268, 12 Pac. 417, 58 Am. Rep. 315, p. 2497, 2502, 2505.
Gee v. Pritchard, 2 Swanst. 402, 413, 414, p. 62, 279, 545, 2689.
Gee v. Spencer, 1 Vern. 32, p. 1494, 1499.
Geer v. Missouri L. & M. Co., 134 Mo. 85, 54 Am. St. Rep. 489, 34 S. W. 1099, p. 1101, 1119.
Geery v. Geery, 63 N. Y. 252, p. 2789.
Geib v. Reynolds, 35 Minn. 331, 28 N. W. 923, p. 1096, 1127, 1495, 1500.
Geiler v. Littlefield, 148 N. Y. 603, 43 N. E. 66, p. 1444.
Geishaker v. Pancoast, 57 N. J. Eq. 60, 40 Atl. 200, p. 1062, 1084.
Gelbach v. Shively, 67 Md. 498, 10 Atl. 247, p. 2209.
Gelman v. Hunnewell, 122 Mass. 130, p. 542.
Gelston v. Hoyt, 1 Johns. Ch. 54, 543, 547, 548, 549, p. 245, 258, 259, 273, 321, 324, 326.
Genau v. Abbott, (Nebr.) 93 N. W. 942, p. 2279.
General Electric Co. v. West Asheville Imp. Co., 73 Fed. 386, p. 499.
General Electric Co. v. Wise, 119 Fed. 922, p. 660, 661.
General Estates Co., In re, L. R. 3 Ch. 758, p. 1231.
General Smith, The, 4 Wheat. 438, 4 L. ed. 609, p. 2483.
Gen. Exchange Bank v. Horner, L. R. 9 Eq. 480, p. 1613, 2079.
Gen. Life Ins. Co. v. U. S. Ins. Co., 10 Md. 517, 525, 526, 69 Am. Dec. 174, p. 1111, 1142, 1146, 1164.
Genet v. Beekman, 45 Barb. 382, p. 1897.
Gent v. Harris, 10 Hare, 383, p. 2173.
George v. Andrews, 60 Md. 26, 45 Am. Rep. 706, p. 2408.
George v. Braddock, 45 N. J. Eq. 757, 18 Atl. 881, 14 Am. St. Rep. 754, 6 L. R. A. 511, p. 1947, 1948, 1968, 1975.
George v. Bussing, 15 B. Mon. 558, p. 787, 812.
George v. Curtis, 45 W. Va. 1, 30 S. E. 69, p. 667, 1703, 1712.
George v. Cutting, 46 N. H. 130, 88 Am. Dec. 195, p. 2195.
George v. Dean, 47 Tex. 73, p. 2678.
George v. Kent, 7 Allen, 16, p. 1054, 1055, 1127, 1146, 1358, 2447.
George v. Solomon, 71 Miss. 168, 14 South. 531, p. 260.
George v. Wood, 9 Allen, 80, 85 Am. Dec. 741, p. 1130, 1132, 2447, 2455.
George Armstrong & Sons, In re, [1896] 1 Ch. 536, p. 2626.
Geo. D. Washburn & Co. v. Donnenberg Co., 117 Ga. 567, 44 S. E. 97, p. 1072.
Geo. R. Barse Live-Stock Com. Co. v. Range Valley Cattle Co., 16 Utah, 59, 50 Pac. 630, p. 1223.
George T. Smith M. P. Co. v. McGroarty, 136 U. S. 240, 10 Sup. Ct. 1019, p. 500.
George Whitechurch Ltd. v. Cavanagh, [1902] App. Cas. 117, 145, p. 1437, 1445.
Georges Creek Coal & Iron Co. v. Detmold, 1 Md. Ch. 371, p. 2348, 2694.
George Newman & Co., In re, [1895] 1 Ch. 675, p. 2084.
Georgetown Water Co. v. Fidelity Trust & S. V. Co., 25 Ky. Law Rep. 1739, 78 S. W. 113, p. 2399.
Georgia Infirmary v. Jones, 37 Fed. 750, p. 2209, 2213.

Georgia Pac. R'y Co. v. Brooke, 66 Miss. 583, 6 South. 467, p. 1651, 1653.
Georgia State B. & L. Ass'n v. Faison, 114 Ga. 655, 40 S. E. 760, p. 1021.
Geough v. Pratt, 9 Md. 526, p. 465.
Gerald v. Elley, 45 Iowa, 322, p. 1486, 2726.
Gerdine v. Menage, 41 Minn. 417, 43 N. W. 91, p. 1495, 1500, 2424, 2449, 2451.
German v. Browne, 137 Ala. 429, 34 South. 985, p. 219.
German v. Machin, 6 Paige, 288, p. 2769.
German Alliance Assur. Co. v. Van Cleave, 191 Ill. 410, 61 N. E. 94, p. 407, 454.
German-American Bank v. Carondelet R. E. Co., 150 Mo. 570, 51 S. W. 691, p. 1102, 1114.
German Am. Sem. v. Kiefer, 43 Mich. 105, p. 2043.
German Mining Co., In re, 4 De Gex, M. & G. 19, p. 2605.
German Sav. & Loan Soc. v. Cannon, 65 Fed. 542, 545, p. 511.
German Sav. Bank v. Renshaw, 78 Md. 475, 28 Atl. 281, p. 1244.
Germania Ins. Co. v. Ashby, 23 Ky. Law Rep. 1564, 65 S. W. 611, p. 1158.
Germania Safety Vault & Tr. Co. v. Driskell, 23 Ky. Law Rep. 2050, 66 S. W. 610, p. 1174.
Germania Sav. Bank's Appeal, 95 Pa. St. 329, p. 2197.
Germantown R'y etc. v. Fitler, 60 Pa. St. 124, 131, 133, 90 Am. Dec. 546, p. 697, 754, 764.
Gerrard v. Hull, 92 Ga. 787, 20 S. E. 357, p. 1027.
Gerrish v. Black, 104 Mass. 400, p. 2431.
Gerrish v. New Bedford Inst. for Sav., 128 Mass. 159, 35 Am. Rep. 370, p. 1864.
Gerry v. Stimson, 60 Me. 186, p. 1989, 2756.
Gerson v. Pool, 31 Ark. 85, p. 1325.
Gervis v. Gervis, 14 Sim. 654, p. 2222.
Gessner v. Palmateer, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187, p. 2499, 2530, 2534.
Gest v. Packwood, 34 Fed. 368, p. 1328, 1331, 1337, 1338, 1342, 1391, 1392.
Gest v. Packwood, 39 Fed. 525, p. 2470, 2471, 2474, 2476.
Getchell v. Jewett, 4 Me. 350, 359, p. 548, 550.
Getheil Park Inv. Co. v. Town of Montclair, (Colo.) 76 Pac. 1050, p. 338.
Gething v. Keighley, L. R. 9 Ch. Div. 547, p. 1540, 1550.
Getman v. Dorr, 59 N. Y. Supp. 788, 28 Misc. Rep. 654, p. 217.
Gettins v. Scudder, 71 Ill. 86, p. 2056, 2066.
Getty v. Binsse, 49 N. Y. 385, 388, 389, 10 Am. Rep. 379, p. 684, 2608, 2609.
Getty v. Devlin, 70 N. Y. 504, p. 1642.
Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. 570, p. 374, 398, 453.
Ghiselin v. Fergusson, 4 Har. & J. 522, p. 2500.
Ghormley v. Smith, 139 Pa. St. 584, 23 Am. St. Rep. 215, 21 Atl. 135, 11 L. R. A. 565, p. 1846.
Ghost v. Waller, 9 Beav. 497, p. 2059.
Giacometti v. Prodgers, L. R. 14 Eq. 253, 8 Ch. 338, p. 2167, 2168, 2172, 2174.
Giant Powder Co. v. San Diego Flume Co., 78 Cal. 193, 20 Pac. 419, p. 354.
Gibb v. Linder, 76 Ill. 137, p. 738.
Gibbes v. Cobb, 7 Rich. Eq. 54, p. 982, 1358.
Gibbes v. Elliott, 5 Rich. Eq. 327, p. 2300, 2302.
Gibbes v. Jenkins, 3 Sand. Ch. 130, p. 2028.
Gibbon v. Dougherty, 10 Ohio St. 365, p. 1074.
Gibbon v. Gibbon, 40 Ga. 562, p. 826.
Gibbons v. Caunt, 4 Ves. 840, 849, p. 1487.
Gibbons v. Eyden, L. R. 7 Eq. 371, p. 2222.
Gibbons v. Hills, 1 Dick. 324, p. 2216.
Gibbs v. Baltimore Gas Co., 130 U. S. 405, 9 Sup. Ct. 553, p. 1711.
Gibbs v. Champion, 3 Ohio, 335, p. 345, 1603, 1607.
Gibbs v. Daniel, 4 Giff. 1, p. 1767.
Gibbs v. David, L. R. 20 Eq. 373, p. 2659.

Gibbs v. Hending, L. R. 5 Ch. 336, 8 Eq. 490, p. 1679, 2765.
Gibbs v. McFadden, 39 Iowa, 371, p. 383, 451.
Gibbs v. Marsh, 2 Met. 243, 251, p. 1469.
Gibbs v. Rumsey, 2 Ves. & B. 294, p. 1985, 1986.
Gibbs v. Smith, 2 Rich. Eq. 131, p. 2107.
Giberson v. Cook, 124 Fed. 986, p. 503.
Gibert v. Peteler, 38 N. Y. 165, 97 Am. Dec. 785, 38 Barb. 488, p. 767, 1050, 1147, 1200.
Gibert v. Washington City etc. R. R., 33 Gratt. 586, p. 2662.
Gibler v. Trimble, 14 Ohio, 323, p. 1069, 1082, 1291, 1349.
Gibson, In re, L. R. 7 Ch. 52, p. 2622.
Gibson, In re, L. R. 2 Eq. 669, p. 2208, 2212.
Gibson v. Barber, 100 N. C. 192, 6 S. E. 766, p. 1755, 1756.
Gibson v. Bott, 7 Ves. 89, p. 2321.
Gibson v. Crehore, 3 Pick. 475, 5 Pick. 146, p. 1402, 1412, 2440, 2442, 2735.
Gibson v. Currier, (Miss.) 35 South. 315, p. 1333.
Gibson v. Decius, 82 Ill. 304, p. 2040.
Gibson v. D'Este, 2 Younge & C. 542, 572, p. 1568, 1598, 1609, 1616, 1618, 1624.
Gibson v. Fifer, 21 Tex. 260, p. 1648.
Gibson v. Finlay, 4 Md. Ch. 75, p. 195, 304, 2562.
Gibson v. Fletcher, 1 Ch. Rep. 59, p. 1389.
Gibson v. Foote, 40 Miss. 788, p. 1902.
Gibson v. Gibson, 1 Drew. 42, 57, p. 827, 831.
Gibson v. Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592, p. 2637, 2642, 2643, 2645, 2646.
Gibson v. Hambleton, 52 Nebr. 601, 72 N. W. 1033, p. 2405.
Gibson v. Hutchins, 43 S. C. 287, 21 S. E. 250, p. 1328.
Gibson v. Ingo, 6 Hare, 112, 124, p. 1292, 2763.
Gibson v. Jeyes, 6 Ves. 266, 271, 273, 277, p. 1667, 1752, 1768, 1769, 2623.
Gibson v. McCall, 1 Rich. 174, p. 1977.
Gibson v. May, 4 De Gex, M. & G. 512, p. 2470.
Gibson v. Rees, 50 Ill. 383, p. 1856.
Gibson v. Russell, 2 Younge & C. Ch. 104, p. 1671, 1673.
Gibson v. Seagrim, 20 Beav. 614, p. 2786.
Gibson v. Soper, 6 Gray, 279, 66 Am. Dec. 414, p. 1725.
Gibson v. Winslow, 46 Pa. St. 380, 84 Am. Dec. 562, p. 1051.
Gibson's Case, 2 De Gex & J. 275, p. 1624.
Giddings v. Baker, 80 Tex. 308, 16 S. W. 33, p. 1579.
Giddings v. Eastman, 5 Paige, 561, p. 2032.
Giddings v. Giddings, 3 Russ. 241, p. 854, 857, 1782.
Giddings v. Seward, 16 N. Y. 365, p. 2207, 2218, 2219.
Gidley v. Lovenberg, (Tex. Civ. App.) 79 S. W. 831, p. 1944, 1956.
Giesy v. Truman, 17 App. D. C. 449, p. 2414.
Giffard v. Williams, L. R. 5 Ch. 546, p. 2741.
Gifford v. Carvill, 29 Cal. 589, p. 1560, 1563, 1565.
Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756, 15 Am. St. Rep. 508, 6 L. R. A. 610, p. 2409.
Gifford v. Thorn, 9 N. J. Eq. 703, p. 1667, 2707.
Gilbert v. Averill, 15 Barb. 20, p. 2407.
Gilbert v. Chapin, 19 Conn. 342, p. 1927.
Gilbert v. Dickerson, 7 Wend. 449, 22 Am. Dec. 592, p. 2743.
Gilbert v. Erie Bldg. Ass'n, 184 Pa. St. 554, 39 Atl. 291, p. 1244.
Gilbert v. Gilbert, 2 Abb. App. 256, p. 1997, 2004.
Gilbert v. Gilbert, 9 Barb. 532, p. 1482.
Gilbert v. Jess, 31 Wis. 110, p. 1149, 1358.
Gilbert v. Kobb, 85 Md. 627, 37 Atl. 423, p. 2077.
Gilbert v. Lewis, 1 De Gex, J. & S. 38, p. 2146.
Gilbert v. Mickle, 4 Sand. Ch. 357, p. 2684.
Gilbert v. Overton, 2 Hem. & M. 110, p. 1879.
Gilbert v. Sanderson, 56 Iowa, 349, 9 N. W. 293, 41 Am. Rep. 103, p. 2409, 2413.

Gilbert v. Sleeper, 71 Cal. 290, 12 Pac. 172, p. 1198, 2018.
Gilbert v. Thomas, 3 Ga. 575, 579, 580, p. 567.
Gilbert Bros. & Co. v. Lawrence Bros., (W. Va.) 49 S. E. 155, p. 1328.
Gilchrist v. Cator, 1 De Gex & S. 138, 188, p. 646, 2173.
Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250, p. 1106, 1122, 1328, 1330.
Gilchrist v. Helena H. S. & S. R. Co., 58 Fed. 708, 710, 711, 712, p. 193, 501, 1182, 1259, 2544.
Gilchrist v. Patterson, 18 Ark. 575, p. 2345.
Gilchrist v. Stevenson, 9 Barb. 9, p. 1872.
Gildart's Heirs v. Starke, 1 How. 450, p. 2277.
Gilder v. Gilder, 1 Del. Ch. 331, p. 2495.
Gilder v. Merwin, 6 Whart. 522, 540–543, p. 560.
Gildersleeve v. Burrows, 24 Ohio St. 204, p. 1234.
Gildersleeve v. Stratton, 59 N. J. Eq. 1, 36 Atl. 477, p. 1910.
Giles v. Anslow, 128 Ill. 187, 21 N. E. 225, p. 1929.
Giles v. Austin, 38 N. Y. Sup. Ct. 215, 62 N. Y. 486, p. 631, 717, 753, 1466, 1467, 2722.
Giles v. Giles, 1 Keen, 688, p. 1548.
Giles v. Lyon, 4 N. Y. 600, p. 586.
Giles v. Ortman, 11 Kan. 59, p. 2749.
Giles v. Perkins, 9 East, 12, Ames' Cas. on Trusts, 9, p. 1913.
Gill v. Clark, 54 Mo. 415, p. 2475.
Gill v. Downing, L. R. 17 Eq. 316, p. 2483.
Gill v. Lyon, 1 Johns. Ch. 447, p. 2447.
Gill v. Newell, 13 Minn. 462, 472, p. 2776.
Gillam v. Taylor, L. R. 16 Eq. 581, 584, p. 1933, 1942.
Gillaume v. Adderley, 15 Ves. 384, p. 2207, 2218.
Gillbee v. Gillbee, 1 Phill. Ch. 121, p. 2622.
Gillen v. City of Frost, 25 Tex. Civ. App. 371, 61 S. W. 345, p. 1911.
Gillenwaters v. Miller, 49 Miss. 150, p. 1762, 1764.
Gillespie v. Alexander, 2 Sim. & St. 145, p. 889.
Gillespie v. Buffalo, R. & P. R'y Co., 204 Pa. St. 107, 53 Atl. 639, p. 1108.
Gillespie v. Holland, 40 Ark. 28, 48 Am. Rep. 1, p. 1779.
Gillespie v. Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559, p. 1489, 1523, 1528, 1530, 1531, 2726.
Gillespie v. Reed, 3 McLean, 377, p. 1115.
Gillespie v. Rogers, 146 Mass. 610, 16 N. E. 711, p. 1101, 1116, 1124.
Gillespie's Adm'r v. Burleson, 28 Ala. 551, p. 2146.
Gillett v. Campbell, 1 Denio, 520, p. 2417.
Gillett v. Eaton, 6 Wis. 30, p. 2362, 2364.
Gillett v. Peppercorne, 3 Beav. 78, p. 1760, 1762.
Gillett v. Wiley, 126 Ill. 310, 9 Am. St. Rep. 587, 19 N. E. 287, p. 1774.
Gillette v. Murphy, 7 Okl. 91, 54 Pac. 413, p. 1212, 1254.
Gilliam v. Alford, 69 Tex. 267, 6 S. W. 757, p. 1501, 1502, 1503.
Gilliam v. Brown, 43 Miss. 641, p. 873, 876, 1713.
Gilliam v. Chancellor, 43 Miss. 437, 448, 453–456, 5 Am. Rep. 498, p. 148, 225, 334, 335, 336, 573, 873, 879, 918, 935, 938, 2277, 2278.
Gilliam v. Esselman, 5 Sneed 86, p. 2793.
Gilliat v. Gilliat, 28 Beav. 481, p. 2211.
Gilliat v. Gilliat, L. R. 9 Eq. 60, p. 1694.
Gillies v. Longlands, 4 De Gex & S. 372, p. 2316, 2332, 2333.
Gillig v. Grant, 49 N. Y. Supp. 78, 23 App. Div. 596, p. 1503.
Gillig v. Maass, 28 N. Y. 191, p. 1303, 1404.
Gillihan v. Rollins, 41 Nebr. 540, 59 N. W. 893, p. 731, 733.
Gilliland v. Gilliland, 96 Mo. 522, 10 S. W. 139, p. 1997.
Gillings v. Fletcher, L. R. 38 Ch. Div. 373, p. 879.
Gillis v. Downey, 85 Fed. 483, 56 U. S. App. 577, p. 503.
Gillis v. Hall, 7 Phila. 422, 2 Brewst. 342, p. 729, 730, 749, 1690, 2676.

Gillott v. Esterbrook, 48 N. Y. 374, 8 Am. Dec. 553, 47 Barb. 455, p. 2690.
Gillott v. Kettle, 3 Duer, 624, p. 2690.
Gill's Estate, 1 Pars. Cas. 139, p. 896, 899, 909, 935, 938, 945.
Gilman v. Andrus, 28 Vt. 241, 67 Am. Dec. 713, p. 2604.
Gilman v. Brown, 1 Mason, 191, 210, Fed. Cas. No. 5,441, p. 2503, 2504, 2529.
Gilman v. Dwight, 13 Gray, 356, 74 Am. Dec. 634, p. 1690.
Gilman v. Gilman, 2 Lans. 1, p. 2069, 2075, 2080.
Gilman v. Hamilton, 16 Ill. 225, p. 1065, 1070, 1954, 1965, 1966, 1973.
Gilman v. Jones, 87 Ala. 691, 5 South. 785, 4 L. R. A. 113, p. 1703.
Gilman v. McArdle, 99 N. Y. 451, 52 Am. Rep. 41, 2 N. E. 464, p. 1893.
Gilman v. Moody, 43 N. H. 239, p. 2392, 2394.
Gilman v. Reddington, 24 N. Y. 9, p. 1895, 1896.
Gilman v. Sheboygan etc. R. R., 40 Wis. 653, p. 2695.
Gilmer v. Mobile etc. R'y Co., 79 Ala. 569, 58 Am. Rep. 623, p. 1199, 1204.
Gilmer v. Stone, 120 U. S. 586, 7 Sup. Ct. Rep. 689, p. 1910.
Gilmer's Legatees v. Gilmer's Ex'rs, 42 Ala. 9, p. 2208, 2216, 2224.
Gilmore, Estate of, 81 Cal. 240, 20 Pac. 655, p. 844.
Gilmore, In re, 81 Cal. 240, 22 Pac. 655, p. 789, 809, 812, 841.
Gilmore v. Burch, 7 Oreg. 374, 33 Am. Rep. 710, p. 1781.
Gilmore v. Tuttle, 32 N. J. Eq. 611, p. 2056, 2066, 2068, 2070, 2077.
Gilpatrick v. Glidden, 81 Me. 137, 10 Am. St. Rep. 245, 16 Atl. 464, p. 2036.
Gilroy v. Alis, 22 Iowa, 174, p. 1525.
Gilson v. Boston, 11 Nev. 413, p. 1147.
Gilson v. Gilson, 2 Allen, 115, p. 2470, 2474.
Gilson v. Hutchinson, 120 Mass. 27, p. 541.
Gilson v. Whitney, 51 Vt. 552, p. 2434.
Giltenau v. Lemert, 13 Kan. 476, p. 2749, 2751.
Ginesi v. Cooper, L. R. 14 Ch. Div. 596, p. 1690, 2675.
Gingell v. Horne, 9 Sim. 539, 548, p. 1635.
Girard v. Flutterer, 84 Ala. 323, 4 South. 292, p. 2045.
Girard v. Philadelphia, 7 Wall. 1, p. 1977, 1978.
Girard Ins. Co. v. Guerard, 3 Woods, 427, p. 1637, 1643.
Girard Life Ins. etc. Co. v. Chambers, 46 Pa. St. 485, 86 Am. Dec. 513, p. 1840, 1846.
Girardin v. Lampe, 58 Wis. 267, 16 N. W. 614, p. 1098, 1122.
Giraud v. Giraud, 58 How. Pr. 175, p. 2325.
Girault v. Adams, 61 Md. 1, p. 2193.
Girdlestone v. North Brit. etc. Ins. Co., L. R. 11 Eq. 197, p. 262, 272.
Girty v. Standard Oil Co., 1 App. Div. 224, 37 N. Y. Supp. 369, p. 1735.
Gist, In re, [1904] 1 Ch. 398, p. 2320.
Githens v. Murray, 92 Ga. 748, 18 S. E. 975, p. 1154.
Gitt v. Watson, 18 Mo. 274, p. 2631.
Given v. Marr, 27 Me. 212, p. 1402, 1404.
Given v. Simpson, 5 Me. 303, 309, p. 551, 552.
Givens v. McCalmout, 4 Watts, 460, 464, p. 2430, 2431.
Givens v. Shouse, 5 Ky. Law Rep. 419, p. 1979.
Given's Appeal, 121 Pa. St. 260, 15 Atl. 468, 6 Am. St. Rep. 795, p. 1703.
Givin v. Biel, 70 Ind. 505, p. 2585.
Gjerstadengen v. Van Duzen, 7 N. Dak. 612, 76 N. W. 233, 66 Am. St. Rep. 679, p. 1444, 1482.
Gladding v. St. Matthew's Church, (R. I.) 57 Atl. 860, p. 1964.
Gladding v. Warner, 36 Vt. 54, p. 2432.
Glading v. Frick, 88 Pa. St. 460, p. 1118.
Gladstone v. Birley, 2 Mer. 401, 403, 404, p. 191, 2466, 2480.
Glascock v. Minor, 11 Mo. 655, p. 1563, 1583, 1591, 1594.
Glasgow v. Flowers, 1 Hayw. (N. C.) 233, p. 570.
Glasier v. Rolls, 42 Ch. Div. 436, p. 1577.
Glass v. Ellison, 9 N. H. 69, p. 2344.

Glass v. Hieronymus, 125 Ala. 140, 28 South. 71, 82 Am. St. Rep. 225, p. 2379.
Glass v. Hulbert, 102 Mass. 24, 28, 41, 43, 3 Am. Rep. 418, p. 543, 1523, 1525, 1530, 1534, 1537, 1660.
Glass v. Pullen, 6 Bush, 346, p. 2786.
Glasscock v. Glasscock's Adm'r, 17 Tex. 480, p. 2502.
Glasscott v. Copper Min. Co., 11 Sim. 305, p. 265, 270.
Glassop v. Heston etc. Board, L. R. 12 Ch. Div. 102, 109, p. 2686.
Glastenbury v. McDonald's Adm'r, 44 Vt. 450, 453, p. 149, 217, 1639, 2706, 2707.
Glaze v. Drayton, 1 Desaus. Eq. 109, p. 2602.
Glaze v. Johnson, (Tex. Civ. App.) 65 S. W. 662, p. 1071.
Glazebrook's Adm'r v. Ragland's Adm'r, 8 Gratt. 344, p. 1105.
Glazier v. Bailey, 47 Miss. 395, p. 2749.
Gleason v. Bailey Mfg. Co. v. Hoffman, 168 Ill. 25, 48 N. E. 143, p. 353.
Gleaves v. Paine, 1 De Gex, J. & S. 87, p. 646, 2434.
Glegg v. Legh, 4 Madd. 193, 208, p. 262.
Glegg v. Rees, L. R. 7 Ch. 71, p. 1855, 2564.
Glen v. Fisher, 6 Johns. Ch. 33, 36, 10 Am. Dec. 310, p. 646, 787.
Glen v. Fowler, 8 Gill & J. 340, p. 229.
Glendenning v. Bell, 70 Tex. 632, 8 S. W. 324, p. 1048, 1275, 1279.
Glendenning v. Johnston, 33 Wis. 347, p. 2370.
Glengall v. Barnard, 1 Keen 769, p. 930.
Glengall v. Frazer, 2 Hare, 99, p. 283.
Glenn v. Allison, 58 Md. 527, p. 2088.
Glenn v. Davis, 35 Md. 215, 6 Am. Rep. 389, p. 1106.
Glenn v. Glenn, 47 Ala. 204, p. 2153.
Glenn v. Mathews, 44 Tex. 400, p. 1701.
Glenn v. Randall, 2 Md. Ch. 220, p. 290.
Glenn v. Rudd, (S. C.) 46 S. E. 555, p. 1406.
Glenn v. Statler, 42 Iowa, 107, 110, p. 1486, 1510.
Glenn's Adm'r v. Billingslea, 64 Ala. 345, p. 2255.
Glenny v. Stedwell, 51 How. Pr. 321, p. 292.
Glenorchy, Lord, v. Bosville, Cas. t. Talb. 3, 1 Lead. Cas. Eq., 4th Am. ed., 1, 13, 36, p. 175, 1850, 1881, 1885, 1886.
Glidden v. Chase, 35 Me. 90, 56 Am. Dec. 690, p. 552.
Glidden v. Hunt, 24 Pick. 221, p. 1136, 1325, 1344, 1359.
Glidden v. Strupler, 52 Pa. St. 400, p. 1448, 1724.
Gliddon v. Andrews, 14 Ala. 733, p. 2438.
Glidewell v. Spaugh, 26 Ind. 319, p. 1019, 2005.
Globe Iron Roof & C. Co. v. Thacher, 87 Ala. 458, 465, 6 South. 366, p. 469.
Globe Mut. L. Ins. Co. v. Reals, 79 N. Y. 202, 50 How. Pr. 237, 48 How. Pr. 502, p. 1639, 1640, 2727, 2730.
Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 69 Am. St. Rep. 17, 55 Pac. 713, 43 L. R. A. 199, p. 760.
Gloninger v. Hazard, 42 Pa. St. 389, 401, p. 560, 2798.
Gloucester v. Osborn, 1 H. L. Cas. 272, 3 Hare, 131, p. 1986.
Glover v. Alcott, 11 Mich. 470, p. 2193.
Glover v. Glover, 16 Ala. 440, 446, p. 2177.
Glover v. Hall, 16 Sim. 568, p. 2145.
Glover v. Hartcup, 34 Beav. 74, p. 877.
Glover v. Hedges, 1 N. J. Eq. 113, 119, p. 2708.
Glover v. Payn, 19 Wend. 518, p. 2372, 2376.
Glover's Appeal, 167 Mass. 280, 45 N. E. 744, p. 2052.
Gloyd's Estate, In re, 93 Iowa, 303, 61 N. W. 975, p. 2100.
Glyn v. Caulfield, 3 Macn. & G. 463, p. 282.
Glyn v. Duesbury, 11 Sim. 139, 147, 148, p. 2635, 2638.
Glyn v. Hood, 1 De Gex, F. & J. 334, p. 1215.
Glynn v. Bank of England, 2 Ves. Sr. 281, p. 1464.

Glynn v. Houston, 1 Keen, 329, p. 257, 258, 274.
Glynn v. Moran, 174 Mass. 233, 54 N. E. 535, p. 736.
Gnash v. George, 58 Iowa, 492, 12 N. W. 546, p. 2500, 2512, 2513.
Goad v. Montgomery, 119 Cal. 552, 63 Am. St. Rep. 145, 51 Pac. 681, p. 2050.
Goad v. Moulton, 67 Cal. 537, 8 Pac. 63, p. 2200.
Gobble v. Linder, 76 Ill. 157, p. 748.
G. Ober & Sons v. Keating, 77 Md. 100, 26 Atl. 501, p. 1332.
Goble v. Howard, 10 Ohio St. 165, 168, p. 570, 587.
Goble v. Swobe, 64 Nebr. 838, 90 N. W. 919, p. 1852.
Godbold v. Branch Bank, 11 Ala. 191, 46 Am. Dec. 211, p. 2066.
Goddard v. American Queen, 59 N. Y. Supp. 46, 27 Misc. Rep. 482, p. 344.
Goddard v. Brown, 12 R. I. 31, p. 2049, 2051, 2056, 2300, 2302.
Goddard v. Carlisle, 9 Price, 169, p. 1607, 1767.
Goddard v. Donaha, 42 Kan. 754, 22 Pac. 708, 16 Am. St. Rep. 510, p. 1341.
Goddard v. Gardner, 28 Conn. 172, p. 277.
Goddard v. Leech, Wright, 476, p. 2645.
Goddard v. Pomeroy, 36 Barb. 546, 556, p. 2493.
Goddard v. Prentice, 17 Conn. 546, p. 1274.
Goddard v. Reagan, 8 Tex. Civ. App. 272, 28 S. W. 352, p. 1347.
Goddard v. Sawyer, 9 Allen, 78, p. 2383.
Goddard v. Snow, 1 Russ. 485, p. 2165.
Goddin v. Crowhurst, 10 Sim. 642, p. 1842.
Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360, p. 1387.
Godfrey v. Faulkner, 23 Ch. Div. 483, p. 2073.
Godfrey v. Harben, L. R. 13 Ch. Div. 216, p. 2184.
Godfrey v. Littel, 1 Russ. & M. 59, 2 Russ. & M. 630, p. 2738.
Godfrey v. Thornton, 46 Wis. 677, p. 1434, 1446.
Godfrey v. Watson, 3 Atk. 517, p. 2429, 2431.
Godfroy v. Disbrow, Walk. Ch. 260, p. 1096.
Godillot v. Harris, 81 N. Y. 263, p. 2690.
Godsal v. Webb, 2 Keen, 99, p. 1872.
Godschalk v. Fulmer, (Ill.) 45 N. E. 809, p. 1907.
Godwin v. Collins, 4 Houst. 28, p. 2768.
Goelet v. McManus, 1 Hun, 306, p. 1135, 1358, 1359.
Goembel v. Arnett, 100 Ill. 34, p. 2472.
Goe's Estate, In re, 146 Pa. St. 431, 28 Am. St. Rep. 805, 23 Atl. 383, p. 1846.
Goetzinger v. Rosenfeld, 16 Wash. 392, 47 Pac. 882, 38 L. R. A. 257, p. 1328.
Goff v. Gott, 5 Sneed (Tenn.), 562, 2 Ames' Cas. Eq. Jur. 281, p. 1499.
Goff v. McLain, 48 W. Va. 445, 37 S. E. 506, 566, 86 Am. St. Rep. 64, p. 1062, 1073, 1079.
Going v. Emery, 16 Pick. 107, 26 Am. Dec. 645, p. 1966, 1967, 1979.
Going v. Orns, 8 Kan. 85, p. 2192.
Gold v. Ogden, 61 Minn. 88, 63 N. W. 266, p. 2406.
Gold & Stock Tel. Co. v. Todd, 17 Hun, 548, p. 2676.
Goldberg v. Taylor, 2 Utah, 486, p. 2750.
Golden v. Health Dept., 47 N. Y. Supp. 623, 21 App. Div. 420, p. 357, 359, 382, 451.
Golden's Appeal, 110 Pa. St. 581, 1 Atl. 660, p. 1856.
Golder v. Bresler, 105 Ill. 419, p. 2046.
Golder v. Golder, 95 Me. 259, 49 Atl. 1050, p. 2347.
Golder v. Littlejohn, 30 Wis. 344, p. 2208, 2210.
Goldicutt v. Townsend, 28 Beav. 445, p. 2593.
Goldman v. Goldman, 51 La. Ann. 761, 25 South. 555, 761, p. 730, 737, 749.
Goldschmidt v. Maier, 140 Cal. xvii, 73 Pac. 984, p. 2094.
Goldsmid v. Goldsmid, 1 Swanst. 211, 220, 221, p. 863, 948, 949, 955, 957.
Goldsmid v. Tunbridge etc. Comm'rs, L. R. 1 Ch. 349, 1 Eq. 161, p. 2685.

Goldsmith v. Buning, 1 Eq. Cas. Abr. 89, p. 1678, 1716.
Goldsmith v. Guild, 10 Allen, 239, p. 2778, 2779.
Goldsmith v. Russell, 5 De Gex, M. & G. 547, p. 1793, 1801.
Goldstein v. Hort, 30 Cal. 372, p. 2461.
Goldstone v. Williams, [1898] 1 Ch. 47, 68 L. J. Ch. 24, 79 L. T., N. S., 373, 47 Wkly. Rep. 91, p. 282.
Goldstone v. Williams, Deacon & Co., [1899] 1 Ch. 47, p. 281.
Goldthwaite v. National Bank, 67 Ala. 549, p. 1226, 1234.
Goldworthy v. Strutt, 1 Ex. 659, 665, p. 735.
Goleborn v. Alcock, 2 Sim. 552, p. 1368.
Gollober v. Martin, 33 Kan. 252, 6 Pac. 267, p. 983.
Golson v. Dunlap, 73 Cal. 157, 160, 162, 14 Pac. 576, p. 1750, 1757.
Golson v. Fielder, 2 Tex. Civ. App. 400, 21 S. W. 173, p. 1051, 1329.
Goltra v. Sanasack, 53 Ill. 456, p. 1482.
Gombert v. Lyon, 80 Fed. 305, p. 503.
Gomez v. Tradesmen's Bank, 4 Sand. 102, 106, p. 1901.
Gomley v. Wood, 3 Jones & L. 678, 688, p. 2098.
Gompertz v. Pooley, 4 Drew. 448, 453, p. 2713.
Goninan v. Stephenson, 24 Wis. 75, p. 1610, 1615.
Gooch v. Ass'n for Relief etc., 109 Mass. 558, p. 1943, 1978.
Gooch's Case, L. R. 7 Ch. 207, p. 265.
Good v. Fichthorn, 144 Pa. St. 287, 27 Am. St. Rep. 630, 22 Atl. 1032, p. 1927.
Good v. Harris, 2 Ired. Eq. 630, p. 2145.
Good v. Herr, 7 Watts & S. 253, p. 1483, 1502, 1508.
Goodale v. Mooney, 60 N. H. 528, 49 Am. Rep. 334, p. 1943, 1956, 1957, 1975.
Goodall v. Little, 1 Sim., N. S., 155, p. 277, 278, 282.
Goodbar v. Daniel, 88 Ala. 583, 7 South. 252, 254, 16 Am. St. Rep. 76, p. 1154, 1157, 1163, 1166, 1167.
Goodbar v. Dunn, 61 Miss. 618, p. 1529.
Goodburn v. Stevens, 1 Md. Ch. 420, p. 2735.
Goode v. Georgia Home Ins. Co., 92 Va. 392, 23 S. E. 744, 53 Am. St. Rep. 817, 30 L. R. A. 842, p. 1157.
Goode v. Goode, 22 Mo. 518, 66 Am. Dec. 630, p. 1544.
Goode v. Hawkins, 2 Dev. Eq. 393, p. 1692.
Goodell v. Blumer, 41 Wis. 436, p. 2758.
Goodell v. Field, 15 Vt. 448, p. 1486, 1513.
Goodell v. Union Ass'n, 29 N. J. Eq. 32, p. 1933, 1939, 1940, 1943, 1952, 1954, 1960, 1961, 1975.
Goodenough v. Tremamondo, 2 Beav. 512, p. 2322.
Goodenow v. Ewer, 16 Cal. 461, 467, 76 Am. Dec. 540, p. 2354, 2356, 2800.
Goodere v. Lloyd, 3 Sim. 538, p. 1986.
Goodfellow v. Burchett, 2 Vern. 298, p. 920.
Goodfellow v. Goodfellow, 18 Beav. 356, p. 836.
Goodhue v. Berrien, 2 Sand. Ch. 630, p. 2383, 2387, 2388.
Goodier v. Edmunds, [1893] 3 Ch. 455, p. 2331.
Goodier v. Johnson, L. R. 18 Ch. Div. 441, p. 2331.
Goodin v. Cincinnati etc. Co., 18 Ohio St. 169, 98 Am. Dec. 95, p. 2011, 2125.
Gooding v. McAllister, 9 How. Pr. 123, p. 1523.
Goodman v. Crawley, 161 Mo. 657, 61 S. W. 850, p. 1865.
Goodman v. Grierson, 2 Ball & B. 274, 278, p. 2370, 2374.
Goodman v. Henderson, 58 Ga. 567, p. 1690.
Goodman v. Kopperl, 169 Ill. 136, 48 N. E. 172, affirming 67 Ill. App. 42, p. 2267, 2268.
Goodman v. Randall, 44 Conn. 321, p. 2726.
Goodman v. Sayers, 2 Jacob & W. 249, p. 1483, 1503, 1508, 1549.
Goodman v. Simonds, 20 How. 343, 371, p. 1326, 1331.

Goodman v. Whitcomb, 1 Jacob & W. 589, p. 2656.
Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13, p. 2612, 2619.
Goodrich v. City of Milwaukee, 24 Wis. 422, p. 1896.
Goodrich v. Proctor, 1 Gray, 567, p. 2050.
Goodrich v. Shaw, 72 Mich. 109, 40 N. W. 187, p. 1734.
Goodrich v. Tenney, 144 Ill. 422, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371, p. 1700.
Goodrich's Estate, 38 Wis. 492, p. 1920.
Goodrick v. Brown, Freem. Ch. 180, p. 1655.
Goodright v. Wright, 1 P. Wms. 397, p. 2228.
Goodrum v. Goodrum, 8 Ired. Eq. 313, p. 2144.
Goodson v. Beacham, 24 Ga. 153, p. 157.
Goodson v. Ellison, 3 Russ. 583, p. 2054.
Goodson v. Richardson, L. R. 9 Ch. 221, 223, 226, p. 2684, 2687, 2698.
Goodtitle v. Notitle, 11 Moore, 491, p. 2337.
Goodtitle v. Southern, 1 Moore & S. 299, p. 1547.
Goodwin v. Cloudman, 43 Me. 577, p. 1101, 1146.
Goodwin v. Dean, 50 Conn. 517, p. 1167.
Goodwin v. McMinn, 193 Pa. St. 646, 74 Am. St. Rep. 703, 44 Atl. 1094, p. 2038.
Goodwin v. Massachusetts L. etc. Co., 152 Mass. 189, 25 N. E. 100, p. 1327.
Goodwin v. Provident Sav. Life Ass'n, 97 Iowa, 226, 59 Am. St. Rep. 411, 66 N. W. 157, 32 L. R. A. 473, p. 1158.
Goodwin v. Richardson, 11 Mass. 469, p. 681.
Goodwyn v. Goodwyn, 1 Ves. Sr. 228, p. 846.
Goodyear v. Goodyear, 72 Iowa, 329, 33 N. W. 142, p. 1410, 2407.
Goodyear Shoe Mach. Co. v. Selz, Schwab & Co., 157 Ill. 186, 41 N. E. 625, p. 734.
Goold v. Teague, 5 Jur., N. S., 116, p. 2314.
Goos v. Goos, 57 Nebr. 294, 77 N. W. 687, p. 2405, 2411, 2413.
Gorden, In re, 172 N. Y. 25, 92 Am. St. Rep. 689, 64 N. E. 753, p. 821, 832.
Gordon, Ex parte, L. R. 20 Eq. 291, p. 2662.
Gordon, In re, L. R. 6 Ch. Div. 531, p. 2333.
Gordon v. Bell, 50 Ala. 213, p. 2498, 2516.
Gordon v. Butler, 105 U. S. 553, p. 1564.
Gordon v. Cheltenham R'y, 5 Beav. 229, 237, p. 696, 1450.
Gordon v. Constantine Hydraulic Co., 117 Mich. 620, 76 N. W. 142, p. 1053, 1096, 1116.
Gordon v. Cox, (Tenn.) 75 S. W. 925, p. 1344.
Gordon v. Duff, 3 De Gex, F. & J. 662, p. 2208, 2212, 2218.
Gordon v. Gordon, 55 N. H. 399, 3 Swanst. 400, p. 527, 1019.
Gordon v. Gordon, 3 Swanst. 400, 463, 470, p. 1501, 1508, 1609, 1613.
Gordon v. Graham, 2 Eq. Cas. Abr. 598, pl. 16, 7 Vin. Abr. 52, pl. 3, p. 2382, 2385, 2390.
Gordon v. Green, 10 Ga. 534, p. 1892, 2005.
Gordon v. Hobart, 2 Story, 243, Fed. Cas. No. 5,608, p. 2431.
Gordon v. Jackson, 72 Fed. 86, p. 385, 503, 504.
Gordon v. Lewis, 2 Sum. 143, 147, Fed. Cas. No. 5,613, p. 2432.
Gordon v. Lowell, 21 Me. 251, 257, p. 550, 552, 632, 766, 2788.
Gordon v. McCulloh, 66 Md. 245, 7 Atl. 457, p. 1901.
Gordon v. Manning, 44 Miss. 756, p. 2574.
Gordon v. Marquis of Hertford, 2 Madd. 106, p. 1517.
Gordon v. Rixey, 76 Va. 694, p. 1184, 1270, 2525, 2527.
Gordon v. Stevens, 2 Hill Ch. 46, 27 Am. Dec. 445, p. 821, 832.
Gordon v. Tweedy, 74 Ala. 232, 49 Am. Rep. 813, p. 2482.
Gordon v. West, 8 N. H. 444, p. 2100.
Gore, Ex parte, 6 Jur. 1118, 7 Jur. 136, p. 1760.

Gore v. Bowser, 5 De Gex & S. 30, p. 278.
Gore v. Carl, 47 Conn. 291, p. 2190.
Gore v. Condon, 82 Md. 649, 33 Atl. 261, p. 1198.
Gore v. Knight, 2 Vern. 535, p. 2146.
Gorgarn v. Pope, (Mass.) 69 N. E. 343, p. 532.
Gorham v. Arnold, 22 Mich. 247, p. 2359.
Gorham v. Daniels, 23 Vt. 600, p. 1828.
Gorham v. Toomey, 9 Cal. 77, p. 458, 2716, 2719.
Goring v. Bickerstaff, 1 Ch. Cas. 4, 8, p. 2547.
Gorland v. Wells, 15 Nebr. 298, 18 N. W. 132, p. 1347.
Gorman v. Bannigan, 22 R. I. 22, 46 Atl. 38, p. 246, 273.
Gorman v. Wood, 68 Ga. 524, p. 1372.
Gormley v. Clark, 134 U. S. 338, 348, 10 Sup. Ct. 554, p. 351, 504.
Gormly v. Gormly, 130 Pa. St. 467, 18 Atl. 727, p. 1502.
Gorrell, v. Alspaugh, 120 N. C. 362, 27 S. E. 85, p. 1907.
Gorringe v. Irwell etc. Works, 34 Ch. Div. 128, p. 2562.
Gorringe v. Reed, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692, p. 673, 1703, 1716, 1718, 1735.
Gorton v. Massey, 12 Minn. 145, p. 2004.
Gosling v. Gaskell, [1897] A. C. 575, p. 2059.
Goss v. Tracey, 1 P. Wms. 287, p. 1635.
Gossom v. Donaldson, 18 B. Mon. 230, p. 1065.
Gothard v. Flynn, 25 Miss. 58, p. 2540, 2541.
Gott v. Brigham, 41 Mich. 227, p. 1771.
Gott v. Cook, 7 Paige, 521, 523, 534, p. 185, 621, 1854, 2316.
Gott v. Powell, 41 Mo. 416, p. 586.
Gott v. State, 44 Md. 319, p. 2089.
Gottschalk v. Kircher, 109 Mo. 170, 17 S. W. 905, p. 1622, 1623.
Gottschalk v. Neal, 6 Mo. App. 596, p. 1860.
Gotwalt v. Neal, 25 Md. 434, p. 1707, 1708.
Gotzian, Estate of, 34 Minn. 159, 57 Am. Rep. 43, 24 N. W. 920, p. 824, 830, 2227.
Gotzian, In re, 34 Minn. 159, 57 Am. Rep. 43, 24 N. W. 920, p. 812.
Gough v. Crane, 3 Md. Ch. 119, 4 Md. 316, p. 2765, 2767.
Gough v. Manning, 26 Md. 347, 366, p. 824, 1684.
Gough v. Pratt, 9 Md. 526, p. 229, 461.
Gould v. Bugbee, 6 Gray, 371, 375, p. 717.
Gough v. Bult, 16 Sim. 45, p. 1890.
Gould v. Cayuga Co. etc. Bank, 86 N. Y. 75, p. 2729, 2730.
Gough v. Crane, 3 Md. Ch. 119, 4 Md. 316, p. 2601.
Gould v. Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501, p. 1540.
Gould v. Gould, 3 Story, 516, 537, p. 1635.
Gould v. Hayes, 19 Ala. 438, p. 220, 2252, 2256, 2555, 2706.
Gould v. Kemp, 2 Mylne & K. 304, 308, p. 2770.
Gould v. Kendall, 15 Nebr. 549, 19 N. W. 483, p. 1711.
Gould v. Lynde, 114 Mass. 366, p. 1989.
Gould v. Marsh, 1 Hun, 566, p. 2419.
Gould v. Okeden, 4 Brown Parl. C. 198, p. 1731, 2033.
Gould v. Tancred, 2 Atk. 533, p. 2432.
Gould v. Taylor Orphan Asylum, 46 Wis. 106, 50 N. W. 422, p. 1936, 1969, 2306, 2309, 2310, 2315.
Gould v. West, 32 Tex. 338, p. 1445.
Gould v. Womack, 2 Ala. 83, p. 2602, 2767.
Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323, p. 1283.
Gouldby's Estate, In re, 201 Pa. St. 491, 57 Atl. 315, p. 2069.
Goulder v. Camm, 1 De Gex, F. & J. 146, p. 2143, 2157.
Goulding v. Bunster, 9 Wis. 513, p. 2377.
Goulding v. Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357, p. 2239, 2243.
Goundie v. Northampton W. Co., 7 Pa. St. 233, p. 1439.
Gouraud v. Trust, 6 Thomp. & C. 133, 3 Hun, 627, p. 2691.
Gourley v. Linsenbigler, 51 Pa. St. 345, p. 2233, 2236, 2570.

Gouverneur v. Lynch, 2 Paige, 300, p. 1044, 1109.
Gouverneur v. Titus, 6 Paige, 347, 1 Edw. Ch. 477, p. 1269, 1276, 1279, 1381, 1523, 1529, 1533.
Governor v. McEwen, 5 Humph. 241, p. 2799.
Governors of the Gray Coat Hospital v. Westminster etc. Comm'rs, 1 De Gex & J. 531, p. 1089.
Gowans v. Pierce, 57 Kan. 180, 45 Pac. 586, p. 2411.
Gower v. Andrew, 8 Pac. L. J. 617, p. 2028.
Gower v. Carter, 3 Iowa, (3 Clarke) 244, 66 Am. Dec. 71, p. 735.
Gower v. Doheny, 33 Iowa, 36, 39, p. 1100, 1277, 1381.
Gower v. Mainwaring, 2 Ves. Sr. 87, 89, p. 1959.
Gower v. Saltmarsh, 11 Mo. 27, p. 732.
Gower v. Sterner, 2 Whart. 75, p. 1515, 1523, 1528.
Gower v. Winchester, 33 Iowa, 303, p. 2435.
Gowland v. De Faria, 17 Ves. 20, 24, p. 1749, 1784.
Goyer Cold-Storage Co. v. Wildberger, 71 Miss. 438, 15 South. 235, p. 1222.
Grable v. McCulloh, 27 Ind. 472, p. 2358.
Grabowski's Settlement, In re, L. R. 6 Eq. 12, p. 2089.
Grace v. Wade, 45 Tex. 522, p. 1272, 1280.
Grace v. Webb, 15 Sim. 384, p. 1683.
Graeff v. De Turk, 44 Pa. St. 527, p. 1657.
Graeff v. Felix, 200 Pa. St. 137, 49 Atl. 758, p. 338.
Graff v. Bonnett, 31 N. Y. 9, 88 Am. Dec. 236, p. 1845, 1897.
Graff v. Castleman, 5 Rand. 207, 16 Am. Dec. 741, p. 1052.
Graff v. Middleton, 43 Cal. 341, p. 1343.
Graffan v. Burgess, 117 U. S. 184, 6 Sup. Ct. 686, p. 1672.
Gragg v. Martin, 12 Allen, 498, 90 Am. Dec. 164, p. 1793, 1796.
Graham, In re, L. R. 10 Eq. 530, p. 2612.
Graham v. Bickham, 4 Dall. 149, 2 Yeates, 32, 1 Am. Dec. 328, p. 743.
Graham v. Birkenhead etc. R'y, 2 Macn. & G. 146, p. 696, 1450, 1788.
Graham v. Burch, 44 Minn. 33, 46 N. W. 148, p. 1738.
Graham v. Castor, 55 Ind. 559, p. 1728.
Graham v. Dahlonega Co., 71 Ga. 296, p. 424.
Graham v. Davidson, 2 Dev. & B. Eq. 155, p. 2096.
Graham v. Graham, 8 Bush, 334, p. 2743.
Graham v. Graham, 55 Ind. 23, p. 2380, 2381.
Graham v. Graham, 1 Ves. Sr. 263, p. 874.
Graham v. Henry, 17 Tex. 164, p. 2574.
Graham v. Johnson, L. R. 8 Eq. 36, p. 1226.
Graham v. Little, 3 Jones Eq. 152, p. 1728.
Graham v. Londonderry, 3 Atk. 393, 1 Lead. Cas. Eq., 4th Am. ed., 730, 731, p. 2142, 2143, 2163, 2164.
Graham v. McCampbell, Meigs, 52, 33 Am. Dec. 126, p. 2477.
Graham v. Moffett, 119 Mich. 303, 75 Am. St. Rep. 393, 78 N. W. 132, p. 2509.
Graham v. Newman, 21 Ala. 497, p. 2417.
Graham v. O'Fallon, 3 Mo. 507, p. 2279.
Graham v. Orange Co. Nat. Bank, 59 N. J. L. 225, 35 Atl. 1053, p. 1175.
Graham v. Pancoast, 30 Pa. St. 89, p. 1668, 1671, 1728.
Graham v. Roberts, 1 Head, 56, 59, p. 1641, 1652, 2702, 2703, 2709.
Graham v. Samuel, 1 Dana, 166, p. 1114.
Graham v. Stagg, 2 Paige, 321, p. 2710.
Graham v. Thompson, 55 Ark. 296, 18 S. W. 58, 29 Am. St. Rep. 40, p. 1440.
Graham v. Whitridge, (Md.) 57 Atl. 609, p. 794.
Graham v. Whitridge, (Md.) 58 Atl. 36, p. 1828.
Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 312, 632, p. 1212, 1216, 1218, 1219, 1234.
Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423, p. 195, 585, 2563.

Grain v. Shipman, 45 Conn. 572, p. 2143.
Gram v. Stebbins, 6 Paige, 124, p. 2762, 2764.
Grammel v. Carmer, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363, p. 2569.
Grand Chute v. Winegar, 15 Wall. 373, 21 L. ed. 170, p. 151, 210, 220, 221, 514, 1637, 2706, 2707.
Grandin v. Anderson, 15 Ohio St. 286, p. 1127.
Grand Island etc. Ass'n v. Moore, 40 Nebr. 686, 59 N. W. 115, p. 2405.
Grand Prairie Seminary v. Morgan, 171 Ill. 444, 49 N. E. 516, p. 1946, 1955, 1958, 1974.
Grand Rapids etc. R. Co. v. Sparrow, 36 Fed. 210, 211, 1 L. R. A. 482, p. 504.
Granger v. Crouch, 86 N. Y. 494, 499, p. 2393.
Granger v. Roll, 6 S. Dak. 611, 62 N. W. 970, p. 2402.
Grange Union v. Burkhart, 8 Oreg. 51, p. 2286.
Grant v. Bennett, 96 Ill. 513, p. 1067, 1081, 1082.
Grant v. Bissett, 1 Caines Cas. 112, p. 1111.
Grant v. Burr, 54 Cal. 298, p. 1860, 1861, 1895.
Grant v. Cole, 8 Ala. 519, p. 1161.
Grant v. Dodge, 43 Me. 489, p. 1281.
Grant v. Dyer, 2 Dow. 93, p. 1546, 1686.
Grant v. Grant, 34 Beav. 623, 626, p. 1879, 2142.
Grant v. Grant, 56 Me. 573, p. 1560.
Grant v. King, 31 Mo. 312, p. 2750.
Grant v. Lloyd, 12 Smedes & M. 191, p. 1692.
Grant v. Ludlow's Adm'r, 8 Ohio St. 1, 37, p. 2552.
Grant v. Lynam, 4 Russ. 292, p. 1889.
Grant v. Mills, 2 Ves. & B. 306, p. 1198, 2510, 2516.
Grant v. Munt, Coop. 173, p. 1015, 1596.
Grant v. Quick, 5 Sand. 612, p. 2716.
Grant v. Ramsey, 7 Ohio St. 157, p. 2780.
Grant v. Saunders, 121 Iowa, 80, 100 Am. St. Rep. 310, 95 N. W. 411, p. 1943, 1955, 1965, 1974.
Grant County v. McKinley, 8 Okl. 128, 56 Pac. 1044, p. 237.
Grantham v. Grantham, 34 S. C. 504, 13 S. E. 675, 27 Am. St. Rep. 839, p. 1993.
Grantham v. Hawley, Hob. 132, p. 2472.
Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 63 Fed. 891, 12 C. C. A. 350, 24 U. S. App. 38, p. 2473.
Grapengether v. Fejervary, 9 Iowa, 163, 74 Am. Dec. 336, p. 2499.
Grassly v. Reinback, 4 Ill. App. 341, p. 2417, 2419.
Grattan v. Appleton, 3 Story, 755, 763, p. 2233, 2234.
Grattan v. Grattan, 18 Ill. 167, 65 Am. Dec. 726, p. 2266.
Grattan v. Wiggins, 23 Cal. 16, p. 2393, 2395, 2396.
Gratz v. Cohen, 11 How. 1, 19, p. 1728.
Gratz v. Land & River Imp. Co., 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393, p. 1355.
Grave v. Lord Salisbury, 1 Brown Ch. 425, 18 Ves. 152, p. 900, 908, 920, 943.
Gravely v. Barnard, L. R. 18 Eq. 518, p. 1690.
Gravenburg v. Laws, 100 Fed. 1, 40 C. C. A. 240, p. 496.
Gravenor v. Hallam, Amb. 643, p. 1836.
Graves v. Blondell, 70 Me. 190, p. 1437, 1444.
Graves v. Cochran, 68 Mo. 74, p. 2443.
Graves v. Coutant, 31 N. J. Eq. 763, p. 1391, 2501, 2511, 2516.
Graves v. Currie, 132 N. C. 307, 43 S. E. 897, p. 2576.
Graves v. Dolphin, 1 Sim. 66, p. 1841.
Graves v. Graves, 6 Gray, 391, p. 1113.
Graves v. Graves, 36 Iowa, 310, 14 Am. Rep. 525, p. 2177.
Graves v. Graves, 3 Met. 167, p. 2005.
Graves v. Graves, 29 N. H. 129, p. 1989.
Graves v. Graves, 8 Sim. 43, 55, p. 2486, 2489.
Graves v. Lebanon Bank, 10 Bush, 23, 19 Am. Rep. 58, p. 1583.
Graves v. Mattingly, 6 Bush, 361, p. 1515.

Graves v. Spier, 58 Barb. 349, 383, 384, 386, p. 231, 355, 1625, 2552.
Graves v. Ward, 2 Duvall, 301, p. 1101.
Graves v. White, 4 Baxt. 38, p. 1730, 1738.
Gray v. Bartlett, 20 Pick. 186, 32 Am. Dec. 208, p. 1438.
Gray v. Chiswell, 9 Ves. 118, p. 682, 683.
Gray v. Coan, 40 Iowa, 327, p. 1372.
Gray v. Corbett, 4 Del. Ch. 135, p. 1843.
Gray v. Dougherty, 25 Cal. 266, 278, 280, 281, 282, p. 94, 231, 255, 1524, 2776.
Gray v. Duke of Northumberland, 17 Ves. 281, p. 2693.
Gray v. Hawkins, 133 N. C. 1, 45 S. E. 363, p. 1846.
Gray v. Henderson, 71 Pa. St. 368, p. 2046.
Gray v. H. M. Loud & Sons' Lumber Co., 128 Mich. 427, 8 Detroit Leg. N. 714, 87 N. W. 376, 54 L. R. A. 731, p. 2446, 2449.
Gray v. Lamb, 207 Ill. 228, 69 N. E. 794, p. 1038.
Gray v. Lewis, L. R. 8 Ch. 1035, 1049, 1050, p. 2121.
Gray v. Mathias, 5 Ves. 286, p. 667, 1702, 2728.
Gray v. New York etc. Co., 3 Hun, 383, 5 Thomp. & C. 224, p. 2125.
Gray v. Obear, 59 Ga. 675, p. 2624.
Gray v. Ohio etc. R. R., 1 Grant Cas. 412, p. 1788.
Gray v. Payne, 43 Mo. 203, p. 586.
Gray v. Reamer, 11 Bush, 113, p. 2061, 2094.
Gray v. Robb, 4 Heisk. 74, p. 2143, 2145, 2155.
Gray v. Suspension Car-Truck Co., 127 Ill. 187, 19 N. E. 874, p. 1561.
Gray v. Thompson, 1 Johns. Ch. 82, p. 2089.
Gray v. Turley, 110 Ind. 254, 11 N. E. 40, p. 1726.
Gray v. Ward, (Tenn. Ch. App.) 52 S. W. 1028, p. 2052.
Gray v. Zelmer, 66 Kan. 514, 72 Pac. 228, p. 1022, 1439.
Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. 558, p. 1204.
Graydon v. Graydon, 23 N. J. Eq. 229, p. 1681.
Graydon v. Graydon, McMull. Eq. 63, p. 2742.
Graydon v. Hicks, 2 Atk. 16, p. 1686.
Gray's Adm'rs v. Cruise, 36 Ala. 559, p. 1104.
Grayson v. Bowlin, 70 Ark. 145, 66 S. W. 658, p. 1907.
Grayson v. Deakin, 3 De Gex & S. 298, p. 837.
Great Berlin S. Co., In re, L. R. 26 Ch. Div. 616, p. 664.
Greated v. Greated, 26 Beav. 621, p. 1546.
Great Falls Co. v. Worster, 15 N. H. 412, 444, p. 1027, 2350.
Great Hive of L. of M. v. Supreme Hive of L. of M., (Mich.) 97 N. W. 779, p. 1435.
Gt. Luxembourg R'y Co. v. Magnay, 25 Beav. 586, 594, p. 182, 1646, 2032.
Great North etc. R'y v. Clarence R'y, 1 Coll. C. C. 507, 517, 521, 526, p. 2694, 2698.
Greatorex v. Cary, 6 Ves. 615, p. 819.
Greatrex v. Greatrex, 1 De Gex & S. 692, p. 2698, 2699.
Great West Min. Co. v. Woodmas, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204, p. 1424, 1443.
Great Western Colliery Co. v. Tucker, L. R. 9 Ch. 376, p. 270.
Great West R'y v. Birmingham, etc. R'y, 2 Phill. Ch. 597, 602, 603, p. 2670.
Great Western R'y v. Cripps, 5 Hare, 91, p. 1487, 1503.
Great Western R'y v. Oxford etc. R'y, 3 De Gex, M. & G. 341, 359, p. 696, 1450, 1788.
Great Western R'y Co. v. Wheeler, 20 Mich. 419, p. 1163, 1164.
Greaves v. Forman, cited 3 Ves. 67, p. 784.
Greaves v. Gouge, 69 N. Y. 154, 157, p. 2119, 2121.
Greaves v. Tofield, L. R. 14 Ch. Div. 563, 565, 571, 575, 577, p. 712, 1090, 1137, 1139, 1198, 1292.
Greedup v. Franklin County, 30 Ark. 101, 109, p. 407, 443, 454.
Greedy v. Lavender, 13 Beav. 62, p. 2172.
Greeley v. De Cottes, 24 Fla. 475, 5 South. 239, p. 1495, 1549.

Greeley v. Lowe, 155 U. S. 58, 75, 15 Sup. Ct. 24, 28, p. 503.
Greeley v. Nashua, 62 N. H. 166, p. 2053.
Greeley State Bank v. Line, 50 Nebr. 434, 69 N. W. 966, p. 2418.
Green v. Allen, 5 Humph. 170, p. 1977.
Green v. Ball, 4 Bush, 586, p. 179, 2039.
Green v. Barrett, 1 Sim. 45, p. 1633.
Green v. Baverstock, 14 Com. B., N. S., 204, p. 1693.
Green v. Betts, 1 Fed. 289, 1 McCrary, 72, p. 2501, 2504.
Green v. Biddle, 8 Wheat. 1, 77, 78, 5 L. ed. 547, p. 2482.
Green v. Blackwell, (N. J. Ch.) 35 Atl. 375, p. 1946, 1975.
Green v. Blackwell, 31 N. J. Eq. 37, p. 2108.
Green v. Bridges, 4 Sim. 96, p. 632, 754, 759.
Green v. Britten, 1 De Gex, J. & S. 649, p. 2145, 2322.
Green v. Brooks, 81 Cal. 328, 22 Pac. 849, p. 2052.
Green v. Carlill, L. R. 4 Ch. Div. 882, p. 2147.
Green v. Claiborne, 83 Va. 386, 5 S. E. 376, p. 2153.
Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725, p. 2779.
Green v. Crapo, 181 Mass. 55, 62 N. E. 956, p. 2071.
Green v. Creighton, 10 Smedes & M. 159, 48 Am. Dec. 742, p. 2277.
Green v. Currier, 63 N. H. 563, 3 Atl. 428, p. 1407.
Green v. Dixon, 9 Wis. 532, p. 2431, 2435.
Green v. Drinker, 7 Watts & S. 440, p. 1107, 1114.
Green v. Early, 39 Md. 223, 229, p. 1050, 1146.
Green v. Finin, 35 Conn. 178, p. 2782.
Green v. Garrington, 16 Ohio St. 548, p. 1119.
Green v. Givan, 33 N. Y. 343, p. 1193.
Green v. Glynn, 71 Ind. 336, p. 2748, 2752.
Green v. Green, 5 Hare, 400, note, p. 2140, 2698.
Green v. Green, 2 Mer. 86, p. 783, 784, 786.
Green v. Green, 14 N. Y. Sup. Ct. 492, p. 1774.
Green v. Green, 50 S. C. 514, 27 S. E. 952, 62 Am. St. Rep. 846, p. 2322.
Green v. Green, 56 S. C. 193, 34 S. E. 249, 46 L. R. A. 525, p. 2024.
Green v. Hart, 1 Johns. 580, p. 2417.
Green v. Hedenberg, 159 Ill. 489, 42 N. E. 851, 50 Am. St. Rep. 178, p. 2127.
Green v. Hogan, 153 Mass. 462, 27 N. E. 413, p. 1934, 1979.
Green v. Hugo, 81 Tex. 452, 26 Am. St. Rep. 824, 17 S. W. 79, p. 1761.
Green v. Jackson, 2 Russ. & M. 238, p. 2327.
Green v. Johnson, 4 Bush, 164, 167, p. 2306, 2316.
Green v. Kemp, 13 Mass. 515, 575, 7 Am. Dec. 169, p. 1706.
Green v. Lowes, 3 Brown Ch. 217, p. 2670.
Green v. McDonald, 75 Vt. 93, 53 Atl. 332, p. 2481.
Green v. Marsden, 1 Drew. 646, p. 1909, 1929.
Green v. Massie, 21 Gratt. 356, p. 261.
Green v. Meyers, 98 Mo. App. 438, 72 S. W. 128, p. 1102, 1121.
Green v. Morgan, (N. J. Eq.) 21 Atl. 857, p. 994, 1147, 1149.
Green v. Morris, 12 N. J. Eq. 165, 170, p. 1493, 1494, 1516.
Green v. Oakes, 17 Ill. 249, p. 2683.
Green v. Otte, 1 Sim. & St. 250, p. 2172, 2174.
Green v. Price, 13 Mees. & W. 695, 701, 16 Mees. & W. 346, 354, p. 729, 737, 747.
Green v. Putnam, 1 Barb. 500, p. 2740, 2742.
Green v. Ramage, 18 Ohio, 428, 51 Am. Dec. 458, p. 2448.
Green v. Richards, 23 N. J. Eq. 32, 35, 536, p. 2762, 2769.
Green v. Rick, 121 Pa. St. 130, 6 Am. St. Rep. 670, 760, 15 Atl. 497, 2 L. R. A. 48, p. 1076, 1080, 1108.
Green v. Sargeant, 23 Vt. 466, 56 Am. Dec. 88, p. 1779.
Green v. Scranage, 19 Iowa, 461, 87 Am. Dec. 447, p. 1735.
Green v. Slayter, 4 Johns. Ch. 38, p. 1054, 1064, 1072.

Green v. Smith, 1 Atk. 572, 573, p. 615, 2305, 2311, 2772.
Green v. Spaulding, 76 Va. 411, p. 1637.
Green v. Spicer, 1 Russ. & M. 395, p. 1841, 1842.
Green v. Spring, 43 Ill. 280, p. 148, 212, 213.
Green v. Stephens, 17 Ves. 64, 77, p. 2316.
Green v. Stewart, 45 N. Y. Supp. 982, 19 App. Div. 201, p. 341.
Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099, p. 1516, 1540, 1541, 1542, 2405, 2414.
Green v. Symonds, 1 Brown Ch. 129, note, p. 2213.
Green v. Thompson, 2 Ired. Eq. 365, p. 1668, 1670.
Green v. Turner, 80 Fed. 41 (affirmed in 86 Fed. 837), p. 1553, 2413.
Green v. Turner, 38 Iowa, 112, p. 2402, 2432.
Green v. Tweed, 13 Abb. Pr., N. S., 427, p. 748.
Green v. Weaver, 1 Sim. 404, 427, 432, p. 275.
Green v. Wescott, 13 Wis. 606, p. 2431, 2432.
Green v. White, 7 Blackf. 242, p. 1065.
Green v. Wilkie, 98 Iowa, 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434, p. 1731.
Green v. Willis, (Tex. Civ. App.) 81 S. W. 1185, p. 1342.
Green v. Winter, 1 Johns. Ch. 26, 39, 60, 7 Am. Dec. 475, p. 1762, 2482.
Greenaway v. Adams, 12 Ves. 393, 395, 400, 401, p. 345, 2772.
Green Bay Lumber Co. v. Miller, (Iowa) 62 N. W. 742, p. 354.
Greene v. Cook, 29 Ill. 186, p. 2534.
Greene v. Creighton, 7 R. I. 1, p. 1200.
Greene v. Greene, 42 Nebr. 634, 47 Am. St. Rep. 724, 60 N. W. 937, p. 1781.
Greene v. McDonald, 75 Vt. 93, 53 Atl. 332, p. 2413.
Greene v. Mumford, 4 R. I. 313, p. 2636, 2639, 2642.
Greene v. Nunnemacher, 36 Wis. 50, p. 2687.
Greene v. Warnick, 64 N. Y. 220, 224, 225, p. 1239, 1242, 1249, 1256, 1262.
Greenfell v. Dean of Windsor, 2 Beav. 544, 549, p. 2554.
Greenfield v. Edwards, 2 De Gex, J. & S. 582, p. 1010, 1016, 1050, 1292.
Greenfield v. Vason, 74 Ga. 126, p. 2104.
Greenfield's Estate, 14 Pa. St. 489, 506, 507, p. 1739, 1751, 1767.
Greenfield's Estate, 24 Pa. St. 232, 240, 332, p. 1780, 2568.
Greenhill v. Greenhill, 2 Vern. 679, p. 1853.
Greenhill v. North British & Mercantile Ins. Co., [1893] 3 Ch. 474, p. 845.
Greenland v. Waddell, 116 N. Y. 239, 22 N. E. 367, 15 Am. St. Rep. 400, p. 185, 2305.
Greenlaw v. King, 1 Beav. 137, p. 278.
Greenleaf v. Edes, 2 Minn. 264, p. 1271, 1279.
Greenleaf v. Mumford, 19 Abb. Pr. 469, p. 2791.
Greenleaf v. Mumford, 50 Barb. 543, p. 2791.
Greenleaf v. Queen, 1 Pet. 138, p. 274.
Greenlee v. Gaines, 13 Ala. 198, 48 Am. Dec. 49, p. 2704.
Greenlee v. Greenlee, 22 Pa. St. 225, p. 2780.
Greenough v. Gaskell, 1 Mylne & K. 98, 115, p. 279, 280, 281.
Greenough v. Small, 137 Pa. St. 131, 20 Atl. 396, 553, p. 2309.
Greens v. Barnard, 18 Kan. 518, p. 2503.
Green's Adm'r v. Creighton, 23 How. 90, 105, 16 L. ed. 419, 423, p. 507, 508.
Greenslade v. Dare, 20 Beav. 284, 291, p. 1174.
Greenville, Ex parte, 7 Rich. Eq. 471, p. 1834.
Greenway, Ex parte, 6 Ves. 812, 813 (see notes at end of case, p. 813, Perkins' ed.), p. 227, 462, 463, 1461, 1463.
Greenway v. Greenway, 2 De Gex, F. & J. 128, p. 2309.
Greenway v. Greenway, 1 Giff. 131, p. 2321.
Greenwell v. Heritage, 71 Mo. 459, p. 2424.
Greenwood, In re, [1892] 2 Ch. 295, p. 2227.
Greenwood v. Fenn, 136 Ill. 146, 26 N. E. 487, p. 1602.

Greenwood v. Greenwood, 1 Brown Ch. 31, note, p. 889.
Greenwood v. Greenwood, 2 De Gex, J. & S. 28, 42, p. 1502.
Greenwood v. Marvin, 111 N. Y. 423, 436, 19 N. E. 228, p. 2318.
Greenwood v. Penny, 12 Beav. 403, p. 782, 806, 857.
Greenwood v. Spring, 54 Barb. 375, p. 1760.
Greenwood v. Wakeford, 1 Beav. 576, 581, p. 2106.
Greenwood Loan & G. Co. v. Childs, (S. C.) 45 S. E. 167, p. 1105, 1119.
Greenwood's Appeal, 92 Pa. St. 181, p. 2034, 2042.
Greer v. Cagle, 84 N. C. 385, p. 2284.
Greer v. Greers, 9 Gratt. 330, 332, p. 1728.
Greer v. Higgins, 20 Kan. 420, p. 1145.
Greer v. Mezes, 24 How. 268, 277, 16 L. ed. 661, p. 494, 495.
Greer v. Payne, 4 Kan. App. 153, 46 Pac. 190, p. 666, 1689.
Gregg v. Baldwin, 84 N. W. 373, 9 N. Dak. 515, p. 1170.
Gregg v. Crosby, 18 Johns. 219, 226, p. 734.
Gregg v. Hamilton, 12 Kan. 333, p. 2772, 2780, 2782.
Gregg v. Irish, 6 Pa. St. 211, p. 1977.
Gregg v. Landis, 19 N. J. Eq. 356, 850, 21 N. J. Eq. 494, 507, 511, 514, p. 753, 756, 762.
Gregg v. Mass. Med. Soc., 111 Mass. 185, 15 Am. Rep. 24, p. 2677.
Gregg v. Sanford, 65 Fed. 151, 157, 28 U. S. App. 313, p. 497.
Gregg v. Thurber, 69 N. H. 480, 45 Atl. 241, p. 1110.
Gregg v. Von Phul, 1 Wall. 274, p. 1434, 1435.
Gregg v. Wells, 10 Ad. & E. 90, p. 1435.
Gregory v. Bowlesby, 115 Iowa, 327, 88 N. W. 822, p. 2037.
Gregory v. Cable, 26 N. J. Eq. 178, p. 2462.
Gregory v. Edmondson, 39 Ch. Div. 253, p. 1926.
Gregory v. Gregory, Coop. 201, p. 1753, 1755.
Gregory v. Gregory, 1 Jones & S. 1, p. 2659.
Gregory v. Gregory, 69 N. C. 522, p. 2740.
Gregory v. Gregory, 1 Sweeny, 613, p. 2656.
Gregory v. High, 29 Ind. 527, p. 2740.
Gregory v. Ingwersen, 32 N. J. Eq. 199, p. 2766, 2774.
Gregory v. Mighell, 18 Ves. 328, p. 2781.
Gregory v. Nelson, 41 Cal. 278, p. 2686.
Gregory v. Orr, 61 Miss. 307, p. 1775.
Gregory v. Peoples, 80 Va. 355, p. 1994.
Gregory v. Perkins, 40 Iowa, 82, p. 2775.
Gregory v. Savage, 32 Conn. 250, 264, p. 1400.
Gregory v. Spiekes, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70, p. 1691.
Gregory v. Van Vleck, 21 Tex. 40, p. 2198.
Gregory v. Wilson, 9 Hare, 683, 689, p. 632, 717, 752, 753, 759, 1476, 1510.
Gregson, In re, [1893] 3 Ch. 233, p. 1834.
Greig v. Smith, 29 S. C. 426, 7 S. E. 610, p. 2201.
Greither v. Alexander, 15 Iowa, 470, p. 2402.
Grell v. Levy, 16 Com. B., N. S., 73, p. 1702.
Grellet v. Heilshorn, 4 Nev. 526, p. 1097, 1147, 1403.
Grepengether v. Fejervary, 9 Iowa, 163, 74 Am. Dec. 336, p. 2392.
Gresham v. Ware, 79 Ala. 132, p. 1404, 2428, 2429, 2482.
Gresley v. Mousely, 4 De Gex & J. 78, 90, 91, 92, 93, 94, 95, 98, 99, 3 De Gex, F. & J. 433, 2 Kay & J. 288, p. 182, 282, 625, 1627, 1752, 1769, 1772, 1788, 1808, 2006, 2729.
Greswold v. Marsham, 2 Ch. Cas. 170, p. 1401.
Grether v. Smith, (S. Dak.) 96 N. W. 93, p. 2418.
Grether v. Wright, 75 Fed. 742, 746, 43 U. S. App. 770, p. 500.
Gretton v. Haward, 1 Swanst. 409, 413, 420, 423, 425, 433, 441, p. 655, 771, 779, 781, 793, 845, 846, 857.
Greville v. Browne, 7 H. L. Cas. 689, p. 2490.
Grey v. Cockeril, 2 Atk. 114, p. 2727.

Grey v. Grey, 2 Swanst. 594, 597, p. 1997.
Grey v. Ohio & Penn. R. R., 1 Grant Cas. 412, p. 697, 1450.
Grey v. Tubbs, 43 Cal. 359, p. 761, 2778, 2779.
Grey de Wilton, Lord, v. Saxon, 6 Ves. 106, p. 2673.
Gribben v. Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233, p. 1726.
Grice v. Shaw, 10 Hare, 76, p. 1400, 1402.
Grider v. American Freehold L. & M. Co., 99 Ala. 281, 12 South. 775, 42 Am. St. Rep. 58, p. 651.
Grider v. Driver, 46 Ark. 50, p. 1705.
Gridley v. Andrews, 8 Conn. 1, p. 2493.
Gridley v. Garrison, 4 Paige, 647, p. 2705.
Gridley v. Gridley, 24 N. Y. 130, p. 2488.
Gridley v. Watson, 53 Ill. 186, p. 1801.
Gridley's Heirs v. Phillips, 5 Kan. 349, p. 1469.
Griel v. Lomax, 89 Ala. 420, 6 South. 741, p. 1609, 1612.
Grier v. Rhyne, 69 N. C. 346, p. 2762.
Grierson v. Eyre, 9 Ves. 341, 345, p. 2737.
Griesbach v. Freemantle, 17 Beav. 314, p. 2333.
Griffen v. Griffen, 163 Ill. 216, 45 N. E. 241, p. 346.
Griffen v. Marquardt, 17 N. Y. 28, p. 1331.
Griffeth v. Brown, 76 Cal. 260, 18 Pac. 372, p. 1431.
Griffies v. Griffies, 11 Wkly. Rep. 943, p. 2742.
Griffin v. Archer, 2 Anstr. 478, 2 Ves. 643, p. 264.
Griffin v. Blanchar, 17 Cal. 70, p. 1897, 2016.
Griffin v. Camack, 36 Ala. 695, 76 Am. Dec. 344, p. 2498.
Griffin v. Fries, 23 Fla. 173, 2 South. 266, 11 Am. St. Rep. 351, p. 1463.
Griffin v. Griffin, 18 N. J. Eq. 104, p. 2540, 2541.
Griffin v. Griffin, 1 Schoales & L. 352, p. 2027.
Griffin v. Hall, 111 Ala. 601, 20 South. 485, 115 Ala. 647, 22 South. 156, p. 1034, 1049.
Griffin v. Harrison, 52 Miss. 824, p. 2749.
Griffin v. Marquardt, 21 N. Y. 121, p. 1858.
Griffin v. Missouri, K. & E. R'y Co., 82 Mo. App. 93, p. 992.
Griffin v. New Jersey Oil Co., 11 N. J. Eq. 49, p. 2383, 2388.
Griffin v. Nitcher, 57 Me. 270, 272, p. 2790, 2791.
Griffin v. Pringle, 56 Ala. 486, p. 2100.
Griffin v. Sketoe, 30 Ga. 300, p. 1652.
Griffin's Ex'r v. Cunningham, 19 Gratt. 571, p. 2774, 2775.
Griffith v. Blackwater B & L. Co., 46 W. Va. 56, 33 S. E. 125, p. 2084.
Griffith v. Brown, 3 Rob. (N. Y.) 627, p. 2709.
Griffith v. Follett, 20 Barb. 620, 634, p. 2066.
Griffith v. Fred Co. Bank, 6 Gill & J. 424, p. 1733.
Griffith v. Griffith, 9 Paige, 315, 317, 1 Hoff. Ch. 153, p. 974, 977, 1007, 1008, 1064, 1072, 1147, 1152, 1346.
Griffith v. Hughes, [1892] 3 Ch. 105, p. 2087.
Griffith v. Milwaukee Harvester Co., 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573, p. 1665, 1667.
Griffith v. Phillips, 3 Grant Cas. 381, p. 2631.
Griffith v. Ricketts, 7 Hare, 299, 307, 311, p. 1854, 1855, 2305, 2312, 2315.
Griffith v. Spratley, 1 Cox, 383, 388, 389, cited 2 Brown Ch. 179, p. 1665, 1666, 1667.
Griffith v. State, 2 Del. Ch. 421, p. 1967, 1973.
Griffith v. Tower Pub. Co., [1897] 1 Ch. 21, p. 2552.
Griffiths v. Cope, 17 Pa. St. 96, p. 1976.
Griffiths v. Evan, 5 Beav. 241, p. 1924.
Griffiths v. Porter, 25 Beav. 236, p. 2059, 2067, 2094.
Griffiths v. Robins, 3 Madd. 191, p. 1671, 1674, 1752.
Griffith's Adm'r v. Griffith, 5 B. Mon. 113, p. 1905, 2144.
Grigby v. Cox, 1 Ves. Sr. 517, p. 183, 2133.
Grigg v. Banks, 59 Ala. 311, p. 2434.
Grigg v. Cocks, 4 Sim. 438, p. 2029.
Grigg v. Landis, 21 N. J. Eq. 494, 514, p. 631, 759.

Grigg v. Swindal, 67 Ala. 187, p. 2753, 2756.
Griggs v. Clark, 23 Cal. 427, p. 2263.
Griggs v. Gibson, L. R. 1 Eq. 685, p. 845, 846, 857.
Griggs v. Staplee, 2 De Gex & S. 572, p. 2165.
Griggs v. Veghte, 47 N. J. Eq. 179, p. 827.
Grigsby v. Breckenridge, 3 Bush, 480, 92 Am. Dec. 509, p. 2688.
Grigsby v. Burtnett, 31 Cal. 406, p. 2686.
Grigsby v. Clear Lake W. Co., 40 Cal. 396, p. 2686.
Grill v. Central Iron, etc. Co., L. R. 11 Com. P. 600, 612, 614, p. 2064.
Grimball v. Cruse, 70 Ala. 534, p. 2099.
Grimes v. Hilliary, 38 Ill. App. 246, p. 250.
Grimes's Ex'rs v. Harmon, 35 Ind. 198, 9 Am. Rep. 690, p. 1962, 1966, 1967, 1974.
Grimstone, Ex parte, Amb. 706, 708, 4 Brown Ch. 235, note, p. 2437, 2619, 2622.
Grimstone v. Carter, 3 Paige, 421, 437, 439, 24 Am. Dec. 230, p. 1032, 1044, 1109, 1116, 1142, 1291, 1348, 1351.
Grindey, In re, [1898] 2 Ch. 593, p. 2065.
Grinnell v. Baxter, 17 Pick. 383, p. 2273.
Grinnell v. Buchanan, 1 Daly, 538, p. 586.
Grinnell v. Cobbold, 4 Sim. 546, p. 298.
Grissell v. Swinhoe, L. R. 7 Eq. 291, 295, p. 775, 782, 787, 793, 809, 813.
Grissler v. Powers, 81 N. Y. 57, 37 Am. Rep. 475, p. 1231, 1443, 1445, 1453.
Grissom v. Hill, 17 Ark. 483, p. 1972.
Gristock v. Royal Ins. Co., 84 Mich. 161, 47 N. W. 549, 87 Mich. 428, 49 N. W. 634, p. 1158.
Griswold v. Bragg, 18 Blatchf. 204, 48 Fed. 519, 520, 48 Conn. 579, p. 501, 2482.
Griswold v. Davis, 31 Vt. 390, 394, p. 1330.
Griswold v. Fuller, 33 Mich. 268, p. 212.
Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380, p. 1421, 1626.
Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999, p. 1486, 1490.
Griswold v. Hazard, 26 Fed. 135, p. 1516.
Griswold v. Mather, 5 Conn. 435, 438, 440, p. 565, 2346.
Griswold v. Smith, 10 Vt. 452, p. 1098, 1148.
Gritton v. McDonald, 3 Met. (Ky.) 252, p. 2500.
Griveson v. Kirsopp, 2 Keen, 653, p. 2309.
Grode v. Van Valen, 25 N. J. Eq. 95, p. 2486.
Groel v. United Electric Co., 132 Fed. 252, p. 2127.
Groenvelt v. Burwell, 1 Ld. Raym. 466, 467, p. 146.
Groesbeck v. Seeley, 13 Mich. 329, p. 2004.
Groff v. State Bank, 50 Minn. 234, 52 N. W. 651, 36 Am. St. Rep. 640, p. 1032.
Grogan v. Grass Valley Trading Co., (Mont.) 76 Pac. 211, p. 2374.
Gross v. Leber, 47 Pa. St. 520, p. 1501.
Gross v. McClaran, 8 Tex. 341, 344, p. 589.
Grosvenor v. Allen, 9 Paige, 74, 76, p. 1188, 1261.
Grosvenor v. Durston, 25 Beav. 97, p. 811, 813.
Grosvenor v. Sherrath, 28 Beav. 659, p. 1671.
Grotenkemper v. Carver, 9 Lea, (77 Tenn.) 280, p. 1329.
Grove v. Hodges, 55 Pa. St. 504, 519, p. 1561.
Grove v. Kase, 195 Pa. St. 325, 45 Atl. 1054, p. 2038.
Grove v. Miles, 58 Ill. 338, 71 Ill. 376, p. 2534.
Grove v. Price, 26 Beav. 103, p. 2057, 2070.
Grover v. Grover, 24 Pick. 261, 35 Am. Dec. 319, p. 2233, 2236.
Grover v. Hale, 107 Ill. 638, p. 1863, 2059.
Grover v. Hugell, 3 Russ. 428, p. 1753, 1754.
Grover v. Thatcher, 4 Gray, 526, p. 1402.
Grover v. Wakeman, 11 Wend. 187, 201, 203, 25 Am. Dec. 624, 4 Paige, 23, p. 1856.

Grover & Baker Sewing Machine Co. v. Radcliff, 63 Md. 496, p. 2147.
Groverman v. Diffenderffer, 11 Gill & J. 15, 22, p. 646.
Groves v. Groves, 3 Younge & J. 163, p. 1999.
Groves v. Osburn, (Oreg.) 79 Pac. 500, p. 2180, 2182.
Groves v. Webber, 72 Ill. 606, p. 2752, 2757.
Groves v. Williams, 69 Ga. 614, p. 2381.
Grove's Trusts, In re, 3 Giff. 575, p. 2174.
Grubb v. Kolb, 55 Ga. 630, p. 1470, 1642.
Grubb v. Sharkey, 90 Va. 831, 20 S. E. 784, p. 344.
Grubbs v. Wisors, 32 Gratt. 127, p. 2534.
Grubb's Appeal, 90 Pa. St. 228, p. 1644.
Gruber v. Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302, p. 2555.
Gruhn v. Richardson, 128 Ill. 178, 21 N. E. 18, p. 2041, 2499, 2519.
Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304, p. 1760, 1761, 1764, 2032.
Grundies v. Reid, 107 Ill. 304, p. 1007, 1099, 1133.
Grymes v. Hone, 49 N. Y. 17, 22, 10 Am. Rep. 313, p. 1222, 2238.
Grymes v. Sanders, 93 U. S. 55, 62, p. 1605, 1628, 1789.
Gschwend v. Estes, 51 Cal. 134, p. 1895.
Guarantee Co. of N. A. v. E. R. T. Co., 96 Ga. 511, 23 S. E. 503, 51 Am. St. Rep. 150, p. 1156.
Gubbins v. Creed, 2 Schoales & L. 214, p. 1734.
Gude v. Worthington, 3 De Gex & S. 389, p. 1890.
Gudger v. Western etc. R. Co., 21 Fed. 81, 84, p. 494.
Guedici v. Boots, 42 Cal. 452, 456, p. 1524, 2722.
Guelich v. Clark, 3 Thomp. & C. 315, p. 2492.
Guerand v. Dandelet, 32 Md. 561, 13 Am. Rep. 164, p. 1690, 2675.
Guerin v. Stacy, 175 Mass. 595, 56 N. E. 892, p. 738.
Guernsey v. Am. Ins. Co., 17 Minn. 104, 108, p. 94, 231, 355, 586, 1524.
Guernsey v. Cook, 120 Mass. 501, p. 1698.
Guernsey v. Powers, 9 Hun, 78, p. 2657.
Guerrant v. Anderson, 4 Rand. 208, p. 1275.
Guerrero v. Ballerino, 48 Cal. 118, p. 2032.
Guess v. Stone Mountain I. & R. Co., 67 Ga. 215, p. 416, 455, 456.
Guest v. Brooklyn, 69 N. Y. 506, 512, 513, p. 403, 433, 2757.
Guest v. Cowbridge R'y, L. R. 6 Eq. 619, p. 2436.
Guest v. Farley, 19 Mo. 147, 149, p. 1828, 1829.
Guest v. Hanfray, 5 Ves. 818, p. 2775.
Guffey v. O'Reiley, 88 Mo. 418, 57 Am. Rep. 424, p. 1435.
Guggenheimer v. Groeschel, 23 S. C. 274, 55 Am. Rep. 20, p. 1790, 1791.
Guice v. Parker, 46 Ala. 616, p. 323.
Guidot v. Guidot, 3 Atk. 254, 256, p. 620, 1853.
Guignard v. Mayrant, 4 Desaus. Eq. 614, p. 879, 918.
Guignon v. First Nat. Bk., 22 Mont. 140, 55 Pac. 1051, 1097, p. 1914, 2020, 2021, 2043.
Guignon v. Union Trust Co., 156 Ill. 135, 47 Am. St. Rep. 186, 40 N. E. 556, p. 2100.
Guild v. Guild, 16 Ala. 121, p. 2633.
Guild v. Hall, 127 Ill. 523, 20 N. E. 665, p. 1739.
Guilfoil v. Arthur, 158 Ill. 600, 41 N. E. 1009, p. 1942, 1955, 1973.
Guion v. Knapp, 6 Paige, 35, 42, 29 Am. Dec. 741, p. 1054, 1055, 1058, 1130, 2447, 2448, 2453, 2455.
Guion v. Trask, 1 De Gex, F. & J. 373, p. 2679.
Guiteau v. Wisely, 47 Ill. 433, p. 1272, 1279.
Gulden v. O'Byrne, 7 Phila. 93, p. 725.
Gulf Coast Canning Co. v. Foster, (Miss.) 17 South. 683, p. 1051.
Gulf, Colorado & S. F. R. Co. v. Gill, 5 Tex. Civ. App. 496, 23 S. W. 142, p. 1011, 1038, 1347.
Gulf, C. & S. F. R. R. Co. v. Schneider, (Tex. Civ. App.) 28 S. W. 260, p. 337.

Gulf, C. & S. F. R. Co. v. Ward, (Tex. Civ. App.) 34 S. W. 328, p. 743.
Gulick v. Ward, 10 N. J. L. 87, 18 Am. Dec. 389, p. 1692.
Gulley v. Macy, 84 N. C. 434, p. 2380.
Gully v. Cregoe, 24 Beav. 185, p. 1921.
Gump's Appeal, 65 Pa. St. 476, p. 1515, 1541, 1550.
Gunby v. Thompson, 56 Ga. 316, p. 2059.
Gunn v. Black, 60 Fed. 151, 8 C. C. A. 534, 19 U. S. App. 477, p. 1761.
Gunn v. Brown, 63 Md. 96, p. 2055.
Gunn v. Harrison, 7 Ala. 585, p. 2746.
Gunnell v. Cockerill, 84 Ill. 319, p. 1862.
Gunnell v. Whitear, L. R. 10 Eq. 664, p. 2058.
Gunnison v. Chicago, M. & St. P. Ry. Co., 117 Fed. 629, p. 1448.
Gunnison v. Erie Dime S. & L. Co., 157 Pa. St. 303, 27 Atl. 747, p. 1994.
Gunnison Gas & W. Co. v. Whitaker, 91 Fed. 191, p. 1715.
Gunster v. Scranton Illum., H. & P. Co., 181 Pa. St. 327, 37 Atl. 550, 59 Am. St. Rep. 650, p. 1174, 1179.
Gunter v. Gunter, 23 Beav. 571, p. 1411.
Gunter v. Janes, 9 Cal. 643, 660-662, p. 2079, 2082.
Gunter v. Williams, 40 Ala. 561, 572, p. 2189.
Gupton v. Gupton, 47 Mo. 37, 47, p. 343, 345, 2772, 2782.
Gurnee v. Maloney, 38 Cal. 85, 99 Am. Dec. 352, p. 2261.
Gurnell v. Gardner, 9 Jur., N. S., 1220, 4 Giff. 626, p. 195, 2561.
Gurney v. Goggs, 25 Beav. 334, p. 2143.
Guthrie v. Quinn, 43 Ala. 561, p. 1436.
Guthrie & Byles's Appeal, 92 Pa. St. 269, p. 2584.
Guy v. Carriere, 5 Cal. 511, p. 1284.
Guy v. Pearkes, 18 Ves. 196, p. 2175.
Guy v. Sharp, 1 Mylne & K. 589, p. 886, 891, 933, 937.
Gwathmeys v. Ragland, 1 Rand. 466, p. 2392, 2396.
Gwin, Estate of, 77 Cal. 313, 19 Pac. 527, p. 841, 844, 855.
Gwynn v. Gwynn, 27 S. C. 525, 4 S. E. 229, p. 2201.
Gwynn v. Gwynn, 31 S. C. 482, 10 S. E. 221, p. 2201.
Gwynn v. Hamilton, 29 Ala. 233, p. 1483.
Gwynn v. Lithbridge, 14 Ves. 585, p. 1519.
Gwynne v. Heaton, 1 Brown Ch. 1, 9, p. 1667, 1745.
Gyett v. Williams, 2 Johns. & H. 429, p. 2790.

H.

Haack v. Weicken, 118 N. Y. 75, 23 N. E. 133, p. 812.
Haag v. Sparks, 27 Ark. 594, p. 181, 574, 581, 2258.
Haas v. Chicago Build. Soc., 89 Ill. 498, p. 2658.
Haas v. Sternbach, 156 Ill. 44, 41 N. E. 51, p. 1154.
Habenicht v. Rawls, 24 S. C. 461, 58 Am. Rep. 268, p. 2201.
Haberdashers' Co. v. Isaac, 3 Jur., N. S., 611, p. 1731.
Haberman's Appeal, 101 Pa. St. 329, p. 2080.
Hablitzel v. Latham, 35 Iowa, 550, p. 2722.
Hack v. Leonard, 9 Mod. 90, p. 759.
Hack v. Norris, 46 Mich. 587, 10 N. W. 104, p. 2034.
Hacker v. Barton, 84 Ill. 313, p. 382, 450, 2685, 2695.
Hacker v. White, 23 Ky. Law Rep. 849, 64 S. W. 446, p. 1078.
Hacker v. White, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. Rep. 945, p. 1278.
Hackett v. Alcock, 1 Call, 463, p. 717.
Hackett v. Baiss, L. R. 20 Eq. 494, p. 2685.
Hackett v. Callender, 32 Vt. 97, 108, 109, p. 1270, 1274.
Hackett v. Moxley, 65 Vt. 71, 25 Atl. 898, p. 2148.
Hackett v. Moxley, 68 Vt. 210, 34 Atl. 949, p. 2319.
Hackett v. Pattle, 6 Madd. 4, p. 1471.
Hackett v. Reynolds, 4 R. I. 512, p. 2540, 2542.
Hackett v. Watts, 138 Mo. 502, 40 S. W. 113, p. 2475, 2477.
Hackey v. Western, [1898] 1 Ch. 351, p. 2066.
Hackley v. Draper, 60 N. Y. 88, 4 Thomp. & C. 614, p. 1639, 2663.

Hackwith v. Damron, 1 T. B. Mon. 235, p. 1145, 1158.
Hadden v. Chorn, 8 B. Mon. 70, p. 1980.
Hadden v. Dandy, 51 N. J. Eq. 154, 32 L. R. A. 625, 26 Atl. 464, p. 1959.
Hadden v. Dooley, 92 Fed. 274, 34 C. C. A. 338, reversing 84 Fed. 80, p. 1176.
Hadden v. Larned, 87 Ga. 634, 13 S. E. 806, p. 1781.
Hadden v. Spader, 20 Johns. 554, 5 Johns. Ch. 280, p. 1079, 2788.
Haddon v. Hemingway, 39 Mich. 615, p. 2749.
Haddon v. Lundy, 59 N. Y. 320, p. 2283.
Hadduck v. Wilmarth, 5 N. H. 181, 20 Am. Dec. 570, p. 1147.
Haden, In re, [1898] 2 Ch. 220, p. 2141.
Haden v. Ivey, 51 Ala. 381, p. 2143, 2147.
Hadley v. Clark, (Idaho) 69 Pac. 319, p. 2411.
Hadley v. Clinton etc. Co., 13 Ohio St. 502, 82 Am. Dec. 454, p. 1609, 1616, 1643.
Hadley v. Fowler, 12 Abb. Pr., N. S., 244, p. 292.
Hadley v. Hopkins Acad., 14 Pick. 240, p. 1979.
Hadley v. London Bank of Scotland, 3 De Gex, J. & S. 63, p. 2671.
Hadley v. McDougall, L. R. 7 Ch. 312, p. 284, 287.
Hadley v. Nash, 69 N. C. 162, p. 2533.
Hadon v. Ware, 15 Ala. 149, p. 1493.
Haescig v. Brown, 34 Mich. 503, p. 2703, 2704.
Haffley v. Maier, 13 Cal. 13, p. 2354.
Hafner v. City of St. Louis, 161 Mo. 34, 61 S. W. 632, p. 1838.
Hafter v. Strange, 65 Miss. 323, 3 South. 190, 7 Am. St. Rep. 659, p. 1031.
Hagaman v. Comm'rs of Cloud County, 19 Kan. 394, p. 2678.
Hagan v. Continental Nat. Bank, (Mo.) 81 S. W. 171, p. 224.
Hagan v. Varney, 147 Ill. 281, 35 N. E. 219, p. 1099.
Hagan v. Walker, 14 How. 29, 33, p. 508, 2788.
Hagar v. Brainerd, 44 Vt. 294, p. 2353.
Hagar v. Buck, 44 Vt. 285, 290, 8 Am. Rep. 368, p. 631, 632, 717, 752, 756, 763, 2557.
Hagen v. Lyndonville Nat. Bk., 70 Vt. 543, 556, 67 Am. St. Rep. 680, 689, 41 Atl. 1046, 1051, p. 337.
Hager v. Buechler, 6 Ill. App. 462, p. 2704.
Hager v. Catlin, 18 Hun, 448, p. 1698.
Hager v. National German-American Bank, 105 Ga. 116, 31 S. E. 141, p. 1156.
Hager v. Reed, 11 Ohio St. 626, 635, p. 570, 587.
Hager v. Shindler, 29 Cal. 47, 55, p. 2753, 2754, 2756.
Hagerty v. White, 69 Wis. 317, 34 N. W. 92, p. 765.
Haggard v. Benson, 3 Tenn. Ch. 268, p. 1983, 2006.
Haggerson v. Phillips, 37 Wis. 364, p. 2677.
Haggerty v. McCanna, 25 N. J. Eq. 48, p. 1510.
Haggerty v. Palmer, 6 Johns. Ch. 437, p. 1331.
Haggett v. Hurley, 91 Me. 542, 40 Atl. 561, 41 L. R. A. 362, p. 2193.
Hagner v. Heyberger, 7 Watts & S. 104, 106, p. 560.
Hagthorp v. Hook's Adm'rs, 1 Gill & J. 270, 272, p. 283, 1050.
Hahl v. Sugo, 61 N. Y. Supp. 770, 46 App. Div. 632, p. 383, 451.
Hahn v. Behrman, 73 Ind. 120, p. 2444, 2447.
Hahn v. Concordia Soc., 42 Md. 460, p. 750, 2675.
Hahn v. Horstman, 12 Bush, 249, p. 729.
Hahn v. Hutchinson, 159 Pa. St. 133, 28 Atl. 167, p. 1846.
Haigh v. Haigh, 3 De Gex, F. & J. 157, p. 1549, 1652, 1653.
Haigh v. Kaye, L. R. 7 Ch. 469, p. 1535, 1658, 1715, 1985, 1986, 2590, 2781.
Haight v. Badgeley, 15 Barb. 499, p. 2773.
Haight v. Brisbin, 96 N. Y. 135, p. 2051.
Haight v. Burr, 19 Md. 130, p. 2653.
Haight v. Hayt, 19 N. Y. 464, 467, p. 1582, 2552.
Haight v. McVegh, 69 Ill. 624, p. 2191.

Haight v. Moore, 37 N. Y. Sup. Ct. 161, p. 1769.
Haight v. Pearson, 11 Utah, 51, 39 Pac. 479, p. 2041.
Hailey v. Ano, 136 N. Y. 569, 32 N. E. 1068, 32 Am. St. Rep. 764, p. 1062, 1072, 1076, 1077.
Haines v. Allen, 78 Ind. 100, 41 Am. Rep. 555, p. 1948.
Haines v. Beach, 3 Johns. Ch. 459, p. 2437.
Haines v. Carpenter, 1 Woods, 262, 269, 270, Fed. Cas. No. 5,905, p. 510, 2658.
Haines v. Elliot, (Conn.) 58 Atl. 718, p. 2107.
Haines v. Haines, 6 Md. 435, p. 1673.
Haines v. Mico, 1 Brown Ch. 129, p. 956.
Haines v. Thomson, 70 Pa. St. 434, p. 2372.
Haines's Appeal, 73 Pa. St. 169, p. 2755.
Hains v. Hains, 69 Mich. 581, 37 N. W. 563, p. 982, 997.
Hair v. Burnell, 106 Fed. 280, p. 1221.
Haire v. Baker, 5 N. Y. 357, p. 1524, 2722.
Halbert v. De Bode, (Tex. Civ. App.) 40 S. W. 1011, p. 1325.
Halbert v. Paddleford, (Tex. Civ. App.) 33 S. W. 592, p. 1330.
Haldane v. Sweet, 55 Mich. 196, 20 N. W. 902, p. 1647.
Haldeman v. Jennings, 14 Ark. 329, p. 743.
Hale v. Allinson, 102 Fed. 790, 791, 792, 188 U. S. 56, 23 Sup. Ct. 244, 250–254, p. 357, 370, 371, 377, 423, 446, 456.
Hale v. Baker, 60 Tex. 217, p. 2524.
Hale v. Clarkson, 23 Gratt. 42, p. 325.
Hale v. Cole, 31 W. Va. 576, 8 S. E. 516, p. 1739.
Hale v. Cushman, 6 Met. 425, p. 543.
Hale v. Darter, 5 Humph. 79, p. 212, 2737.
Hale v. Dressen, 73 Minn. 277, 76 N. W. 31, p. 2018.
Hale v. Hale, 4 Beav. 369, p. 2656.
Hale v. Hale, 4 Humph. 183, p. 2800.
Hale v. Hale, 125 Ill. 399, 17 N. E. 470, p. 2311.
Hale v. Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247, p. 1919, 2620.
Hale v. Hollon, 90 Tex. 427, 39 S. W. 287, 59 Am. St. Rep. 819, 36 L. R. A. 75, p. 2574.
Hale v. Hollon, 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288, p. 193.
Hale v. Omaha Nat. Bank, 49 N. Y. 626, 64 N. Y. 550, p. 2470, 2474.
Hale v. Stery, 7 Colo. App. 165, 42 Pac. 598, p. 1732.
Hale v. Stone, 14 Ala. 803, p. 1515, 2144.
Hale v. Tyler, 115 Fed. 833, p. 508, 511.
Hale v. Warner, 36 Ark. 217, p. 1065, 1068, 1076.
Hale v. Webb, 2 Brown Ch. 78, p. 1471.
Hale v. Wilkinson, 21 Gratt. 75, 80, p. 1666, 1669, 2767, 2774.
Hales v. Cox, 22 Beav. 118, p. 2786.
Hales v. Darell, 3 Beav. 324, 332, p. 874, 877.
Hales v. Holland, 92 Ill. 494, p. 2266, 2267.
Hales v. Thompson, 1 Smedes & M. 443, p.
Haley v. Bagley, 37 Mo. 363, p. 2752.
Haley v. Bennett, 5 Port. 452, p. 2498.
Halff v. O'Connor, 14 Tex. Civ. App. 191, 37 S. W. 238, p. 748.
Halford v. Stains, 16 Sim. 488, p. 1988.
Halifax Guardians v. Wheelwright, L. R. 10 Ex. 183, p. 1423, 1442.
Hall, Ex parte, L. R. 10 Ch. Div. 615, p. 2566.
Hall, Ex parte, 7 Ves. 261, 264, p. 1726.
Hall, In re, 48 App. Div. 488, 62 N. Y. Supp. 888, p. 2071.
Hall, In re, 7 L. R. Ir. 180, p. 1213.
Hall v. Arnot, 80 Cal. 348, 22 Pac. 200, p. 651, 2354, 2381.
Hall v. Buffalo, 2 Abb. App. 301, p. 2561, 2584.
Hall v. Byron, L. R. 4 Ch. Div. 667, p. 2695.
Hall v. Cannte, 22 Ala. 650, p. 564.
Hall v. Carter, 8 Ga. 388, p. 2096.
Hall v. Christy, 8 Nebr. 264, p. 2195.
Hall v. Clagett, 2 Md. Ch. 151, 153, p. 1517, 1524.
Hall v. Cole, (Ark.) 76 S. W. 1076, p. 2258.
Hall v. Crouse, 13 Hun, 557, p. 2383.

Hall v. Crowley, 5 Allen, 304, 81 Am. Dec. 745, p. 747.
Hall v. Delaplaine, 3 Wis. 206, 68 Am. Dec. 57, p. 345.
Hall v. Dotson, 55 Tex. 520, p. 2198.
Hall v. Edwards, 43 Mich. 473, p. 2447, 2453, 2454.
Hall v. Erwin, 66 N. Y. 649, p. 1242.
Hall v. Farmers & Merchants' Bank, 145 Mo. 418, 46 S. W. 1000, p. 1901.
Hall v. First Nat. Bank, 173 Mass. 16, 53 N. E. 154, 73 Am. St. Rep. 255, 44 L. R. A. 319, p. 1505, 1507.
Hall v. Fisher, 9 Barb. 17, 31, p. 1436, 1756.
Hall v. Gambril, 92 Fed. 321, 63 U. S. App. 751, 34 C. C. A. 190, p. 506.
Hall v. Gardner, 71 Me. 233, p. 2434.
Hall v. Griffin, 119 Ala. 214, 24 South. 27, p. 1273.
Hall v. Hall, 3 Atk. 721, p. 2617.
Hall v. Hall, 1 Bland, 130, 135, p. 785, 790.
Hall v. Hall, 1 Dru. & War. 94, p. 876.
Hall v. Hall, 1 Gill, 383, 391, p. 1651.
Hall v. Hall, 37 L. J. P. & M. 40, L. R. 1 P. & M. 481, p. 1737.
Hall v. Hall, 2 McCord Eq. 269, 280, 299, 306, p. 807, 848, 849.
Hall v. Hall, 3 Macn. & G. 79, p. 2656.
Hall v. Hall, 78 N. Y. 535, p. 2099.
Hall v. Hardy, 3 P. Wms. 187, p. 2764.
Hall v. Hall, 8 Rich. 407, 64 Am. Dec. 758, p. 832.
Hall v. Hall, 41 S. C. 163, 19 S. E. 305, 44 Am. St. Rep. 696, p. 2372.
Hall v. Heirs of Wilson, 14 Ala. 295, p. 2258.
Hall v. Hickman, 2 Del. Ch. 318, p. 1230.
Hall v. Hiles, 2 Bush, 532, p. 2765.
Hall v. Hill, Dru. & War. 94, 103, 114, 115, 133, 1 Con. & L. 129, p. 833, 835, 837, 891, 924, 931, 933, 934, 939, 946, 2001.
Hall v. Jenkinson, 2 Ves. & B. 125, p. 2659.
Hall v. Joiner, 1 S. C. (1 Rich., N. S.) 186, 190, p. 67, 148. 214, 228, 229, 466, 468, 564, 571, 2765.
Hall v. Jones, 21 Md. 439, p. 192, 2500, 2528.
Hall v. Kellogg, 16 Mich. 135, p. 2749.
Hall v. Lance, 25 Ill. 277, p. 2347.
Hall v. Lietch, L. R. 9 Eq. 376, p. 1544.
Hall v. Livingston, 3 Del. Ch. 348, 402–406, p. 994, 1900.
Hall v. Lover, 1 Hare, 571, p. 2103.
Hall v. McCormick, 31 Minn. 280, 17 N. W. 620, p. 2393.
Hall v. McDuff, 24 Me. 311, p. 1127.
Hall v. Morgan, 79 Mo. 47, p. 2440.
Hall v. Naylor, 18 N. Y. 588, 75 Am. Dec. 269, p. 1609.
Hall v. Otterson, 52 N. J. Eq. 522, 28 Atl. 907, p. 1495, 1781.
Hall v. Palmer, 3 Hare, 532, p. 667, 669.
Hall v. Perkins, 3 Wend. 626, p. 1671.
Hall v. Potter, Show. Parl. C. 76, 3 Lev. 411, p. 1677.
Hall v. Purnell, 2 Md. Ch. 137, p. 1232.
Hall v. Read, 28 Tex. Civ. App. 18, 66 S. W. 809, p. 1103, 1126.
Hall v. Reed, 2 Barb. Ch. 500, 1478, 1487, 1490.
Hall v. Sauntry, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497, p. 1273.
Hall v. Savill, 3 G. Greenc, 37, 54 Am. Dec. 485, p. 2358.
Hall v. Short, 81 N. C. 273, p. 2196.
Hall v. Smith, 61 N. H. 144, p. 2228.
Hall v. Smith, 14 Ves. 426, p. 1053.
Hall v. Stryker, 27 N. Y. 596, p. 2791.
Hall v. Theisen, 9 Pac. C. L. J. 479, p. 2757.
Hall v. Thompson, 23 Hun, 334, p. 2493, 2494.
Hall v. Warren, 9 Ves. 605, p. 1833.
Hall v. Waterhouse, 5 Giff. 64, 11 Jur., N. S., 361, p. 2149, 2150.
Hall v. Wescott, 15 R. I. 373, 5 Atl. 629, p. 2400.
Hall v. Wesster, 7 Mo. App. 56, p. 2673, 2676.
Hall v. Wheeler, 37 Minn. 522, 35 N. W. 377, p. 1501.
Hall v. Whiston, 5 Allen, 126, p. 310, 2753, 2757.
Hall v. Whittier, 10 R. I. 530, p. 2776, 2777, 2780.
Hall v. Williams, 120 Mass. 344, p. 1845.
Hall v. Wilson, 14 Ala. 295, p. 335, 580.
Hall v. Yahoka R. Min. Co., 1 Woods, 547, Fed. Cas. No. 5,955, p. 501.

Hall v. Young, 37 N. H. 134, p. 1993.
Hallam v. Telleren, 55 Nebr. 255, 75 N. W. 560, p. 2403.
Hallatt's Trusts, Re, 18 Wkly. Rep. 416, Ames' Cas. on Trusts, 221, p. 2109.
Halle v. Einstein, 34 Fla. 589, 16 South. 554, p. 2191.
Halle v. Meinhard, 34 Fla. 607, 16 South. 559, p. 2191.
Halle v. Newbold, 69 Md. 265, 14 Atl. 662, p. 1199.
Hallenbeck v. Rogers, 57 N. J. Eq. 199, 40 Atl. 576, 58 N. J. Eq. 580, 43 Atl. 1098, p. 1998.
Hallett v. Cumston, 110 Mass. 32, p. 543, 2800.
Hallett v. Fish, 120 Fed. 986, p. 1781.
Hallett v. Middleton, 1 Russ. 243, p. 2772.
Hallett v. Parker, 69 N. H. 134, 39 Atl. 583, p. 1994.
Hallett v. Thompson, 5 Paige, 583, p. 1840.
Hallett v. Wylie, 3 Johns. 44, 3 Am. Dec. 457, p. 1460.
Hallett's Estate, In re, 13 Ch. Div. 696, p. 2016, 2019, 2020, 2021, 2023, 2029, 2032.
Halley v. Ball, 66 Ill. 250, p. 2191.
Halley v. Oldham, 5 B. Mon. (Ky.) 233, 41 Am. Dec. 262, p. 1191, 1276.
Hall Lumber Co. v. Gustin, 54 Mich. 624, 20 N. W. 616, p. 1065, 1066, 1074.
Halloran v. Holmes, (N. Dak.) 101 N. W. 310, p. 1202.
Hallorn v. Trum, 125 Ill. 247, 17 N. E. 823, p. 1065, 1067, 1079.
Halloway v. Platner, 20 Iowa, 121, 89 Am. Dec. 517, p. 1277, 1381.
Hallowell Sav. Inst. v. Titcomb, 96 Me. 62, 51 Atl. 249, p. 1866.
Hallows v. Fernie, L. R. 3 Ch. 467, 475, 3 Eq. 520, p. 1453, 1567, 1573.
Halls v. Thompson, 1 Smedes & M. 443, p. 1618.
Hall's Appeal, 112 Pa. St. 54, p. 558.
Hall's Case, 1 Bland, 203, 17 Am. Dec. 275, p. 820.
Hall's Estate, In re, L. R. 9 Eq. 179, p. 2736.
Hall's Heirs v. Hall, 2 Root, 383, p. 1098.
Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877, p. 1097, 1839.
Halsell v. Wise Co. Coal Co., 19 Tex. Civ. App. 564, 47 S. W. 1017, p. 1907, 2039.
Halsey v. Brotherhood, L. R. 19 Ch. Div. 386, 15 Ch. Div. 514, p. 2695.
Halsey v. Convention of Protestant Episcopal Church, 75 Md. 275, 23 Atl. 781, p. 1971.
Halsey v. Grant, 13 Ves. 73, 77, p. 2775.
Halsey v. Reed, 9 Paige, 446, p. 1409, 2405, 2413, 2451.
Halsey v. Whitney, 4 Mason, 206, 227–230, p. 1857.
Halsman v. Boiling Springs etc. Co., 14 N. J. Eq. 335, p. 2686.
Halstead v. Bank of Kentucky, 4 J. J. Marsh. 554, 558, p. 1114, 1130, 1327, 1346, 1348, 1393.
Halstead v. Gordon, 34 Barb. 422, p. 1858.
Halstead v. Swartz, 1 Thomp. & C. 559, p. 2462.
Halstead v. Westervelt, 41 N. J. Eq. 100, 3 Atl. 270, p. 1845.
Halsted v. Davison, 10 N. J. Eq. 290, p. 2788.
Halsted v. Rabb, 8 Port. 63, p. 2800.
Halverson v. Brown, 75 Iowa, 702, 38 N. W. 123, p. 1344, 1345, 1384.
Ham v. Ham, 58 N. H. 70, p. 2045.
Hamaker v. Schroers, 49 Mo. 406, p. 729, 746.
Hamberlin v. Terry, 7 How. (Miss.) 143, p. 1635, 2277.
Hamblen v. Folts, 70 Tex. 132, 7 S. W. 834, p. 2503.
Hamblett v. Hamblett, 6 N. H. 333, p. 787, 815, 820.
Hamblin v. Bishop, 41 Fed. 74, p. 1482, 1665.
Hamblin v. Dinneford, 2 Edw. Ch. 529, p. 2773.
Hambro v. Hambro, [1894] 2 Ch. 565, p. 2486.
Hambrook v. Smith, 17 Sim. 209, p. 275.
Hamer v. Sidway, 124 N. Y. 538, 550, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693, Ames' Cas. on Trusts, 33, p. 1912.
Hamersley v. Lambert, 2 Johns. Ch. 509, 510, p. 683.

Hamersley v. Smith, 4 Whart. 126, p. 2159, 2161.
Hamet v. Dundass, 4 Pa. St. 178, p. 1668, 2377.
Hamilton, In re, [1895] 2 Ch. 373, p. 1925.
Hamilton v. Batlin, 8 Minn. 403, 83 Am. Dec. 787, p. 2729.
Hamilton v. Bishop, 8 Yerg. 33, 29 Am. Dec. 107, p. 2139, 2144.
Hamilton v. Brooks, 51 Tex. 142, p. 2198.
Hamilton v. Buckwalter, 2 Yeates, 389, 392, 1 Am. Dec. 350, p. 820, 830.
Hamilton v. City of Fond du Lac, 25 Wis. 490, p. 2757.
Hamilton v. Clarion, M. & P. R. Co., 144 Pa. St. 34, 23 Atl. 53, 13 L. R. A. 779, p. 2286.
Hamilton v. Cummings, 1 Johns. Ch. 517, p. 224, 310, 311, 312, 517, 542, 2707, 2728, 2730.
Hamilton v. Dobbs, 19 N. J. Eq. 227, p. 2427.
Hamilton v. Dooly, 15 Utah, 280, 49 Pac. 769, p. 1754, 2086.
Hamilton v. Fowlkes, 16 Ark. 340, p. 1099.
Hamilton v. Gilbert, 2 Heisk. 680, p. 2521.
Hamilton v. Hall, 111 Mich. 291, 67 N. W. 484, p. 1911.
Hamilton v. Hamilton, [1892] 1 Ch. 396, p. 781, 846.
Hamilton v. Hamilton, 89 Ill. 349, p. 1701.
Hamilton v. Hamilton, (Ind.) 70 N. E. 535, p. 1666.
Hamilton v. Hamilton, 59 Mo. 232, p. 345, 2782.
Hamilton v. Hamilton, 2 Rich. Eq. 355, 46 Am. Dec. 58, p. 1692.
Hamilton v. Hector, L. R. 6 Ch. 701, p. 2676.
Hamilton v. Ingram, 13 Tex. Civ. App. 604, 35 S. W. 748, p. 1028.
Hamilton v. Johnston, 82 Ill. 39, p. 2793.
Hamilton v. Marks, 5 De Gex & S. 638, p. 2637, 2647, 2649.
Hamilton v. McKinney, 52 W. Va. 317, 43 S. E. 83, p. 1899.
Hamilton v. Nott, L. R. 16 Eq. 112, p. 277.
Hamilton v. Nutt, 34 Conn. 501, p. 1054, 1144, 1358.
Hamilton v. Overton, 6 Blackf. 206, 38 Am. Dec. 136, p. 727.
Hamilton v. Rogers, 8 Md. 301, p. 2576.
Hamilton v. Royse, 2 Schoales & L. 315, 327, p. 1166.
Hamilton v. Steele, 22 W. Va. 348, p. 1998, 2001.
Hamilton v. Traber, 78 Md. 26, 44 Am. St. Rep. 258, 27 Atl. 229, p. 2622.
Hamilton v. Watson, 12 Clark & F. 109, p. 1622.
Hamilton v. Whitridge, 11 Md. 128, 69 Am. Dec. 184, p. 2683.
Hamilton v. Wickson, 131 Mich. 71, 90 N. W. 1032, p. 2004.
Hamilton v. Wood, 55 Minn. 482, 57 N. W. 208, p. 1715.
Hamilton v. Worsefold, 10 Ves. 290, p. 2693.
Hamilton v. Wright, 9 Clark & F. 111, 123, 125, p. 1753, 1757.
Hamilton's etc. Iron Works, In re, L. R. 12 Ch. Div. 707, 710, 711, p. 1266.
Hamlin v. Hamlin, 19 Me. 141, p. 1849.
Hamlin v. Sears, 82 N. Y. 327, p. 1436, 1443.
Hamm v. J. Stone & Sons Live Stock Co., 13 Tex. Civ. App. 414, 35 S. W. 427, p. 217.
Hamman v. Keigwin, 39 Tex. 34, p. 1322, 1337.
Hammatt v. Emerson, 27 Me. 308, 326, 46 Am. Dec. 598, p. 1559, 1582, 1583.
Hammell v. Hyatt, 59 N. J. Eq. 174, 44 Atl. 953, p. 1730, 1738.
Hammersley v. De Biel, 12 Clark & F. 45, p. 1561, 2591.
Hammond v. Corbett, 51 N. H. 311, p. 2195.
Hammond v. Fuller, 1 Paige, 197, p. 2686.
Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727, p. 1228, 1229.
Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. Rep. 418, 36 L. ed. 134, p. 2086.
Hammond v. Hudson River etc. Co., 20 Barb. 378, p. 2788.
Hammond v. Messenger, 9 Sim. 327, 332, p. 469, 545, 2549, 2557.

Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321, p. 1065, 1069, 1070, 1081.
Hammond v. Pennock, 61 N. Y. 145, 151, 152, p. 1583, 1639, 2034.
Hammond v. Perry, 38 Iowa, 217, p. 2714, 2722.
Hammond v. Peyton, 34 Minn. 529, 27 N. W. 72, p. 2497, 2501, 2505, 2510, 2520.
Hammond v. Smith, 33 Beav. 452, p. 874.
Hammonds v. Barclay, 2 East, 227, 235, p. 2466.
Hammontree v. Lott, 40 Mich. 190, p. 2749.
Hampden v. Hampden, 3 Brown Parl. C. 550, p. 1654.
Hampden v. Rice, 24 Conn. 350, p. 1972.
Hampshire v. Bradley, 2 Coll. C. C. 34, p. 2054.
Hampshire Land Co., In re, [1896] 2 Ch. 743, p. 1160.
Hampson v. Edelen, 2 Harr. & J. 64, 66, 3 Am. Dec. 530, p. 621, 1269.
Hampson v. Fall, 64 Ind. 382, p. 1992, 2005, 2006, 2715, 2722.
Hampton v. Levy, 1 McCord Ch. 107, 111, p. 1271.
Hampton & Branchville R. & L. Co. v. Bank of Charleston, 48 S. C. 120, 26 S. E. 238, p. 1228, 1229.
Hampton Lumber Co. v. Ward, 95 Fed. 3, p. 508, 1119.
Hanauer v. Doane, 12 Wall, 342, p. 1696.
Hanauer v. Woodruff, 15 Wall. 439, p. 1696.
Hanbury, In re, [1904] 1 Ch. 415, p. 1926.
Hanbury v. Kirkland, 3 Sim. 265, p. 2095.
Hanberger v. Root, 5 Pa. St. 108, p. 909.
Hanbury v. Hanbury, 2 Brown Ch. 352, p. 920.
Hanbury v. Litchfield, 2 Mylne & K. 629, 633, p. 1001, 1004, 1008, 1025, 1033, 1045, 1047.
Hance v. Truwhitt, 2 Johns. & H. 216, p. 806.
Hanchett v. Briscoe, 22 Beav. 496, p. 2150.
——— v. Hancock, 17 Ves. 384, p. 1833.
Hancock v. Bramlett, 85 N. C. 393, p. 2771, 2775.
Hancock v. Carlton, 6 Gray, 39, p. 717, 753, 757.
Hancock v. Hancock, 22 N. Y. 568, p. 1402, 1403.
Hancock v. Harper, 86 Ill. 445, p. 2380.
Hancock v. McAvoy, 151 Pa. St. 439, 25 Atl. 48, p. 1051, 1052, 1056.
Hancock v. Titus, 33 Miss. 224, p. 701.
Hancock v. Twyman, 19 Ky. Law Rep. 2006, 45 S. W. 68, p. 1844.
Hancock Bank v. Joy, 41 Me. 568, p. 2193.
Hancock's Appeal, 34 Pa. St. 155, p. 2393.
Hand v. Dexter, 41 Ga. 454, p. 2653, 2654, 2660.
Handley v. Hiffin, 84 Ala. 600, 4 South. 725, p. 246, 247, 250, 259.
Handley v. Palmer, 103 Fed. 39, 43 C. C. A. 100, affirming 91 Fed. 948, p. 1946, 1954, 1976.
Handley v. Pfister, 39 Cal. 283, 2 Am. Rep. 449, p. 1895.
Handley v. Wrightson, 60 Md. 198, p. 1930.
Handley's Ex'r v. Fitzhugh, 1 A. K. Marsh. 24, p. 224.
Handy v. Noonan, 51 Miss. 166, p. 1448, 2749.
Haney v. Legg, 129 Ala. 619, 30 South. 38, 87 Am. St. Rep. 81, p. 697, 1996, 2024.
Hanford v. Blessing, 80 Ill. 188, p. 2373.
Hanington v. Du Chatel, 1 Brown Ch. 124, p. 1697.
Hank v. Van Ingen, 196 Ill. 20, 63 N. E. 705, p. 2022.
Hankinson v. Barbour, 29 Ill. 80, p. 998.
Hanlan v. Doherty, 109 Ind. 37, 9 N. E. 782, p. 1402.
Hanley v. Beatty, 117 Fed. 59, p. 503.
Hanley v. Morse, 32 Me. 287, p. 1146.
Hanley v. Pearson, L. R. 13 Ch. Div. 545, p. 1543, 2727.
Hanley v. Sweeny, 109 Fed. 712, 48 C. C. A. 612, p. 662.
Hanley v. Watterson, 39 W. Va. 214, 19 S. E. 536, p. 352.
Hanley v. Wetmore, 15 R. I. 386, 6 Atl. 777, p. 264.
Hanlon v. Wilson, 10 Nebr. 138, p. 2780.

Hanly v. Morse, 32 Me. 287, p. 1044, 1101.
Hann v. Stoler, 208 Pa. St. 610, 57 Atl. 1115, p. 2241.
Hanna v. Clark, 204 Pa. St. 145, 53 Atl. 757, p. 2099.
Hanna v. Galford, (W. Va.) 47 S. E. 359, p. 2292.
Hanna v. McLaughten, 158 Ind. 292, 63 N. E. 475, p. 2029.
Hanna v. Reeves, 22 Wash. 6, 60 Pac. 62, p. 150, 213, 354.
Hanna v. Spotts, 5 B. Mon. 362, 43 Am. Dec. 132, p. 1773, 1776.
Hanna v. Wilcox, 53 Iowa, 547, 5 N. W. 717, p. 1781.
Hannah v. Hodgson, 30 Beav. 19, 25, p. 1725, 1778.
Hannam v. South London W. Co., 2 Mer. 61, p. 755, 1466.
Hannan v. Seidentopf, 113 Iowa, 658, 659, 86 N. W. 44, p. 1022, 1033, 1048, 1338, 1343, 1356.
Hanneman v. Richter, 62 N. J. Eq. 365, 50 Atl. 904, p. 271.
Hanner v. Moulton, 138 U. S. 486, 11 Sup. Ct. 408, p. 1451, 1647.
Hannon v. Madden, 10 Bush, 664, p. 2192.
Hannon v. Maxwell, 31 N. J. Eq. 318, p. 2710.
Hanold v. Kays, 64 Mich. 439, 31 N. W. 420, 8 Am. St. Rep. 835, p. 1329.
Hanrick v. Gurley, (Tex. Civ. App.) 48 S.W. 994, p. 1068, 1324, 1342, 2018.
Hansard v. Robinson, 7 Barn. & C. 90, p. 1463.
Hansborough v. Hooe, 12 Leigh, (Va.) 322, p. 894.
Hansen v. Berthelson, 19 Nebr. 433, 27 N. W. 423, p. 1738.
Hansen v. Klicka, 78 Ill. App. 177, p. 1067.
Hanson v. Edgerly, 29 N. H. 343, p. 1609, 1613, 1616, 1618.
Hanson v. Gardiner, 7 Ves. 305, 309, 310, p. 362, 382, 450, 2692.
Hanson v. Johnson, 20 Minn. 194, p. 2757.
Hanson v. Keating, 4 Hare, 1-6, p. 638, 643, 645, 649, 2170.
Hanson v. Little Sisters of the Poor of Baltimore, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293, p. 1971.
Hanson v. Millett, 55 Me. 184, p. 2193.
Hanson v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215, p. 407, 408.
Hapgood v. Blood, 11 Gray, 400, p. 2349.
Harang v. Plattsmier, 21 La. Ann. 426, p. 1111.
Harbaugh v. Hohn, 52 Ind. 243, p. 1641, 1652.
Harbert's Case, 3 Coke, 11b, p. 2444.
Harbidge v. Wogan, 5 Hare, 258, p. 1887.
Harbin v. Masterman, [1894] 2 Ch. 184, p. 1851.
Harbison v. Lemon, 3 Blackf. 51, 23 Am. Dec. 376, p. 1733.
Harcourt v. Knowel, cited in 2 Vern. 159, p. 1365.
Harcourt v. Seymour, 2 Sim., N. S., 12, 45, 46, p. 185, 620, 621, 2333.
Hardaway v. Semmes, 24 Ga. 305, p. 1104.
Hardee v. Howard, 33 Ga. 533, 83 Am. Dec. 176, p. 730, 735.
Hardeman v. Battersby, 53 Ga. 36, 38, p. 229, 464, 1464.
Harden v. Darwin, 66 Ala. 55, p. 2001.
Hardenbergh v. Bacon, 33 Cal. 356, 377, p. 1761.
Hardenburgh v. Blair, 30 N. J. Eq. 645, p. 1845.
Hardesty v. Richardson, 44 Md. 617, 22 Am. Rep. 57, p. 2769.
Hardesty v. Taft, 23 Md. 512, 530, 87 Am. Dec. 584, p. 308, 2628.
Hardie v. Bulger, 66 Miss. 577, 6 South. 186, p. 424.
Hardie Tynes Foundry Co. v. Glen Allen Oil Mill, (Miss.) 36 South. 262, p. 730, 739.
Hardigree v. Mitchum, 51 Ala. 151, p. 1482, 1494.
Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. ed. 1141, p. 2533.
Hardin v. Emmons, 24 Nev. 329, 53 Pac. 854, p. 1265.
Hardin v. Harrington, 11 Bush, 367, p. 1145, 1322, 1337, 1344, 1373.
Hardin v. Helton, 50 Ind. 319, p. 2550.
Hardin v. Hyde, 40 Barb. 435, p. 2402, 2411.
Hardin v. Jones, 86 Ill. 313, p. 2748.
Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 608, 74 Am. St. Rep. 189, p. 1065, 2124, 2127.

Harding v. Fuller, 141 Ill. 308, 30 N. E. 1053, p. 351.
Harding v. Glyn, 1 Atk. 469, 2 Lead. Cas. Eq., 4th Am. ed., 1833, 1834–1848, 1857–1866, p. 687, 1461, 1889, 1925, 1930.
Harding v. Grady, 1 Dru. & War. 430, p. 2489.
Harding v. Guice, 80 Fed. 162, 42 U. S. App. 411, p. 504.
Harding v. Handy, 11 Wheat. 103, p. 1728, 1729.
Harding v. Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775, p. 1512, 1513, 1514, 1515, 1516.
Harding v. Pingey, 10 Jur., N. S., 872, p. 2434.
Harding v. Randall, 15 Me. 332, p. 1567, 1583.
Harding v. Seeley, 148 Pa. St. 20, 23 Atl. 1118, p. 1028.
Harding v. Shepard, 107 Ill. 264, p. 2266.
Harding v. Wickham, 2 Johns. & H. 676, p. 1653.
Hardinge v. Webster, 1 Drew. & S. 101, p. 307.
Hardingham v. Nicholls, 3 Atk. 304, p. 1323, 1333.
Hardingham v. Thomas, 2 Drew. 353, p. 880, 914.
Hardman v. Orr, 5 W. Va. 71, p. 1899.
Hardoon v. Belilos, [1901] App. Cas. 118, p. 2101.
Hardwick v. Forbes's Adm'r, 1 Bibb, 212, p. 1637.
Hardwick v. Hardwick, L. R. 16 Eq. 168, p. 1544.
Hardy, Ex parte, 30 Beav. 206, p. 2314.
Hardy, In re, 17 Ch. Div. 798, p. 2225.
Hardy v. Beverly Sav. Bank, 175 Mass. 112, 55 N. E. 811, 78 Am. St. Rep. 479, p. 2453.
Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325, p. 1176.
Hardy v. Dyas, 203 Ill. 211, 67 N. E. 852, p. 1672.
Hardy v. Harbin, 4 Saw. 536, p. 1147.
Hardy v. Holly, 84 N. C. 661, p. 2141, 2153, 2154.
Hardy v. Martin, 1 Brown Ch. 419, note, 1 Cox, 26, p. 717, 721, 722, 749.
Hardy v. Mills, 35 Wis. 141, p. 2741.
Hardy v. Reeves, 4 Ves. 466, 480, p. 2429.
Hardy v. Reeves, 5 Ves. 426, p. 1019.
Hardy v. Scales, 54 Wis. 452, 11 N. W. 590, p. 825.
Hardy v. Stone, 23 Ind. 597, p. 2719.
Hardy v. Summers, 10 Gill & J. 316, 32 Am. Dec. 167, p. 1044.
Hare, Ex parte, L. R. 10 Ch. 218, p. 2662.
Hare v. Grant, 77 N. C. 203, p. 2793.
Hare v. London etc. R'y, 2 Johns. & H. 80, p. 2118.
Hare v. Murphy, 45 Nebr. 809, 64 N. W. 211, 29 L. R. A. 851, p. 2414.
Hare v. Shearwood, 3 Brown Ch. 168, p. 1506.
Hare v. Van Duesen, 32 Barb. 92, p. 2502, 2509.
Harford's Trusts, In re, L. R. 13 Ch. Div. 135, p. 2109.
Hargadine v. Henderson, 97 Mo. 375, 11 S. W. 218, p. 2379.
Hargadine-McKittrick Dry Goods Co. v. Krug, (Nebr.) 96 N. W. 286, p. 1161.
Hargrave v. King, 5 Ired. Eq. 430, p. 1764.
Hargreaves v. Korcek, 44 Nebr. 660, 62 N. W. 1086, p. 1735.
Hargreaves v. Rothwill, 1 Keen, 154, 159, p. 1168.
Harkins v. Hughes, 60 Ala. 316, p. 2489.
Harkinson's Appeal, 78 Pa. St. 196. 21 Am. Rep. 9, p. 2675.
Harkness v. B'd of Pub. Works, 1 McAr. 121, 127–133, p. 403, 433, 434, 438.
Harkness v. Fraser, 12 Fla. 336, 341, p. 1752.
Harkness & Allsopp's Contract, In re, [1896] 2 Ch. 358, p. 2138.
Harkrader v. Leiby, 4 Ohio St. 602, p. 2351.
Harlan v. Sweeny, 1 Lea, 682, p. 2796.
Harlan v. Wingate's Adm'r, 2 J. J. Marsh. 139, 140, p. 466.
Harland v. Trigg, 1 Brown Ch. 142, p. 1925.
Harle v. Jarman, [1895] 2 Ch. 419, p. 845, 846.
Harle v. Langdon's Heirs, 60 Tex. 555, 562, p. 1071.

Harley v. Moon, 1 Drew. & S. 623, p. 2224.
Harlow v. Bartlett, 96 Me. 294, 52 Atl. 638, 90 Am. St. Rep. 346, p. 2562.
Harman v. Gurnes, 35 Beav. 478, p. 1548.
Harman v. May, 40 Ark. 146, p. 2380.
Harman v. Remsen, 23 How. Pr. 174, p. 2716.
Harman v. Richards, 10 Hare, 81, 89, p. 1793, 1796.
Harmer v. Gwynne, 5 McLean, 313, 315, 317, Fed. Cas. No. 6,075, p. 364, 385, 452, 503.
Harmon v. Short, 8 Smedes & M. 433, p. 2349.
Harmood v. Oglander, 8 Ves. 106, 124, 125, p. 2222.
Harms v. Coryell, 177 Ill. 496, 53 N. E. 87, p. 1031, 1383.
Harms v. Jacobs, 160 Ill. 589, 43 N. E. 745, p. 1075.
Harms v. Parsons, 32 Beav. 328, p. 1688, 1690.
Harnett v. Baker, L. R. 20 Eq. 50, p. 1440, 1585, 1598.
Harnett v. Macdougall, 8 Beav. 187, p. 2157.
Harnett v. Yielding, 2 Schoales & L. 548, 549, 553, 554, p. 1518, 2761, 2770.
Harney v. Breeden, (Va.) 42 S. E. 916, p. 1434.
Harney v. Charles, 45 Mo. 157, p. 1494.
Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221, p. 1193, 1267, 1269, 1272, 1276, 1324.
Harney v. Indianapolis etc. R. R. Co., 32 Ind. 244, 247, 248, p. 408.
Harnsbarger's Adm'r v. Kinney, 13 Gratt. 511, p. 2703.
Harp v. Calahan, 46 Cal. 222, p. 2354.
Harper v. Bibb, 47 Ala. 547, p. 2216.
Harper v. Clayton, 84 Md. 356, 35 Atl. 1083, 35 L. R. A. 211, 57 Am. St. Rep. 407, p. 49.
Harper v. Ely, 56 Ill. 179, p. 725.
Harper v. Ely, 70 Ill. 581, p. 2347, 2428, 2434.
Harper v. Harper, 85 Ky. 160, 7 Am. St. Rep. 579, 583 and note, 3 S. W. 5, p. 672, 1718.
Harper v. Hayes, 2 De Gex, F. & J. 542, p. 2056, 2065.
Harper v. Perry, 28 Iowa, 57, p. 1771.
Harper v. Phelps, 21 Conn. 257, p. 1927.
Harper v. Reno, 1 Freem. Ch. 323, p. 1114.
Harper v. Tidholm, 155 Ill. 370, 40 N. E. 575, p. 765.
Harper v. Whitehead, 33 Ga. 138, p. 1642.
Harper's Appeal, 64 Pa. St. 315, p. 2227, 2369, 2376, 2430, 2431.
Harpham v. Shacklock, L. R. 19 Ch. Div. 207, p. 1288, 1289.
Harral v. Gray, 10 Nebr. 186, 188, 189, p. 1102, 2749, 2752.
Harrall, In re, 31 N. J. Eq. 101, p. 2612, 2624.
Harraway v. Harraway, 136 Ala. 499, 34 South. 836, p. 1781.
Harrell v. Harrell, 117 Ind. 94, 19 N. E. 621, p. 2192.
Harrer v. Wallner, 80 Ill. 197, p. 2191.
Harrigan v. Gilchrist, (Wis.) 99 N. W. 909, 933, 981, p. 118, 702, 2474.
Harrington v. Allen, 48 Miss. 493, p. 1111, 1358.
Harrington v. Bigelow, 11 Paige, 349, p. 667, 1703, 1712.
Harrington v. Brewer, 56 Mich. 301, 22 N. W. 813, p. 1860.
Harrington v. Churchward, 6 Jur., N. S., 576, p. 2800.
Harrington v. Du Chatel, 1 Brown Ch. 124, p. 227, 460, 461, 465.
Harrington v. Erie Co. Savings Bank, 101 N. Y. 257, 4 N. E. 346, p. 1754.
Harrington v. Foley, 108 Iowa, 287, 79 N. W. 64, p. 2358, 2369.
Harrington v. Fortner, 58 Mo. 468, p. 2475, 2714, 2722.
Harrington v. Grant, 54 Vt. 236, p. 673, 1718.
Harrington v. Keteltas, 92 N. Y. 40, p. 2057.
Harrington v. Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307, p. 1947, 1957, 1969, 1970, 2311, 2312.
Harrington v. Slade, 22 Barb. 161, p. 1064.
Harrington v. Utterback, 57 Mo. 519, p. 2756.
Harrington v. Wheeler, 4 Ves. 686, p. 2775.
Harris, Ex parte, L. R. 2 Ch. Div. 423, p. 2662.

Harris, In re, 7 Del. Ch. 42, 28 Atl. 329, p. 2624.
Harris v. Alcock, 10 Gill & J. 226, 32 Am. Dec. 158, p. 2788.
Harris v. American B. & L. Ass'n, 122 Ala. 545, 25 South. 200, p. 1156.
Harris v. Arnold, 1 R. I. 125, p. 1132, 1148.
Harris v. Bell, 10 Serg. & R. 39, p. 1107.
Harris v. Bratton, 34 S. C. 259, 13 S. E. 447, p. 1905.
Harris v. Burwell, 65 N. C. 584, p. 1234.
Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188, p. 672, 1718.
Harris v. Clark, 3 N. Y. 93, 51 Am. Dec. 352, 2 Barb. 94, p. 2233, 2238, 2242, 2568, 2569, 2670.
Harris v. Clark, 7 N. Y. 242, p. 1896.
Harris v. Columbiana Ins. Co., 18 Ohio, 116, 51 Am. Dec. 448, p. 1523.
Harris v. Cornell, 80 Ill. 54, p. 1641, 1652.
Harris v. Cotterell, 3 Mer. 680, p. 298.
Harris v. Davenport, 132 N. C. 697, 44 S. E. 406, p. 1076.
Harris v. Douglas, 64 Ill. 466, p. 2266, 2267.
Harris v. Dumont, 207 Ill. 583, 69 N. E. 811, p. 1639.
Harris v. Fergusson, 16 Sim. 308, p. 680.
Harris v. Fly, 7 Paige, 421, p. 1054, 2488.
Harris v. Hanie, 37 Ark. 348, p. 2498, 2508.
Harris v. Hanks, 25 Ark. 510, 517, p. 2498.
Harris v. Harris, 29 Beav. 107, p. 2073.
Harris v. Harris, 7 Ired. Eq. 111, 53 Am. Dec. 393, p. 2153, 2196.
Harris v. Harris, 109 La. 913, 33 South. 918, p. 1384.
Harris v. Horner, 21 N. C. (1 Dev. & B. Eq.) 455, 30 Am. Dec. 182, p. 1328.
Harris v. Jex, 66 Barb. 232, p. 2401, 2402.
Harris v. Kemble, 1 Sim. 111, 120, 122, 5 Bligh, N. S., 730, 731, p. 1567, 1568, 1590, 1601, 1608.
Harris v. Lee, 1 P. Wms. 482, p. 2603.
Harris v. McIntyre, 118 Ill. 275, 8 N. E. 182, p. 1037, 1994, 1995.
Harris v. Mott, 14 Beav. 169, p. 2162.
Harris v. Norton, 16 Barb. 264, p. 1336, 1355.
Harris v. Pepperell, L. R. 5 Eq. 1, p. 1516, 2720.
Harris v. Poyner, 1 Drew. 174, p. 2322.
Harris v. Reece, 5 Gilm. 212, p. 1523.
Harris v. Rhode Island etc. Co., 10 R. I. 313, p. 873.
Harris v. Schryock, 82 Ill. 119, p. 2678.
Harris v. Slaght, 46 Barb. 470, p. 2315.
Harris v. Smith, 2 Dana, 10, p. 2749.
Harris v. Smith, 98 Tenn. 286, 39 S. W. 343, p. 1372, 2017, 2018.
Harris v. Tisereau, 52 Ga. 153, 159–163, 21 Am. Rep. 242, p. 181, 575, 581, 2265.
Harris v. Tyson, 24 Pa. St. 347, 360, 64 Am. Dec. 661, p. 1515, 1665, 1669.
Harris v. Vinyard, 42 Mo. 568, p. 93, 2714, 2722.
Harris v. Wamsley, 41 Iowa, 671, p. 1729.
Harris v. Warner, 13 Wend. 400, p. 2793.
Harris v. Watkins, Kay, 438, 447, p. 2222, 2489.
Harris v. Western etc. R. R., 59 Ga. 830, p. 2709.
Harris v. White, 81 N. Y. 532, p. 1676.
Harris v. Youngstown Bridge Co., 93 Fed. 355, 35 C. C. A. 341, p. 2473.
Harris County v. Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467, p. 2560, 2564.
Harris County v. Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791, p. 739, 1212, 1254.
Harrison v. Boring, 44 Tex. 255, 263, p. 1342, 1355.
Harrison v. Cachelin, 23 Mo. 117, 126, p. 1127, 1136, 1276, 1381.
Harrison v. City Fire Ins. Co., 91 Mass. (9 Allen) 231, 85 Am. Dec. 751, p. 1161.
Harrison v. Davenport, 2 Barb. Ch. 77, p. 307.
Harrison v. Deramus, 33 Ala. 463, p. 345, 2782.
Harrison v. Field, 2 Wash. (Va.) 136, p. 684, 2608.

Harrison v. Forth, Prec. Ch. 51, p. 1293, 1346.
Harrison v. Gardner, 2 Madd. 198, p. 1521, 2675.
Harrison v. Guerin, 27 N. J. Eq. 219, p. 2455.
Harrison v. Guest, 6 De Gex, M. & G. 424, 8 H. L. Cas. 481, 742, p. 1664, 1670, 1674, 1728, 1729, 1730, 1731, 1732, 2778.
Harrison v. Harrison, 9 Ala. 470, p. 2256.
Harrison v. Harrison, 1 Keen, 765, p. 819, 835.
Harrison v. Harrison, 36 N. Y. 543, p. 1895.
Harrison v. Harrison's Adm'x, 2 Gratt. 1, 44 Am. Dec. 365, p. 1926.
Harrison v. Howard, 1 Ired. Eq. 407, p. 1513, 1523.
Harrison v. Jackson, L. R. 7 Ch. Div. 339, p. 2213.
Harrison v. Manson, 95 Va. 593, 29 S. E. 420, p. 652.
Harrison v. McMennomy, 2 Edw. Ch. 251, p. 1902.
Harrison v. Mayor etc., 4 De Gex, M. & G. 137, p. 1651.
Harrison v. Nettleship, 2 Mylne & K. 423, p. 307, 2701.
Harrison v. Otley, 101 Iowa, 652, 70 N. W. 724, p. 1729.
Harrison v. Owsley, 172 Ill. 629, 50 N. E. 227, p. 2300.
Harrison v. Patterson, (N. J. Ch.) 50 Atl. 113, p. 2196.
Harrison v. Rowan, 3 Wash. C. C. 580, 585, 586, p. 1727.
Harrison v. Southcote, 1 Atk. 528, 540, p. 2727.
Harrison v. Totten, 29 Misc. Rep. 700, 62 N. Y. Supp. 754, p. 1868.
Harrison v. Town, 17 Mo. 237, p. 1666, 1672.
Harrison v. Wright, 100 Ind. 515, 50 Am. Rep. 805, p. 2560, 2566, 2569, 2570.
Harrison v. Wyse, 24 Conn. 1, 63 Am. Dec. 151, p. 2431.
Harrison Nat. Bank v. Ellicott, 31 Kan. 173, 1 Pac. 593, p. 1913.
Harrison Nat. Bank v. Pease, 8 Kan. App. 573, 54 Pac. 1038, p. 1227, 1300.
Harris's Ex'rs v. Barnett, 3 Gratt. 339, p. 1908.
Harrod v. Harrod, 1 Kay & J. 4, 7, p. 1728.
Harron v. Du Bois, 64 N. J. Eq. 657, 54 Atl. 857, p. 1406.
Harrop, In re, 3 Drew. 726, 734, p. 2319, 2331.
Harrop v. Howard, 3 Hare, 624, p. 2157.
Harrop v. Landers etc. Co., 45 Conn. 561, p. 1212, 2567, 2584.
Harry v. Glover, Riley Eq. 53, 2 Hill Eq. 515, p. 234.
Harryman v. Collins, 18 Beav. 11, p. 1059.
Harshaw v. Dobson, 64 N. C. 384, p. 1734.
Harshberger's Adm'r v. Alger, 31 Gratt. 52, p. 2199.
Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520, p. 2709.
Hart v. Albany, 9 Wend. 571, p. 2694.
Hart v. Beer, 74 Fed. 592, p. 1175.
Hart v. Cannon, 133 N. C. 10, 45 S. E. 351, p. 1775.
Hart v. Chalker, 14 Conn. 77, p. 1126.
Hart v. Chase, 46 Conn. 207, p. 1398, 1403.
Hart v. Deitrich, (Nebr.) 96 N. W. 144, p. 663.
Hart v. Farmers & Merchants' Bank, 33 Vt. 252, p. 268, 1136, 1166, 1168, 1270, 1274, 1327, 1357, 1373, 1384.
Hart v. Freeman, 42 Ala. 567, p. 289, 290.
Hart v. Gardner, 81 Miss. 650, 33 South. 442, 497, p. 1133, 1277.
Hart v. Giles, 67 Mo. 175, p. 1434, 1452.
Hart v. Goldsmith, 1 Allen, 145, p. 649, 1704.
Hart v. Hart, 39 Miss. 221, 77 Am. Dec. 668, p. 2277.
Hart v. Hart, 57 N. J. Eq. 543, 42 Atl. 153, p. 1738.
Hart v. Herwig, L. R. 8 Ch. 860, p. 2671.
Hart v. Homiler, 20 Pa. St. 348, p. 753.
Hart v. Leete, 104 Mo. 315, 15 S. W. 976, p. 2172.
Hart v. McClellan, 41 Ala. 251, p. 2776.

Hart v. Mayor etc. of Albany, 3 Paige, 213, p. 2685.
Hart v. Patterson, 17 Tex. Civ. App. 591, 43 S. W. 545, p. 1103, 1122.
Hart v. Sansom, 110 U. S. 155, 3 Sup. Ct. 586, p. 521.
Hart v. Swaine, L. R. 7 Ch. Div. 42, 46, p. 1583.
Hart v. Ten Eyck, 2 Johns. Ch. 62, 100, 101, 108, p. 188, 2052, 2461, 2462.
Hart v. Tribe, 18 Beav. 215, p. 1924.
Hart v. Tulk, 2 De Gex, M. & G. 300, p. 1544, 1545.
Hart v. Williams, 77 N. C. 426, p. 2494.
Harter v. Capital City Brewing Co., 64 N. J. Eq. 155, 53 Atl. 560, p. 2501, 2508.
Hartford v. Chipman, 21 Conn. 488, 498, p. 565.
Hartford v. Purrier, 1 Madd. 532, p. 621.
Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623, p. 498, 1652.
Hartford Fire Ins. Co. v. Landfare, 63 Nebr. 559, 88 N. W. 779, p. 1158.
Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115, p. 1158.
Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221, p. 1584.
Hartland v. Murrell, 27 Beav. 204, p. 2490.
Hartley v. Harrison, 24 N. Y. 170, 173, p. 1707, 2409.
Hartley v. Ostler, 22 Beav. 449, p. 890.
Hartley v. Tapley, 2 Gray, 565, p. 2553.
Hartly v. Pendarves, [1901] 2 Ch. 498, p. 2320.
Hartman v. Evans, 38 W. Va. 669, 18 S. E. 810, p. 271.
Hartman v. Fishbeck, 18 Fed. 295, p. 508.
Hartman v. Heady, 57 Ind. 545, p. 2702.
Hartman v. Strickler, 82 Va. 225, p. 1737.
Hartman's Appeal, 90 Pa. St. 203, p. 2053.
Hartmyer v. Gates, 1 Root, 61, p. 1098.
Harton v. Harton, 7 Term Rep. 652, 654, p. 1824.
Harton v. Lyons, 97 Tenn. (13 Pickle) 180, 36 S. W. 851, p. 1102.
Harton v. McKee, 73 Fed. 556, p. 670.
Hartopp v. Hartopp, 21 Beav. 259, p. 1543, 1625, 1778.
Hartopp v. Hartopp, 17 Ves. 184, 191, 192, p. 901, 934, 937, 1673.
Hart Pioneer Nurseries v. Coryell, 8 Kan. App. 496, 55 Pac. 514, p. 1177.
Harts v. Emery, 184 Ill. 560, 56 N. E. 865, affirming 84 Ill. App. 317, p. 2413.
Hart's Estate, In re, 203 Pa. St. 480, 53 Atl. 364, p. 2071.
Hartshorn v. Davenport, 2 Barb. Ch. 77, p. 2703.
Hartshorn v. Eames, 31 Me. 93, 96, p. 551, 552, 2790.
Hartshorn v. Cuttrell, 2 N. J. Eq. 297, p. 1549.
Hartshorn v. Potroff, 89 Ill. 509, p. 1429, 1435.
Hartshorn v. South Reading, 3 Allen, 501, p. 2683.
Hartshorne v. Hartshorne, 2 N. J. Eq. 349, p. 2734.
Hartsock v. Russell, 52 Md. 619, p. 2024.
Hartupee v. Pittsburgh, 131 Pa. St. 535, 19 Atl. 507, p. 1653.
Hartwell v. Hartwell, 4 Ves. 811, p. 1697.
Hartwell v. Riley, 47 App. Div. 154, 62 N. Y. Supp. 317, p. 1086.
Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149, p. 1494.
Harvard College v. Amory, 9 Pick. 446, p. 2077.
Harvard College v. Soc. Prom. Theol. Educ., 3 Gray, 280, 282, p. 535, 538, 1979.
Harvard College v. Weld, 159 Mass. 114, 34 N. E. 175, p. 2050.
Harvard Unitarian Soc. v. Tufts, 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390, p. 2208.
Harvey, In re, [1896] 1 Ch. 137, p. 1411.
Harvey v. Cooke, 4 Russ. 34, p. 1499, 1502, 1508.
Harvey v. Gardner, 41 Ohio St. 462, p. 1899, 1900, 1904.
Harvey v. Harvey, 5 Beav. 134, p. 2322.
Harvey v. Harvey, 1 P. Wms. 125, p. 2139.

Harvey v. Hunt, 119 Mass. 279, p. 1790.
Harvey v. Jones, 1 Disn. 65, p. 2750.
Harvey v. Kelly, 41 Miss. 490, 93 Am. Dec. 267, p. 2501, 2523.
Harvey v. Linville Imp. Co., 118 N. C. 693, 24 S. E. 489, 54 Am. St. Rep. 749, 32 L. R. A. 265. p. 670, 1714.
Harvey v. Merrill. 150 Mass. 1, 22 N. E. 49, 15 Am. St. Rep. 159, 5 L. R. A. 200, p. 1678, 1708.
Harvey v. Mount, 8 Beav. 439, p. 2033.
Harvey v. Shelton, 7 Beav. 455, p. 1653.
Harvey v. Smith, 17 Ind. 272, p. 1565.
Harvey v. United States, 105 U. S. 671, p. 347.
Harvey v. Varney, 98 Mass. 118, p. 1712, 1713.
Harvey v. Woodhouse, Sel. Cas. Ch. 80, p. 1383.
Harvey, Blair & Co. v. Johnson, 133 N. C. 352, 45 S. E. 644, p. 2196.
Harvill v. Lowe, 47 Ga. 214, p. 2533.
Harwood v. Kirby, 1 Paige, 469, p. 2739. 2740.
Harwood v. Tooke, 2 Sim. 192, p. 1679, 1745.
Harwood v. Tucker, 18 Ill. 544, p. 2569.
Hasbrouck v. Vandervoort, 4 Sand. 74, p. 189, 2463.
Hascall v. King, 162 N. Y. 134, 76 Am. St. Rep. 302, 56 N. E. 515, p. 1896.
Haskell v. Allen, 23 Me. 448, 451, p. 550, 551, 556.
Haskell v. Haskell, 3 Cush. 540, 542, p. 262, 270.
Haskell v. Scott, 56 Ind. 564, p. 2499, 2509, 2514.
Haskell v. State, 31 Ark. 91, p. 1144.
Haskell v. Wright, 23 N. J. Eq. 389, p. 2676.
Haskett v. Auhl, 3 Kan. App. 744, 45 Pac. 608, p. 973, 983.
Haskins v. Kelly, 1 Rob. (N. Y.) 160, p. 2460.
Haskins v. Kendall, 158 Mass. 224, 33 N. E. 495, 35 Am. St. Rep. 490, p. 1985.
Haskins v. Wallett, 63 Tex. 213, p. 1672.
Haslam v. Haslam, 19 Utah, 1, 56 Pac. 243, p. 2018.
Haslam & Hier-Evans, In re, [1902] 1 Ch. 765, p. 1771.
Hassam v. Barrett, 115 Mass. 256, p. 539, 2369.
Hassel v. Hassel, 2 Dick. 527, p. 2490.
Hassell v. Hawkins, 4 Drew. 468, p. 877.
Hasselman v. McKernan, 50 Ind. 441, p. 1300, 2435, 2437.
Hassey v. Wilke, 55 Cal. 525, p. 1096.
Hastead v. Searle, 1 Ld. Raym. 728, p. 1547.
Hastie v. Conturier, 9 Ex. 102, 5 H. L. Cas. 673, p. 1477.
Hastie v. Hastie, L. R. 2 Ch. Div. 304, p. 2141, 2470.
Hastings v. Clifford, 32 Me. 132, p. 824.
Hastings v. Cutler, 24 N. H. 481, p. 989.
Hastings v. Drew, 76 N. Y. 9, 16, p. 2011, 2012, 2030, 2032.
Hastings v. Nissen, 31 Fed. 597, p. 1338.
Hastings v. O'Donnell, 40 Cal. 148, p. 1616, 1617.
Hastings Malting Co. v. Heller, 47 Minn. 71, 49 N. W. 400, p. 983.
Haston v. Castner, 31 N. J. Eq. 697, p. 1801.
Haszard v. Haszard, 19 R. I. 374, 34 Atl. 150, p. 821.
Hatch v. Atkinson, 56 Me. 324, 96 Am. Dec. 464, p. 2233, 2234, 2237, 2239, 2241, 2243, 2247.
Hatch v. Bassett, 52 N. Y. 359, p. 836.
Hatch v. Bigelow, 39 Ill. 136, p. 1037, 1041.
Hatch v. City of Buffalo, 38 N. Y. 276, p. 2756.
Hatch v. Cobb, 4 Johns. Ch. 559, p. 343, 2782.
Hatch v. Falconer, (Nebr.) 93 N. W. 172, p. 2428, 2431.
Hatch v. Ferguson, 66 Fed. 668, 669, 14 C. C. A. 41, 29 U. S. App. 540, p. 1164, 1176.
Hatch v. Fogerty, 10 Abb. Pr., N. S., 147, 40 How. Pr. 492, p. 1771.
Hatch v. Fogarty, 33 N. Y. Sup. Ct. 166, p. 729.
Hatch v. Hatch, 9 Ves. 292, 297, 298. p. 1716, 1749, 1752, 1767, 1769, 1773, 1774, 1775.
Hatch v. Kimball, 16 Me. 146, p. 1411.

Hatch v. Kizer, 140 Ill. 583, 33 Am. St. Rep. 258, 30 N. E. 605, p. 1517.
Hatch v. Lucky Bill Min. Co., 25 Utah, 405, 71 Pac. 865, p. 1574.
Hatch v. Skelton, 20 Beav. 453, p. 1405.
Hatcher v. Briggs, 6 Oreg. 31, 41, p. 563, 571, 588, 2715, 2722.
Hatcher's Adm'r v. Hatcher's Exr's, 1 Rand. 53, p. 2526.
Hatch's Estate, In re, 62 Vt. 300, 18 Atl. 814, 22 Am. St. Rep. 109, p. 838.
Hatfield v. McWhorter, 40 Ga. 269, p. 2643, 2644, 2645, 2646.
Hatfield v. Pryme, 2 Coll. C. C. 204, p. 2326.
Hathaway v. Brady, 23 Cal. 122, p. 1517.
Hathaway v. Foy, 40 Mo. 540, p. 2636, 2642.
Hathaway v. Hagan, 64 Vt. 135, 24 Atl. 131, p. 352.
Hathaway v. Johnson, 55 N. Y. 93, 14 Am. Rep. 186, p. 1577, 1625.
Hathaway v. Noble, 55 N. H. 508, p. 527, 697, 1451, 1647.
Hathaway v. Thayer, 8 Allen, 421, p. 2273.
Hathaway v. Village of New Baltimore, 48 Mich. 251, 12 N. W. 186, p. 1970.
Hathorne v. Hodges, 28 N. Y. 486, p. 1385, 1621.
Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187, p. 771, 773, 781, 785.
Hatzfield v. Gulden, 7 Watts, 152, 31 Am. Dec. 750, p. 1699.
Hauberger v. Root, 5 Pa. St. 108, 112, p. 560, 896.
Hauck v. Craighead, 67 N. Y. 432, p. 2608.
Hauer, Estate of, 140 Pa. St. 420, 21 Atl. 445, 23 Am. St. Rep. 245, p. 2147.
Haughton v. Haughton, 1 Molloy, 611, p. 1681.
Haughwout v. Murphy, 22 N. J. Eq. 531, 21 N. J. Eq. 118, p. 192, 614, 1067, 1081, 1202, 1324, 1334, 1335, 2528, 2772.
Hausbrandt v. Hofler, 117 Iowa, 103, 90 N. W. 494, 94 Am. St. Rep. 289, p. 1489.
Hause v. Hause, 57 Ala. 262, p. 1993, 2255, 2256, 2258.
Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075, p. 2470.
Hauselt v. Vilmar, 76 N. Y. 630, p. 1857.
Hauseman v. Sterling, 61 Barb. 347, p. 293.
Havelick v. Havelick, 18 Iowa, 414, p. 2269.
Havelock v. Havelock, L. R. 17 Ch. Div. 807, p. 2619.
Havemeyer v. Ingersoll, 12 Abb. Pr., N. S., 301, p. 292.
Haven v. Adams, 8 Allen, 363, 367, p. 1064.
Haven v. Foster, 9 Pick. 111, 112, 19 Am. Dec. 353, p. 1478, 1486, 1503, 1506.
Havens v. Bliss, 26 N. J. Eq. 363, p. 2775.
Havens v. Havens, 1 Sand. Ch. 324, 325, 329, 330, p. 820, 828, 829, 2214.
Havens v. Middleton, 10 Hare, 641, p. 759.
Havens v. Sackett, 15 N. Y. 365, p. 785, 788, 790, 792, 809, 816.
Haverford Loan & B. Ass'n v. Fire Ass'n, 180 Pa. St. 522, 57 Am. St. Rep. 654, 37 Atl. 179, p. 2425.
Haverhill Gaslight Co. v. Barker, 109 Fed. 694, p. 367, 417, 456.
Haverly v. Alcott, 57 Iowa, 171, 10 N. W. 376, p. 1065, 1068.
Haverstick v. Trudel, 51 Cal. 431, p. 2262.
Haviland v. Bloom, 6 Johns. Ch. 178, 180, p. 646, 2167.
Haviland v. Myers, 6 Johns. Ch. 25, 178, p. 2167.
Haviland v. Willetts, 141 N. Y. 35, 35 N. E. 958, p. 1494.
Haward v. Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120, p. 2304, 2309.
Hawes v. Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870, p. 2570.
Hawes v. Dobbs, 137 N. Y. 465, 33 N. E. 560, p. 353.
Hawes v. Dobbs, 18 N. Y. Supp. 123, p. 342.
Hawes v. Marchant, 1 Curt. 136, p. 1562.

Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827, p. 2121, 2125, 2126.
Hawes v. Wyatt, 3 Browne Ch. 156, p. 1734.
Hawes Place Cong. Soc. v. Trustees etc., 5 Cush. 454, p. 2051.
Hawhe v. Snydaker, 86 Ill. 197, p. 2448, 2453, 2455.
Hawk v. Everett, 71 Ga. 675, p. 1782.
Hawk v. Greensweig, 2 Pa. St. 295, p. 2777.
Hawke v. Enyart, 30 Nebr. 149, 27 Am. St. Rep. 391, 46 N. W. 422, p. 1681.
Hawkes, In re, [1898] 2 Ch. 1, p. 287.
Hawkes v. Hubback, L. R. 11 Eq. 5, p. 1847, 2161.
Hawkeye Ins. Co. v. Brainard, 72 Iowa, 130, 33 N. W. 603, p. 1700.
Hawkins, Ex parte, 13 Sim. 569, p. 2319.
Hawkins v. Blair, (Miss.) 36 South. 246, p. 1542.
Hawkins v. Blewitt, 2 Esp. 663, p. 2243.
Hawkins v. Day, Amb. 160, p. 1471.
Hawkins v. Files, 51 Ark. 417, 11 S. W. 681, p. 1276.
Hawkins v. Gardiner, 2 Smale & G. 441, 451, p. 1905.
Hawkins v. Gathercole, 1 Sim., N. S., 150, p. 280.
Hawkins v. Hawkins, 50 Cal. 558, p. 1731.
Hawkins v. Layne, 48 Ark. 544, 3 S. W. 821, p. 2259.
Hawkins v. Maltby, L. R. 3 Ch. 188, 4 Ch. 200, p. 2764.
Hawkins v. Maltby, L. R. 3 Ch. 188, 4 Eq. 572, p. 1650.
Hawkins v. Palmer, 57 N. Y. 664, p. 1583.
Hawkins v. Willard, (Tex. Civ. App.) 38 S. W. 365, p. 1269, 1907, 1911.
Hawkins's Appeal, 32 Pa. St. 263, 265, p. 1775.
Hawkshaw v. Parkins, 2 Swanst. 539, 548, p. 2670, 2700.
Hawksworth v. Hawksworth, L. R. 6 Ch. 539, 543, 544, p. 2618.
Hawley, Matter of, 104 N. Y. 250, 10 N. E. 352, p. 1910.
Hawley v. Bibb, 69 Ala. 52, p. 1226, 1708.
Hawley v. Bristol, 39 Conn. 26, p. 2552, 2567, 2584.
Hawley v. Bullock, 29 Tex. 216, 217, p. 1148, 1355.
Hawley v. Clowes, 2 Johns. Ch. 122, p. 308, 2681.
Hawley v. Cramer, 4 Cow. 717, 728, p. 224, 331, 333, 981, 1692.
Hawley v. Geer, (Tex.) 17 S. W. 914, p. 1020, 1372.
Hawley v. Hawley, 43 Oreg. 352, 73 Pac. 3, p. 1024.
Hawley v. James, 5 Paige, 318, 323, 443, 447, 486, 487, p. 852, 1987, 2059, 2060, 2316, 2318, 2325.
Hawley v. James, 7 Paige, 213, 32 Am. Dec. 623, p. 155, 2633.
Hawley v. James, 16 Wend. 61, p. 1895, 1896.
Hawley v. Jelly, 25 Mich. 94, p. 2779.
Hawley v. Mancius, 7 Johns. Ch. 174, 184, p. 1779, 2786.
Hawley v. Smeiding, 3 Kan. App. 159, 42 Pac. 841, p. 1155.
Hawley v. Tesch, 72 Wis. 299, 39 N. W. 483, p. 2294.
Haworth v. Taylor, 108 Ill. 275, p. 1026, 1033, 1048, 1099, 1117, 1145.
Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613, p. 1487.
Hawthorn v. Bronson, 16 Serg. & R. 269, 278, p. 559.
Hawthorn v. Shedden, 3 Smale & G. 293, 305, p. 2216, 2223.
Hawthorne v. Hodges, 28 N. Y. 486, p. 1577.
Hay v. Marshall, 3 Humph. 623, p. 2798.
Hay v. Star F. Ins. Co., 77 N. Y. 235, 33 Am. Rep. 607, p. 1560, 2726.
Hayday v. Hayday, (N. J. Eq.) 39 Atl. 373, p. 2281, 2300.
Haydel v. Hurck, 5 Mo. App. 267, p. 2051, 2059, 2066, 2067.
Hayden v. Bucklin, 9 Paige, 512, 514, p. 1064, 1067, 1084.
Hayden v. Charter Oak Driving Park, 63 Conn. 142, 27 Atl. 232, p. 1202, 1333, 1335.
Hayden v. Connecticut Hospital for Insane, 64 Conn. 320, 30 Atl. 50, p. 1942, 1955, 1973.
Hayden v. Green, 66 Kan. 204, 71 Pac. 236, p. 1573.

Hayden v. Thompson, 67 Fed. 273, p. 216.
Hayden v. Thompson, 17 C. C. A. 592, 71 Fed. 60, 36 U. S. App. 361, p. 424.
Hayden v. Thrasher, 18 Fla. 795, p. 424.
Hayden v. Thrasher, 28 Fla. 162, 9 South. 855, p. 1061, 1065.
Hayden v. Yale, 45 La. Ann. 362, 40 Am. St. Rep. 232, 12 South. 633, p. 343.
Haydock v. Haydock, 33 N. J. Eq. 494, p. 1738.
Haydon v. Nicoletti, 18 Nev. 290, 3 Pac. 473, p. 1225.
Hayes v. Applegate, 101 Ky. 22, 39 S. W. 436, p. 2070.
Hayes v. Berdan, 47 N. J. Eq. 567, 21 Atl. 339, p. 216, 2549.
Hayes v. Carroll, (Minn.) 76 N. W. 1017, p. 1449.
Hayes v. Garvey, 2 Jones & L. 268, p. 880.
Hayes v. Harmony Grove Cemetery, 108 Mass. 400, p. 2762.
Hayes v. Hayes, 2 Del. Ch. 191, 73 Am. Dec. 709, p. 881.
Hayes v. Hayes, 48 N. H. 219, p. 2208, 2209, 2211, 2280.
Hayes v. Hayes, 45 N. J. Eq. 461, 17 Atl. 634, p. 216.
Hayes v. Johnson, 4 Ala. 267, p. 2635.
Hayes v. Kershow, 1 Sand. Ch. 258, 261, p. 1872.
Hayes v. Livingston, 34 Mich. 384, 22 Am. Rep. 533, p. 1434, 1452, 1454.
Hayes v. Nourse, 114 N. Y. 606, 607, 22 N. E. 40, 11 Am. St. Rep. 700, p. 1069, 1088, 1346.
Hayes v. Oatley, L. R. 14 Eq. 1, p. 2049, 2058.
Hayes v. Parker, 41 N. J. Eq. 632, 7 Atl. 511, p. 1448, 1725.
Hayes v. Pratt, 147 U. S. 557, 570, 13 Sup. Ct. 503, 507, 37 L. ed. 279, p. 508, 1942.
Hayes v. U. S. Phonograph Co., (N. J. Eq.) 55 Atl. 84, p. 1470.
Hayes v. Ward, 4 Johns. Ch. 123, 131, 8 Am. Dec. 554, p. 304, 2793, 2796.
Hayes's Appeal, 123 Pa. St. 138, 16 Atl. 600, p. 2001.
Hayford v. Dyer, 40 Me. 245, p. 548.
Haygarth v. Weaving, L. R. 12 Eq. 320, 327, 328, p. 1565, 1566, 1762.
Haymaker's Appeal, 53 Pa. St. 306, p. 1793, 1796.
Haynes v. Carr, 70 N. H. 463, 49 Atl. 638, p. 1943, 1956, 1968, 1975.
Haynes v. Harriman, 117 Wis. 132, 92 N. W. 1100, p. 1779.
Haynes v. Haynes, 3 De Gex, M. & G. 590, p. 2225.
Haynes v. Haynes, 1 Drew. & S. 426, p. 2319.
Haynes v. Mico, 1 Brown Ch. 129, 130, p. 873, 874.
Haynes v. Onderdonk, 5 Thomp. & C. 176, p. 2749.
Haynes v. Rudd, 83 N. Y. 251, 102 N. Y. 372, 55 Am. Rep. 815, p. 1718.
Haynes v. Seachrest, 13 Iowa, 455, p. 1100, 2726.
Haynes v. Thompson, 34 Miss. 17, p. 568.
Haynes v. Whitsett, 18 Oreg. 454, 22 Pac. 1072, p. 346.
Haynesworth v. Cox, Harp. Eq. 117, 119, p. 1657.
Haynie v. Dickens, 68 Ill. 267, p. 823.
Haynie v. Robertson, 58 Ala. 37, p. 2372, 2376.
Haynsworth v. Bischoff, 6 Rich. 159, p. 1327, 1373.
Hays v. Cockrell, 41 Ala. 75, p. 2256.
Hays v. Crutchers, 54 Ind. 260, p. 2608.
Hays v. Hollis, 8 Gill, 357, p. 1673.
Hays v. Horine, 12 Iowa, 61, 79 Am. Dec. 518, p. 2499.
Hays v. Jackson, 6 Mass. 149, p. 2494.
Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604, p. 1990, 1991.
Hays v. McGuire, 8 Yerg. 92, 100, p. 1102.
Hays v. Quay, 68 Pa. St. 263, p. 1907.
Hays v. Tilson, 18 Tex. Civ. App. 610, 45 S. W. 479, p. 1103.
Hays v. Urquhart, 63 Ga. 323, p. 2710.
Hayter v. Trego, 5 Russ. 113, p. 1962, 1963.
Haythorn v. Margerem, 7 N. J. Eq. 324, p. 2754, 2756.
Hayward v. Andrews, 106 U. S. 672, 678, 1 Sup. Ct. 544, 549, 27 L. ed. 271, p. 496, 2549, 2557.
Hayward v. Dimsdale, 17 Ves. 111, p. 2728, 2752.

Hayward v. Mayse, 1 App. D. C. 133, p. 1036.
Hayward v. Pile, L. R. 5 Ch. 214, p. 2049.
Hayward v. Stearns, 39 Cal. 58, p. 1246.
Haywood v. Brunswick etc. Soc., L. R. 8 Q. B. Div. 403, p. 2597.
Haywood v. Cope, 25 Beav. 140, p. 1508, 1609, 1616, 1617, 1618.
Haywood v. Haywood, 79 N. C. 42, p. 2284.
Haywood v. Hutchins, 65 N. C. 574, p. 2798.
Haywood v. Judson, 4 Barb. 228, p. 2741.
Haywood v. Nooney, 3 Barb. 643, p. 1282.
Hazard v. Coyle, (R. I.) 58 Atl. 987, p. 2100.
Hazard v. Durant, 11 R. I. 195, p. 2125.
Hazard v. Durant, 14 R. I. 25, p. 2080.
Hazard v. Irwin, 18 Pick. 95, 105, p. 1559, 1563, 1582, 1583, 2706.
Hazeltine v. McAfee, 5 Kan. App. 119, 48 Pac. 886, p. 2020, 2023.
Hazeltine v. Moore, 21 Hun, 355, p. 2502, 2514.
Hazelton v. Valentine, 113 Mass. 472, 479, p. 2793.
Hazen v. Lyndonville Nat. Bank, 70 Vt. 543, 556, 67 Am. St. Rep. 680, 689, 41 Atl. 1046, 1051, p. 343.
Hazen v. Nicholls, 126 Cal. 327, 58 Pac. 816, p. 2437.
Hazen v. Thurber, 4 Johns. Ch. 604, p. 2734.
Hazle v. Bondy, 173 Ill. 302, 50 N. E. 671, p. 2424, 2452.
H. B. Claflin Co. v. Furtick, 119 Fed. 429, p. 499.
H. C. Tack Co. v. Ayers, 56 N. J. Eq. 56, 38 Atl. 194, p. 1275.
Head v. Fordyce, 17 Cal. 149, p. 2748, 2751, 2752.
Head v. Goodwin, 37 Me. 181, p. 2576, 2586.
Head v. Gould, [1898] 2 Ch. 250, p. 2066.
Head v. James, 13 Wis. 641, p. 2755, 2757.
Head v. Meloney, 111 Pa. St. 99, 2 Atl. 195, p. 344.
Head v. Temple, 4 Heisk. 34, p. 2141, 2155, 2198.
Headley v. Goundry, 41 Barb. 279, p. 77.
Healy v. O'Brien, 66 Cal. 519, 6 Pac. 386, p. 2381.
Heane v. Rogers, 9 Barn. & C. 577, p. 1428.
Heap v. Touge, 9 Hare, 90, p. 1501.
Heaps v. Dunham, 95 Ill. 583, p. 1735.
Heard v. Dooly County, 101 Ga. 619, 28 S. E. 986, p. 739, 740.
Heard v. Pilley, L. R. 4 Ch. 548, 552, p. 1990.
Heard v. Stamford, Cas. t. Talb. 173, p. 705.
Hearle v. Greenbank, 3 Atk. 695, 715, 1 Ves. Sr. 298, p. 798, 803.
Hearn v. Due, 79 Mo. App. 322, p. 983.
Hearn v. Equitable etc. Ins. Co., 4 Cliff. 192, p. 2726.
Hearn v. Hearn, 24 R. I. 328, 53 Atl. 95, p. 1639.
Hearne v. Keath, 63 Mo. 84, p. 2793.
Hearst v. Pujol, 44 Cal. 230, 235, p. 1487, 1500, 1901, 1904, 2729.
Heartley v. Nicholson, L. R. 19 Eq. 233, p. 1868, 1869, 1870, 1876.
Heath v. Albrook, (Iowa) 98 N. W. 619, p. 1482, 1494.
Heath v. Bishop, 4 Rich. Eq. 46, 55 Am. Dec. 654, p. 1847.
Heath v. Carter, 20 Ind. App. 83, 50 N. E. 318, p. 1997.
Heath v. Chapman, 2 Drew. 417, p. 1937.
Heath v. Crealock, L. R. 10 Ch. 22, 28, p. 1367, 1369, 2728, 2729.
Heath v. Crealock, L. R. 15 Eq. 257, p. 279.
Heath v. Crealock, L. R. 18 Eq. 215, p. 2016, 2032.
Heath v. Dendy, 1 Russ. 543, p. 2227.
Heath v. Derry Bank, 44 N. H. 174, p. 228, 461.
Heath v. Erie R. R., 9 Blatch. 316, p. 244, 245, 251, 255, 259, 270.
Heath v. Erie R'y, 8 Blatchf. 347, Fed. Cas. No. 6,306, p. 2093, 2118, 2125, 2126.
Heath v. Lewis, 3 De Gex, M. & G. 954, p. 1684.
Heath v. Waters, 40 Mich. 457, p. 2080, 2090.

Heath v. Williams, 30 Ind. 495, p. 2373, 2376.
Heath v. Wright, 3 Wall. Jr. 141, p. 1695, 2691.
Heathcote v. Fleete, 2 Vern. 442, p. 257, 260.
Heathcote v. Hulme, 1 Jacob & W. 122, p. 2079, 2082.
Heathcote v. Paignon, 2 Brown Ch. 167, 173, p. 1667.
Heatherington v. Lewenberg, 61 Miss. 372, p. 2494.
Heathman v. Hall, 3 Ired. Eq. 414, p. 2144.
Heatley v. Finster, 2 Johns. Ch. 159, p. 1336.
Heatley v. Thomas, 15 Ves. 596, p. 183, 2133, 2156, 2185.
Heaton v. Dearden, 16 Beav. 147, p. 2740.
Heaton v. Fryberger, 38 Iowa, 185, 190, 201, p. 1487, 2725, 2726.
Heaton v. Knowlton, 65 Ind. 255, p. 2268.
Heaton v. Thatcher, 59 Fed. 731, p. 508.
Heatwole v. Gorrell, 35 Kan. 692, 12 Pac. 135, p. 731, 737, 745.
Heavenridge v. Mondy, 49 Ind. 434, p. 1482, 1487, 1517, 1541.
Hebb v. Hebb, 5 Gill, 506, p. 2233.
Heber v. Bossart, 70 Iowa, 718, 722, 29 N. W. 608, p. 1100.
Heberd v. Wine, 105 Ind. 237, 4 N. E. 457, p. 1268.
Hebrew etc. Ass'n v. Mayor etc., 4 Hun, 446, p. 2757.
Hebron v. Kelly, 75 Miss. 74, 21 South. 799, p. 2040.
Heburn v. Warner, 112 Mass. 271, 17 Am. Rep. 86, p. 2188, 2193.
Heckman's Estate, In re, 172 Pa. St. 185, 33 Atl. 552, 37 Wkly. Notes Cas. 376, p. 1155.
Hedge v. Lowe, 47 Iowa, 137, p. 1690.
Hedges v. Dixon County, 150 U. S. 182, 14 Sup. Ct. 71, p. 705.
Hedges v. Hedges, Prec. Ch. 269, p. 2232.
Hedgman, In re, L. R. 8 Ch. Div. 156, p. 1933, 1945.
Hedley v. Bates, L. R. 13 Ch. Div. 498, p. 2687.
Hedrick v. Strauss, 42 Nebr. 485, 60 N. W. 928, p. 1335.
Heermans v. Burt, 78 N. Y. 259, p. 1896.
Heermans v. Clarkson, 64 N. Y. 171, p. 2662.
Heermans v. Montague, (Va.) 20 S. E. 899, p. 1273.
Heermans v. Robertson, 64 N. Y. 332, p. 93, 1896, 2722.
Hegenmyer v. Marks, 37 Minn. 6, 5 Am. St. Rep. 808, 32 N. W. 785, p. 1613, 1762, 1764.
Heid v. Vreeland, 30 N. J. Eq. 591, p. 2405.
Heidenheimer v. Bauman, 84 Tex. 174, 31 Am. St. Rep. 29, 19 S. W. 382, p. 1902.
Heidenheimer v. Stewart, 65 Tex. 321, p. 1194, 1227.
Heighington v. Grant, 5 Mylne & C. 258, p. 2432.
Heil v. Heil, (Mo.) 84 S. W. 45, p. 1832.
Heilman v. Union Canal Co., 37 Pa. St. 100, 104, p. 148, 215, 219.
Heim v. Ellis, 49 Mich. 241, 13 N. W. 582, p. 1096, 1116.
Heine v. Levee Com'rs, 19 Wall. 655, 658, 1 Woods, 246, p. 515, 516.
Heinemann's Appeal, 96 Pa. St. 112, 42 Am. Rep. 532, p. 2616.
Heinrichs v. Woods, 7 Mo. App. 236, p. 1332.
Heintze v. Bentley, 34 N. J. Eq. 562, p. 2389.
Heinz v. German Fire Ins. Co., 95 Md. 760, 51 Atl. 951, p. 260.
Heinze v. Butte & B. Consol. Min. Co., (C. C. A.) 129 Fed. 274, 287, p. 627.
Heirs of Ludlow v. Johnson, 3 Ohio, 553, 561, 17 Am. Dec. 609, p. 570.
Heirs of Rivers v. Gooding, 43 S. C. 428, 21 S. E. 310, p. 836.
Heiskell v. Powell, 23 W. Va. 717, p. 1994.
Heiskell v. Trout, 31 W. Va. 810, 3 S. E. 557, p. 1986.
Heisler v. Aultman, 56 Minn. 454, 57 N. W. 1053, 45 Am. St. Rep. 486, p. 2424.
Heiss v. Murphey, 40 Wis. 276, p. 1960, 1961, 1965, 1969.
Heist v. Baker, 49 Pa. St. 9, p. 192, 2504, 2522.

Heister v. Fortner, 2 Binn. 40, 4 Am. Dec. 417, p. 1114, 1276, 1381.
Heister v. Green, 48 Pa. St. 96, 86 Am. Dec. 569, p. 2504.
Helbreg v. Schumann, 150 Ill. 12, 37 N. E. 99, 41 Am. St. Rep. 339, p. 1725, 2374, 2375.
Helfenstine v. Garrard, 7 Ohio, 274, p. 1828.
Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659, p. 1873.
Helm v. Boyd, 124 Ill. 370, 16 N. E. 85, p. 2379.
Helm v. Wilson, 76 Cal. 476, 18 Pac. 604, p. 567.
Helme v. Philadelphia Ins. Co., 61 Pa. St. 107, 100 Am. Dec. 621, p. 726.
Helme v. Strater, 52 N. J. Eq. 591, 30 Atl. 333, p. 837.
Helmetag v. Frank, 61 Ala. 67, p. 2142.
Helms v. Chadbourne, 45 Wis. 60, 70, 71, 73, p. 977, 979, 982, 1007, 1011, 1018, 1149.
Helms v. Franciscus, 2 Bland, 544, 568, 20 Am. Dec. 402, p. 2167, 2176.
Helms v. Gilroy, 20 Oreg. 517, 26 Pac. 851, p. 1332.
Helms v. May, 29 Ga. 121, p. 1145.
Helsham v. Langley, 1 Younge & C. Ch. 175, p. 1518, 1539, 1731.
Helsley v. Futz, 76 Va. 671, p. 664.
Hemings v. Pugh, 4 Giff. 456, p. 2799, 2800.
Hemmer v. Cooper, 8 Allen, 334, p. 1565.
Hemming v. Gurrey, 2 Sim. & St. 311, 1 Bligh, N. S., 479, p. 889.
Hemmings v. Munckley, 1 Brown Ch. 303, p. 1683.
Hemminway v. Davis, 24 Ohio St. 150, p. 1265.
Hempfield R. R. v. Thomburg, 1 W. Va. 261, p. 2504.
Hemphill v. Hemphill, 99 N. C. 442, 6 S. E. 201, p. 1909.
Hemphill v. Moody, 64 Ala. 468, p. 2255.
Hemphill v. Ross, 66 N. C. 477, p. 2351.
Hemphill v. Yerkes, 132 Pa. St. 545, 19 Atl. 342, 19 Am. St. Rep. 607, p. 2570.
Hempstead v. Watkins, 6 Ark. 317, 355, 356, 357, 368, 42 Am. Dec. 696, p. 221, 461, 466, 564.
Henderson v. Adams, 15 Utah, 30, 48 Pac. 398, p. 1828.
Henderson v. Astwood, [1894] App. Cas. 150, p. 2430.
Henderson v. Baniel, (Tenn. Ch. App.) 42 S. W. 470, p. 1993.
Henderson v. Beatty, (Iowa) 99 N. W. 716, p. 1670.
Henderson v. Burton's Ex'r, 3 Ired. Eq. 259, p. 2504.
Henderson v. Cook, 4 Drew. 306, p. 1476.
Henderson v. Dickey, 35 Mo. 120, p. 1509.
Henderson v. Dickey, 50 Mo. 161, 165, p. 94, 231, 355, 586, 1524.
Henderson v. Downing, 24 Miss. 106, p. 1279.
Henderson v. Hall, 134 Ala. 455, 32 South. 840, p. 49, 705.
Henderson v. Hays, 2 Watts, 148, 151, p. 1671.
Henderson v. Henderson, 21 Mo. 379, p. 1873.
Henderson v. Henderson, 55 Mo. 534, p. 1384.
Henderson v. Henderson, 113 N. Y. 1, 20 N. E. 814, p. 1890.
Henderson v. Henderson, 133 Pa. St. 399, 19 Atl. 424, 19 Am. St. Rep. 650, p. 2315.
Henderson v. Herrod, 10 Smedes & M. 631, p. 2393, 2396, 2417.
Henderson v. Hicks, 58 Cal. 364, p. 2778, 2779.
Henderson v. Hunter, 59 Pa. St. 335, p. 1976.
Henderson v. Johns, 13 Colo. 280, 22 Pac. 461, p. 161.
Henderson v. Lacon, L. R. 5 Eq. 249, 263, p. 1572, 1573, 1581, 1584, 2116.
Henderson v. Murphree, 109 Ala. 556, 20 South. 45, p. 763.
Henderson v. New York Cent. R. R. Co., 78 N. Y. 423, p. 340, 2687, 2695.
Henderson v. Palmer, 71 Ill. 579, 22 Am. Rep. 117, p. 2757.
Henderson v. Pickett's Heirs, 20 Ky. (4 T. B. Mon.) 54, 16 Am. Dec. 130, p. 1065.
Henderson v. Pilgrim, 22 Tex. 464, p. 1300.

Henderson v. Railroad Co., 17 Tex. 560, p. 1625.
Henderson v. Stryker, 164 Pa. St. 170, 35 Wkly. Notes Cas. 151, 30 Atl. 386, p. 2286.
Henderson v. Walker, 55 Ga. 481, p. 2663.
Hendrickson v. Wallace, 31 N. J. Eq. 604, p. 376.
Henderson v. Wanamaker, 79 Fed. 736, 25 C. C. A. 181, p. 1035, 1066, 1083.
Hendricks v. Isaacs, 117 N. Y. 411, 22 N. E. 1029, 15 Am. St. Rep. 524, 6 L. R. A. 559, p. 2201.
Hendricks v. Montague, L. R. 17 Ch. Div. 638, p. 2690.
Hendricks v. Robinson, 2 Johns. Ch. 283, 296, 311, p. 1755, 1857, 2788, 2789.
Hendrickson v. Hinckley, 17 How. 443, 5 McLean, 211, p. 307, 2702, 2708.
Hendrickson v. Ivins, 1 N. J. Eq. 562, p. 1523, 1528, 1529, 1533.
Hendrickson v. Wooley, 39 N. J. Eq. 307, p. 1285.
Hendrickson's Appeal, 24 Pa. St. 363, p. 1123, 1293.
Hendrix v. Gore, 8 Oreg. 406, p. 2383.
Hendrix v. Nunn, 46 Tex. 141, p. 2034.
Hendrix v. Southern R. Co., 130 Ala. 305, 30 South. 596, 89 Am. St. Rep. 27, p. 1451.
Henkle v. Royal Ex. Ins. Co., 1 Ves. Sr. 317, p. 1515, 1540.
Henkle's Ex'x v. Allstadt, 4 Gratt. 284, p. 2447.
Henley v. Hotaling, 41 Cal. 22, p. 2373, 2377.
Hennequin v. Naylor, 24 N. Y. 139, p. 1609, 1621.
Hennessey v. Andrews, 6 Cush. 170, p. 1146.
Hennessey v. Bray, 33 Beav. 96, p. 2087.
Hennessey v. Walsh, 55 N. H. 515, p. 1999.
Hennessy v. Metzger, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267, p. 729, 739, 748.
Hennesy v. Farrell, 20 Wis. 42, p. 2362, 2364.
Henniges v. Paschke, 9 N. Dak. 489, 84 N. W. 350, 81 Am. St. Rep. 588, p. 1097, 1113, 1299, 1300.
Henrioid v. Neusbaumer, 69 Mo. 96, p. 1773.
Henry v. Allen, 151 N. Y. 1, 45 N. E. 335, 36 L. R. A. 658, p. 1174.
Henry v. Blackburn, 32 Ark. 445, p. 2190.
Henry v. Davis, 7 Johns. Ch. 40, p. 2370, 2377.
Henry v. Doctor, 9 Ohio, 49, p. 2633.
Henry v. Elder, 63 Ga. 347, p. 2121.
Henry v. Gregory, 29 Mich. 68, p. 2757.
Henry v. Henry, 27 Ohio St. 121, p. 2761.
Henry v. Mayer, (Ariz.) 53 Pac. 590, p. 765.
Henry v. Raiman, 25 Pa. St. 354, 64 Am. Dec. 703, p. 998.
Henry v. Smith, 76 N. C. 311, p. 2726.
Henry v. Strong, 39 Ch. Div. 443, p. 1921.
Henry v. Tupper, 29 Vt. 358, p. 763.
Henry v. Vliet, 36 Nebr. 138, 54 N. W. 122, 19 L. R. A. 590, p. 1328.
Henry McShane Mfg. Co. v. Kolb, 59 N. J. Eq. 146, 45 Atl. 533, p. 1282.
Henry Marx & Sons v. Jordan, (Miss.) 36 South. 386, p. 1101, 1124.
Henry Watson etc. Soc. v. Johnston, 58 Md. 139, p. 1971.
Henschel v. Mamero, 120 Ill. 660, 12 N. E. 203, p. 2039.
Henschel v. Maurer, 69 Wis. 576, 34 N. W. 926, 2 Am. St. Rep. 757, p. 2237.
Hensel v. Kegans, (Tex. Civ. App.) 28 S. W. 705, p. 696, 697.
Henshaw v. Bank of Bellows Falls, 10 Gray, 568, 571, 572, p. 2586.
Henshaw v. Clark, 14 Cal. 460, 465, p. 2686, 2746.
Henshaw v. Wells, 9 Humph. 568, p. 2353.
Hensinger v. Dyer, 147 Mo. 219, 48 S. W. 912, p. 1735.
Hensler v. Sefrin, 19 Hun, 564, p. 1046.
Hensman v. Fryer, L. R. 3 Ch. 420, 2 Eq. 627, p. 2209, 2222, 2225.
Henson v. Westcott, 82 Ill. 224, p. 2499, 2515.
Henson v. Wright, 88 Tenn. 501, 12 S. W. 1035, p. 1847.
Henwood v. Jarvis, 27 N. J. Eq. 247, p. 2704, 2707.

Hepburn v. Auld, 5 Cranch, 262, p. 2775, 2778.
Hepburn v. Dunlop, 1 Wheat. 179, 189, 197, p. 321, 331, 348, 1563.
Hepburn v. Lordan, 2 Hem. & M. 345, 352, p. 2698.
Hepburn v. Snyder, 3 Pa. St. 72, p. 2504.
Hepburn's Appeal, 65 Pa. St. 468, p. 2154, 2160, 2161.
Heppe v. Szczepanski, (Ill.) 70 N. E. 737, p. 1024.
Herbage v. Moodie, 51 Nebr. 837, 71 N. W. 778, p. 1227.
Herbert v. Bossart, 70 Iowa 718, 722, 29 N. W. 608, p. 1133.
Herbert v. Bronson, 125 Mass. 475, p. 2584.
Herbert v. Lowns, 1 Ch. Rep. 12, p. 1635.
Herbert v. Salisbury etc. R'y, L. R. 2 Eq. 221, 224, 225, p. 721, 722, 724.
Herbert v. Scofield, 9 N. J. Eq. 492, p. 2501.
Herbert v. Webster, L. R. 15 Ch. Div. 610, p. 2157.
Herbert v. Wren, 7 Cranch, 370, 378, 379, p. 821, 829, 832, 2734, 2735.
Herbert's Case, 3 P. Wms. 115, p. 2621.
Hercy v. Birch, 9 Ves. 357, p. 2771.
Hercy v. Ferrers, 4 Beav. 97, p. 287.
Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139, p. 2408, 2505.
Hereford v. Ravenhill, 1 Beav. 481, 5 Beav. 51, p. 2310, 2328.
Hereford etc. Co., In re, L. R. 2 Ch. Div. 621, p. 1573, 1613.
Heriot's Hospital v. Ross, 12 Clark & F. 507, p. 2101.
Herman v. Deming, 44 Conn. 124, p. 1124.
Hermann v. Hodges, L. R. 16 Eq. 18, p. 2761.
Herndon v. Gibson, 38 S. C. 357, 37 Am. St. Rep. 765, 17 S. E. 145, 20 L. R. A. 545, p. 1692.
Herndon v. Kimball, 7 Ga. 432, 50 Am. Dec. 406, p. 1104, 1114.
Heron v. Heron, 2 Atk. 161, p. 1778, 1785.
Heron v. Hoffner, 3 Rawle, 393, 396, p. 825, 855.
Herrick v. Lynch, 150 Ill. 283, 37 N. E. 221, p. 352, 672, 1718.
Herrick v. Woolverton, 41 N. Y. 581, 1 Am. Rep. 461, p. 1234.
Herriman v. Skillman, 33 Barb. 378, p. 2787.
Herring v. Bender, 48 W. Va. 498, 37 S. E. 568, p. 1087.
Herring v. Clobery, 1 Phill. Ch. 91, p. 279, 282.
Herring v. Fitts, 43 Fla. 54, 99 Am. St. Rep. 108, 30 South. 804, p. 1051.
Herring v. Wickham, 29 Gratt. 628, 26 Am. Rep. 405, p. 2141.
Herrington v. Herrington, 27 Mo. 560, p. 1080.
Herrington v. McCollum, 73 Ill. 476, p. 23, 92, 1069, 1070.
Herrington v. Robertson, 7 Hun, 368, p. 231.
Herrington v. Williams, 31 Tex. 448, 460, 461, p. 571, 588, 2754.
Herron v. Herron, 71 Iowa, 428, 32 N. W. 407, p. 1594, 1665.
Herschberger v. Blewett, 55 Fed. 170, p. 511.
Hersey v. Turbett, 27 Pa. St. 418, p. 1065, 1075.
Hershey v. Weiting, 14 Wright, 244, p. 666.
Herster v. Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95, p. 1738.
Hertford v. Lowther, 7 Beav. 107, p. 885.
Hervey v. Aston, 1 Atk. 361, 375, 377, p. 1681, 1682.
Hervey v. Audland, 14 Sim. 531, p. 619, 634, 2589.
Hervey v. Hervey, 1 Atk. 561, p. 1468.
Hervey v. Savery, 48 Iowa, 313, p. 2727.
Hervey v. Smith, 22 Beav. 299, p. 987, 1014.
Hervey v. Smith, 1 Kay & J. 389, 392, p. 2698.
Heseltine v. Heseltine, 3 Madd. 276, p. 2213.
Hesketh v. Murphy, 35 N. J. Eq. 23, 36 N. J. Eq. 304, p. 1943, 1956, 1975.
Heslop v. Gatton, 71 Ill. 528, p. 2487.
Hess v. Reynolds, 113 U. S. 73, 5 Sup. Ct. 377, 378, p. 507, 508, 510, 511.

Hesse v. Briant, 6 De Gex, M. & G. 623, p. 182, 1619, 1769, 1771.
Hess's Appeal, 112 Pa. St. 168, 4 Atl. 340, p. 1906.
Hester v. Memphis etc. R. R., 32 Miss. 378, p. 1625.
Hester v. Weston, 1 Vern. 463, p. 428.
Hetfield v. Newton, 3 Sand. Ch. 564, p. 1707.
Hetherington v. Clark, 30 Pa. St. 393, 395, p. 1108, 1127, 1132.
Hetherington v. Oakman, 2 Younge & C. Ch. 299, p. 1546.
Hetley, In re, [1902] 2 Ch. 866, p. 2037.
Hetrick's Appeal, 58 Pa. St. 477, p. 1729, 1731.
Hetzel v. Barber, 69 N. Y. 1, p. 1134, 1364.
Heuer v. Rutkowski, 18 Mo. 216, p. 2776.
Heuisler v. Nickum, 38 Md. 270, p. 1281.
Heuser v. Harris, 42 Ill. 425, p. 1961, 1965, 1966, 1973.
Heustis v. Johnson, 84 Ill. 61, p. 181, 575, 2266.
Heuvell v. Whitaker, 3 Russ. 343, p. 2489.
Hevener v. Berry, 17 W. Va. 474, p. 2796.
Heward v. Slagle, 52 Ill. 336, p. 575, 2266, 2268.
Hewes v. Wiswell, 8 Me. 94, p. 1039, 1042.
Hewitt v. Adams, 50 Me. 271, 277, p. 556.
Hewitt v. Crane, 6 N. J. Eq. 159, 631, p. 1779.
Hewitt v. Kaye, L. R. 6 Eq. 198, p. 2232, 2238, 2246.
Hewitt v. Loosemore, 9 Hare, 449, 456, 458, p. 999, 1005, 1006, 1008, 1010, 1011, 1016, 1017, 1045, 1172, 1173, 1174, 1178, 1196, 1287, 1295, 1296.
Hewitt v. Morris, Turn. & R. 241, p. 2321.
Hewitt v. Powers, 84 Ind. 295, p. 1328.
Hewitt v. Wright, 1 Brown Ch. 86, p. 2312, 2313, 2328.
Hewlett v. Pilcher, 85 Cal. 542, 24 Pac. 781, p. 1344, 1345, 1384.
Hext v. Gill, L. R. 7 Ch. 699, p. 2687, 2695.
Heyder v. Excelsior B. & L. Ass'n, 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49, p. 1196, 1294.
Heyer v. Pruyn, 7 Paige, 465, 34 Am. Dec. 355, p. 2704.
Heyland v. Badger, 35 Cal. 404, p. 188, 2460, 2462.
Heyman v. Dubois, L. R. 13 Eq. 158, p. 655, 2786.
Heymann v. European etc. R'y, L. R. 7 Eq. 154, p. 1573, 1574, 1613, 1788.
Heymond v. Bledsoe, 11 Ind. App. 202, 38 N. E. 530, 54 Am. St. Rep. 502, p. 2147.
Heyneman v. Dannenberg, 6 Cal. 376, 65 Am. Dec. 519, p. 2791.
Heysham v. Heysham, 1 Cox, 179, p. 2618.
Heywood, Ex parte, 2 Rose, 355, 357, p. 2466.
Heywood v. City of Buffalo, 14 N. Y. 534, p. 403, 433, 2755, 2757.
Heywood v. Waring, 4 Camp. 291, 295, p. 2466.
Hiatt v. Williams, 72 Mo. 214, 37 Am. Rep. 438, p. 2780.
Hiatt's Heirs v. Calloway's Heirs, 7 B. Mon. 178, p. 2749.
Hibb's Estate, In re, 143 Pa. St. 217, 22 Atl. 882, p. 1846.
Hibbard v. Eastman, 47 N. H. 507, 93 Am. Dec. 467, p. 304, 529, 2704.
Hibbard v. Zenor, 75 Iowa, 471, 9 Am. St. Rep. 497, 39 N. W. 714, p. 1100, 1119.
Hibberd v. Bovier, 1 Grant Cas. 266, p. 1272.
Hibbert v. Aylott, 52 Tex. 530, p. 2780.
Hibbert v. Cooke, 1 Sim. & St. 552, p. 2483.
Hibbs v. Insurance Co., 40 Ohio St. 543, p. 857.
Hibernian Bank v. Everman, 52 Miss. 500, p. 1079.
Hibernia Savings & Loan Soc. v. London & Lancashire Fire Ins. Co., 138 Cal. 257, 71 Pac. 334, p. 120, 192, 203, 516, 2262, 2543, 2544.
Hibernia Sav. & Loan Soc. v. Ordway, 38 Cal. 679, p. 665.
Hichborn v. Fletcher, 66 Me. 209, 22 Am. Rep. 562, p. 2794.

Hichens v. Congreve, 4 Russ. 562, 577, p. 283, 1760.
Hickey v. Hickey, 26 Conn. 261, p. 851.
Hickley v. Hickley, L. R. 2 Ch. Div. 190, p. 2085.
Hicklin v. Marco, 46 Fed. 424, p. 2481.
Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39, p. 1101, 1110, 1119, 1161, 1176.
Hickman v. Hoffman, 11 Tex. Civ. App. 605, 33 S. W. 257, p. 1030, 1348.
Hickman v. Kempner, 35 Ark. 505, p. 652.
Hickman v. Painter, 11 W. Va. 386, p. 464, 1463, 1464.
Hickman v. Stewart, 69 Tex. 255, 5 S. W. 833, p. 1757.
Hickman v. Stout, 2 Leigh, 6, p. 2798.
Hickman v. White, (Tex. Civ. App.) 29 S. W. 692, p. 337.
Hickok v. Still, 168 Pa. St. 155, 47 Am. St. Rep. 880, 31 Atl. 1100, p. 2049.
Hickox v. Lowe, 10 Cal. 197, p. 2374, 2376.
Hicks v. Compton, 18 Cal. 206, p. 3, 108, 2686.
Hicks v. Coody, 49 Ark. 425, 5 S. W. 714, p. 1486, 1491.
Hicks v. Hamilton, 144 Mo. 495, 46 S. W. 432, 66 Am. St. Rep. 4[illegible], p. 2414.
Hicks v. Hicks, 5 Gill & J. 75, p. 2371.
Hicks v. Hicks, (Tex. Civ. App.) 26 S. W. 227, p. 1356, 1373.
Hicks v. Hunt, Johns. 372, p. 1451.
Hicks v. Michael, 15 Cal. 107, 116, p. 2685, 2686.
Hicks v. Morris, 57 Tex. 658, p. 2502, 2521.
Hicks v. Pendarvis, Freem. Ch. 41, p. 1682.
Hicks v. Pogue, (Tex. Civ. App.) 76 S. W. 786, p. 1269, 1279, 1993.
Hicks v. Roanoke Brick Co., 94 Va. 741, 27 S. E. 596, p. 2560.
Hicks v. Sheppard, 4 Lans. 335, 337, p. 2715.
Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241, p. 1586, 1587, 1590, 1597, 1598, 1601.
Hickson v. Aylward, 3 Molloy, 1, p. 1387.
Hickson v. Collis, 1 Jones & L. 94, 113, p. 1090, 1091.
Hidden v. Jordan, 21 Cal. 92, 99–102, p. 179, 1992, 2038.
Hidden v. Jordan, 28 Cal. 301, 32 Cal. 397, p. 2428, 2429, 2430.
Hier v. Staples, 51 N. Y. 136, p. 2200.
Hiern v. Mill, 13 Ves. 114, p. 1001, 1016.
Hiester v. Maderia, 3 Watts, 384, 388, p. 2370, 2373.
Higbee v. Camden etc. R. R., 19 N. J. Eq. 276, p. 2683.
Higbie v. Farr, 28 Minn. 439, 10 N. W. 592, p. 751.
Higbie v. Westlake, 14 N. Y. 281, p. 2736.
Higdon v. Heard, 14 Ga. 255, p. 274.
Higdon v. Higdon, 57 Miss. 264, p. 1998.
Higgenbottom v. Peyton, 3 Rich. Eq. 398, p. 1906.
Higginbotham v. Cornwell, 8 Gratt. 83, 56 Am. Dec. 130, p. 811, 821.
Higginbottam v. Short, 25 Miss. 160, 57 Am. Dec. 198, p. 2743.
Higginbottom, In re, [1892] 3 Ch. 132, p. 2109.
Higginbottom v. Benson, 24 Nebr. 461, 8 Am. St. Rep. 211, 39 N. W. 418, p. 2430.
Higgins v. Bullock, 73 Ill. 205, p. 2710.
Higgins v. Curtiss, 82 Ill. 28, p. 1754, 1755, 2086.
Higgins v. Dennis, 104 Iowa, 605, 74 N. W. 9, p. 1100, 1136, 1363.
Higgins v. Ferguson, 14 Ill. 269, p. 1387.
Higgins v. Higgins, 121 Cal. 487, 53 Pac. 1081, 66 Am. St. Rep. 57, p. 2470.
Higgins v. Jamesburg Mut. B. & L. Ass'n, (N. J. Eq.) 58 Atl. 1078, p. 1299, 1302.
Higgins v. Joyce, 2 Jones & L. 282, p. 1769.
Higgins v. Kendall, 73 Ind. 522, p. 2499, 2516.
Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362, p. 1177, 2566.
Higgins v. Manson, 126 Cal. 467, 77 Am. St. Rep. 192, 58 Pac. 907, p. 2471, 2474, 2542.

Higgins v. Samels, 2 Johns. & H. 460, p. 1598.
Higgins v. Shaw, 2 Dru. & War. 356, p. 1065.
Higgins v. White, 118 Ill. 619, 8 N. E. 808, p. 1021.
Higginson v. Clowes, 15 Ves. 516, 523, 1 Ves. & B. 524, p. 1521, 1531.
Higginson v. Kelly, 1 Ball & B. 252, p. 1543.
Higginson v. Turner, 171 Mass. 586, 51 N. E. 172, p. 1961, 1979.
Higgs v. Northern etc. Co., L. R. 4 Ex. 387, p. 1231.
High v. Batte, 10 Yerg. 186, p. 1336.
High v. Hoffman, 129 Ala. 359, 29 South. 658, p. 2345.
High v. Worley, 33 Ala. 196, p. 2306.
Highberger v. Stiffler, 21 Md. 338, 83 Am. Dec. 593, p. 1729, 1730, 1779.
Highland Boy Gold Min. Co. v. Strickley, 116 Fed. 852, p. 495.
Hightower v. Nuber, 26 Ark. 604, p. 2729.
Hightown v. Mobile, J. & K. C. R. Co., (Miss.) 36 South. 82, p. 414, 432.
Highway v. Banner, 1 Brown Ch. 584, p. 784, 807.
Hildyard v. South Sea Co., 2 P. Wms. 77, p. 2784.
Hile v. Davison, 20 N. J. Eq. 228, p. 2670.
Hiler v. Hetterick, 5 Daly, 33, p. 2790.
Hiles v. Atlee, 80 Wis. 219, 49 N. W. 816, 27 Am. St. Rep. 32, p. 1098, 1120.
Hiles v. Coult, 30 N. J. Eq. 40, p. 2447.
Hill, In re, 31 N. J. Eq. 203, p. 2624.
Hill v. Andrews, 12 Cush. 185, p. 2750.
Hill v. Armistead, 56 Ala. 118, p. 2255.
Hill v. Barclay, 16 Ves. 402, 403, 405, 406, 18 Ves. 36, 56, 58–64, p. 632, 752, 753, 755, 758, 759, 1466.
Hill v. Barrett, 14 B. Mon. 67, p. 585.
Hill v. Billingsly, 53 Miss. 111, p. 2704, 2705.
Hill v. Bishop of London, 1 Atk. 618–620, p. 192, 1985, 2486.
Hill v. Blackwelder, 113 Ill. 283, p. 1424, 1440.
Hill v. Bowie, 1 Bland, 593, p. 2681.
Hill v. Boyland, 40 Miss. 618, p. 2278.
Hill v. Boyle, L. R. 4 Eq. 260, p. 2556.
Hill v. Bush, 19 Ark. 522, p. 1510.
Hill v. Cole, 84 Ga. 245, 10 S. E. 739, p. 1282.
Hill v. Den, 54 Cal. 6, p. 1877, 1894, 1908, 2048.
Hill v. Edmonds, 5 De Gex & S. 603, p. 2170.
Hill v. Eldred, 49 Cal. 398, p. 2478.
Hill v. Epley, 31 Pa. St. 331, 334, p. 1434, 1436, 1438, 1439, 1440.
Hill v. Fisher, 34 Me. 143, 40 Me. 130, p. 551.
Hill v. Fulbrook, Jac. 574, p. 2742.
Hill v. Gettys, (N. C.) 47 S. E. 449, p. 1561.
Hill v. Grant, (Tex. Civ. App.) 44 S. W. 1016, p. 1342.
Hill v. Gregory, 56 Miss. 341, p. 2735.
Hill v. Grigsby, 32 Cal. 55, p. 192, 2528.
Hill v. Hill, 11 Jur., N. S., 806, p. 2209.
Hill v. Hill, 62 N. J. L. 442, 41 Atl. 943, p. 827, 849.
Hill v. Hitey, 79 Fed. 826, p. 1328.
Hill v. Hoole, 116 N. Y. 302, 22 N. E. 547, 5 L. R. A. 620, p. 1297.
Hill v. Jones, 65 Ala. 214, p. 2492.
Hill v. Lane, L. R. 11 Eq. 215, 219, p. 1567, 1573, 1581, 1629, 2116.
Hill v. McLaurin, 28 Miss. 288, p. 1729, 2277.
Hill v. McNicholl, 76 Me. 314, p. 1123, 1347.
Hill v. McRae, 27 Ala. 175, p. 1841.
Hill v. Mitchell, 40 Mich. 389, p. 2275.
Hill v. Moore, 62 Tex. 610, p. 1307, 1355, 1373.
Hill v. Moore, 85 Tex. 335, 19 S. W. 162, p. 1010.
Hill v. Northern Pac. R. Co., 104 Fed. 754, 113 Fed. 914, 51 C. C. A. 544, p. 496.
Hill v. Oliphant, 41 Pa. St. 364, p. 1075.
Hill v. Pine River Bank, 45 N. H. 300, p. 2195.
Hill v. Pioneer Lumber Co., 113 N. C. 173, 18 S. E. 107, 37 Am. St. Rep. 621, 21 L. R. A. 560, p. 2013.
Hill v. Pixley, 63 Barb. 200, p. 1403.
Hill v. Proctor, 10 W. Va. 59, 77, p. 212, 451, 2737.
Hill v. Robertson, 24 Miss. 368, p 2349.

Hill v. Rockingham Bank, 44 N. H. 567, p. 2763.
Hill v. Scotland County, 34 Fed. 208, p. 1079.
Hill v. Scott, 12 Ky. L. Rep. 877, 15 S. W. 667, p. 664.
Hill v. Smith, 32 Cal. 166, p. 2686.
Hill v. South Stafford R'y, 11 Jur., N. S., 192, p. 1452.
Hill v. Spencer, Amb. 641, 836, p. 667, 1702, 1716.
Hill v. Stevenson, 63 Me. 364, p. 1878.
Hill v. True, 104 Wis. 294, 80 N. W. 462, p. 2024.
Hill v. Turner, 1 Atk. 515, p. 2204.
Hill v. Wand, 47 Kan. 340, 27 Pac. 988, 27 Am. St. Rep. 288, p. 1435.
Hill v. Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702, p. 736.
Hill v. White, 1 N. J. Eq. 435, p. 2437.
Hill v. Yarbrough, 62 Ark. 320, 35 S. W. 433, p. 1330.
Hilleary v. Hilleary's Lessee, 26 Md. 274, p. 824.
Hiller v. Jones, 66 Miss. 636, 6 South. 465, p. 1355.
Hilliard v. Allen, 4 Cush. 532, 535, p. 536.
Hilliard v. Benford's Heirs, 10 Ala. 977, 990, p. 823.
Hillman v. Allen, 145 Mo. 638, 47 S. W. 509, p. 1907.
Hillman v. Levy, 55 Cal. 117, p. 1036, 1045.
Hillman v. Newington, 57 Cal. 56, 64, p. 423, 2746.
Hills v. Downton, 5 Ves. 557, p. 962.
Hills v. Miller, 3 Paige, 254, 24 Am. Dec. 218, p. 1200, 2687.
Hills v. National Albany Exch. Bank, 105 U. S. 319, 5 Fed. 248, p. 418, 456.
Hills v. Parker, 111 Mass. 508, 15 Am. Rep. 63, p. 2663.
Hills v. Rowland, 4 De Gex, M. & G. 430, p. 753, 754, 759.
Hill's Adm'rs v. McCarter, 27 N. J. Eq. 41, p. 1130, 2447.
Hillside Coal & Iron Co. v. Heermans, 191 Pa. St. 116, 43 Atl. 76, p. 1070.
Hill's Trusts, In re, L. R. 16 Ch. Div. 173, p. 2488.
Hillyard v. Miller, 10 Pa. St. 326, p. 1977.
Hilton v. Barrow, 1 Ves. 284, p. 2728.
Hilton v. Bissel, 1 Sand. Ch. 407, p. 2410.
Hilton v. Hilton, 2 McAr. 70, p. 2306, 2309, 2317.
Hilton v. Lord Scarborough, 2 Eq. Cas. Abr. 171, pl. 2, p. 368.
Hilton v. Woods, L. R. 4 Eq. 432, p. 1702, 2555.
Himes v. Langley, 85 Ind. 77, p. 2499, 2514.
Himrod v. Gilman, 147 Ill. 293, 35 N. E. 373, affirming 44 Ill. App. 516, p. 691, 1304, 1305.
Hinchcliffe v. Hinchcliffe, 2 Drew. & S. 96, p. 889.
Hinchcliffe v. Hinchcliffe, 3 Ves. 516, p. 917, 918, 922.
Hinchinbroke, Lord, v. Seymour, 1 Brown. Ch. 395, p. 1657.
Hinchman v. Emans, 1 N. J. Eq. 100, p. 1403, 1407, 1482.
Hinchman v. Paterson etc. R. R., 17 N. J. Eq. 75, 86 Am. Dec. 252, p. 2683.
Hinckley v. Greany, 118 Mass. 595, p. 2753, 2754, 2757.
Hinckley, Estate of, 58 Cal. 457, p. 1961, 1967, 1972.
Hinckley v. Smith, 51 N. Y. 21, p. 2200.
Hinckley v. House of Refuge, 40 Md. 461, p. 824.
Hinckley v. Miles, 15 Hun, 170, p. 2709.
Hinckley v. Gilman, C. & S. Railroad Co., 100 U. S. 153, p. 2663.
Hinckman v. Berens, [1895] 2 Ch. 638, p. 1501.
Hincksman v. Smith, 3 Russ. 433, 435, p. 1742.
Hind v. Selby, 22 Beav. 373, p. 2322.
Hinde v. Longworth, 11 Wheat. 199, p. 1800.
Hinde v. Vattier, 1 McLean, 110, 7 Pet. 252, p. 982.
Hindman v. O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490, p. 1774.
Hindmarsh v. Southgate, 3 Russ. 324, p. 2087.
Hinds v. Ballou, 44 N. H. 619, p. 1402.
Hinds v. Hinds, 80 Ala. 225, p. 2176, 2604.
Hinds v. Mooers, 11 Iowa, 211, p. 2392, 2396.

Hinds v. Terry, Walk. (Miss.) 80, p. 2743.
Hindson v. Wetherill, 1 Smale & G. 604, 5 De Gex, M. & G. 301, p. 1653, 1751, 1768.
Hine v. Campion, L. R. 7 Ch. Div. 344, p. 1581.
Hine v. Dodd, 2 Atk. 275, p. 1001, 1137, 1139, 1141, 1166, 1357.
Hine v. Handy, 1 Johns. Ch. 6, p. 2670.
Hine v. Hine, 39 Barb. 507, 512, p. 896, 903, 910, 935, 938, 945, 947.
Hine v. New Haven, 40 Conn. 478, p. 565.
Hine v. Robbins, 8 Conn. 342, p. 1098.
Hines v. Perkins, 2 Heisk. 395, p. 2526, 2530.
Hinkle v. Margerum, 50 Ind. 240, p. 2670, 2722, 2770.
Hinkson v. Williams, 41 N. J. L. 35, p. 2061, 2137, 2200.
Hinman v. Hinman, 4 Conn. 575, p. 1098.
Hinrichsen v. Van Winkle, 27 Ill. 334, p. 2702, 2703.
Hinton v. Dibbin, 2 Q. B. 646, 661, p. 2064.
Hinton v. Leigh, 102 N. C. 28, 8 S. E. 890, p. 1097, 1147.
Hinton v. Pinke, 1 P. Wms. 359, p. 2216.
Hinton v. Pritchard, 120 N. C. 1, 58 Am. St. Rep. 768, 26 S. E. 627, p. 2049.
Hinves v. Hinves, 3 Hare, 609, p. 2322.
Hinxman v. Poynder, 5 Sim. 546, p. 1925.
Hiorns v. Holtom, 16 Beav. 259, p. 1174.
Hipkins v. Amery, 2 Giff. 292, p. 1016, 1292.
Hipp v. Babin, 19 How. 271, 278, 15 L. ed. 633, p. 147, 148, 150, 151, 210, 212, 220, 494, 514, 2706.
Hipp v. City of Houston, 30 Tex. Civ. App. 573, 71 S. W. 39, p. 739.
Hipwell v. Knight, 1 Younge & C. 401, 416, p. 2778.
Hirbour v. Reeding, 3 Mont. 15, p. 958.
Hirsh v. Howell, (Tex. Civ. App.) 60 S. W. 887, p. 1275.
Hirsch v. Jonas, L. R. 3 Ch. Div. 584, p. 2690.
Hirsch v. Jones, (Tex. Civ. App.) 42 S. W. 604, p. 1329.
Hirsch v. Trainer, 3 Abb. N. C. 274, p. 2624.
Hirst v. Denham, L. R. 14 Eq. 542, p. 2690.
Hiscock v. Norton, 42 Mich. 320, p. 2500, 2508.
Hise v. Foster, 17 Iowa, 23, p. 742, 748.
Hitchcock v. Clendinen, 12 Beav. 534, p. 2172.
Hitchcock v. Cosper, (Ind. App.) 69 N. E. 1029, p. 2065.
Hitchcock v. Giddings, 4 Price, 135, p. 1477.
Hitchcock v. Kiely, 41 Conn. 611, p. 2190.
Hitchcock v. Merrick, 18 Wis. 357, p. 2419.
Hitchcock v. Skinner, Hoff. Ch. 21, p. 2741, 2742.
Hitchen v. Birks, L. R. 10 Eq. 471, p. 2655.
Hitchins v. Pettingill, 58 N. H. 386, p. 1529, 1534.
Hitchman v. Stewart, 3 Drew. 271, p. 2794, 2795.
Hix v. Gosling, 1 Lea, 560, p. 2155.
Hixon v. Oneida County, 82 Wis. 515, 52 N. W. 445, p. 1076.
Hlawacek v. Bohman, 51 Wis. 92, p. 2657.
H. L. Spencer Co. v. Koell, (Minn.) 97 N. W. 974, p. 1067.
Hoadley v. Hadley, 48 Ind. 452, p. 1261.
Hoag v. Howard, 55 Cal. 564, p. 1271.
Hoag v. McGinnis, 22 Wend. 163, p. 734.
Hoagland v. Cooper, (N. J. Eq.) 56 Atl. 705, p. 2281, 2300.
Hoagland v. Latourette, 2 N. J. Eq. 254, p. 615, 1269.
Hoagland v. Shampanore, 37 N. J. Eq. 592, p. 1304.
Hoagland v. Township etc., 17 N. J. Eq. 106, p. 569.
Hoare v. Bremridge, L. R. 8 Ch. 22, 14 Eq. 522, p. 2706.
Hoare v. Bremridge, L. R. 14 Eq. 522, 8 Ch. 22, p. 1634.
Hoare v. Hoare, 56 L. T. 147, p. 1963.
Hoare v. Osborne, L. R. 1 Eq. 585, p. 176, 1934, 1939.
Hoare's Case, 30 Beav. 225, p. 2605.

Hoback v. Miller, (W. Va.) 29 S. E. 1014, p. 1052.
Hobart v. Countess of Suffolk, 2 Vern. 644, p. 1988.
Hobart v. Sanborn, 13 N. H. 226, 38 Am. Dec. 483, p. 2350.
Hobart v. Stone, 10 Pick. 215, p. 883.
Hobbs v. Blandford, 7 Mon. 469, p. 2166.
Hobbs v. Hull, 1 Cox, 445, p. 1680.
Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. Rep. 870, 29 L. ed. 940, p. 2101.
Hobbs v. Nashville, C. & St. L. R'y Co., 122 Ala. 602, 82 Am. St. Rep. 103, 26 South. 739, p. 652.
Hobbs v. Norton, 1 Vern. 136, p. 1386.
Hobday v. Peters, 28 Beav. 349, p. 1724, 1761, 1762, 1765, 1773, 2155.
Hobman v. Patterson's Heirs, 29 Ark. 357, p. 1064.
Hoboken Bk. of Sav. v. Schwoon, 62 N. J. Eq. 503, 50 Atl. 490, p. 1864, 1871.
Hoboken L. etc. Co. v. City of Hoboken, 31 N. J. Eq. 462, p. 433.
Hobson v. Edwards, 57 Miss. 128, p. 2523, 2527.
Hobson v. Ferraby, 2 Coll. C. C. 412, p. 1887, 2145.
Hobson v. Hale, 95 N. Y. 588, p. 2311.
Hobson v. Jones, L. R. 9 Eq. 456, p. 2663.
Hobson v. Sherwood, 4 Beav. 184, p. 2740, 2742.
Hobson v. Stevenson, 1 Tenn. Ch. 203, p. 1212.
Hobson v. Trevor, 2 P. Wms. 191, p. 193, 749, 2547, 2574.
Hobson v. Whitelaw, 80 Va. 784, p. 1198.
Hocker v. Gentry, 3 Met. (Ky.) 462, p. 2306.
Hockett v. Bailey, 86 Ill. 74, p. 1446.
Hockman v. Hockman, 93 Va. 455, 25 S. E. 534, 57 Am. St. Rep. 815, p. 1273.
Hockman v. Thuma, (Kan.) 75 Pac. 486, p. 1030.
Hockstacker v. Levy, 11 Cal. 76, p. 458, 2719.
Hoddel v. Pugh, 33 Beav. 489, p. 2315.
Hoddy v. Hoard, 2 Ind. 474, 54 Am. Dec. 456, p. 2725.
Hodge v. Amerman, 40 N. J. Eq. 99, 2 Atl. 257, p. 1022, 1036.
Hodge v. Ludlum, 45 Minn. 290, 47 N. W. 805, p. 1445.
Hodge v. Sloan, 107 N. Y. 252, 1 Am. St. Rep. 816, 17 N. E. 335, p. 2596.
Hodge v. United States Steel Co., 64 N. J. Eq. 90, 53 Atl. 553, 601, p. 660, 2118.
Hodge v. United States Steel Corporation, (N. J. Eq.) 54 Atl. 1, p. 982, 2084.
Hodge v. Weeks, 31 S. C. 276, 9 S. E. 953, p. 2375, 2381.
Hodgeden v. Hubbard, 18 Vt. 504, 46 Am. Dec. 167, p. 1327, 1385.
Hodgen v. Guttery, 58 Ill. 431, p. 2435, 2437.
Hodgens v. Hodgens, 4 Clark & F. 323, 372, p. 2174.
Hodges, Ex parte, 24 Ark. 197, p. 2777.
Hodges, In re, L. R. 7 Ch. Div. 754, p. 2050, 2619.
Hodges v. Buell, (Mich.) 95 N. W. 1078, p. 765.
Hodges v. Grant, L. R. 4 Eq. 140, p. 2218.
Hodges v. Howard, 5 R. I. 149, p. 179, 2037.
Hodges v. King, 7 Met. 583, p. 732, 747.
Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624, 3 R. I. 9, p. 2063, 2066, 2125.
Hodges v. Peacock, 3 Ves. 735, p. 886.
Hodges v. Pingree, 10 Gray, 14, p. 2800.
Hodges v. Winston, 94 Ala. 576, 10 South. 535, p. 1027, 1356.
Hodges' Estate, In re, 66 Vt. 70, 44 Am. St. Rep. 820, 28 Atl. 663, p. 2080, 2090, 2099.
Hodge's Settlement, In re, 3 Kay & J. 213, p. 2612.
Hodgkins v. Montgomery Co. Ins. Co., 34 Barb. 213, p. 1163.
Hodgman v. Richards, 45 N. H. 28, p. 529, 530.
Hodgson, In re, L. R. 11 Ch. Div. 888, p. 2109.
Hodgson v. Bibby, 32 Beav. 221, p. 2096.
Hodgson v. Butts, 3 Cranch, 140, p. 1114.

Hodgson v. Clark, 1 De Gex, F. & J. 394, p. 1548.
Hodgson v. Dean, 2 Sim. & St. 221, p. 1108, 1109.
Hodgson v. Earl of Powis, 1 De Gex, M. & G. 6, p. 2677.
Hodgson v. Farrell, 15 N. J. Eq. 88, p. 1667.
Hodgson v. Hodgson, 2 Keen, 704, p. 2148, 2149.
Hodgson v. King, 7 Metc. 583, p. 732.
Hodgson v. Lowell, 25 Iowa, 97, 95 Am. Dec. 775, p. 1100, 1120.
Hodgson v. Shaw, 3 Mylne & K. 183, 190, p. 2796.
Hodgson v. Temple, 5 Taunt. 181, p. 1720.
Hodgson v. Williamson, L. R. 15 Ch. Div. 87, p. 2185.
Hodnett's Estate, 154 Pa. St. 485, 26 Atl. 623, 35 Am. St. Rep. 851, p. 1910.
Hodson v. Coppard, 29 Beav. 4, p. 2673.
Hodson v. Deans, [1903] 3 Ch. 647, p. 1756.
Hoeffer v. Clogan, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 46 L. R. A. 730, p. 1935, 1938, 1973.
Hoeh v. Hoeh, 197 Pa. St. 387, 47 Atl. 351, p. 1730.
Hoene v. Pollak, 118 Ala. 617, 24 South. 349, 72 Am. St. Rep. 189, p. 1435.
Hoffen's Estate, 70 Wis. 522, 36 N. W. 407, p. 1970.
Hoffman v. Beard, 22 Mich. 59, p. 2741.
Hoffman v. Blume, 64 Tex. 334, p. 1066, 1076.
Hoffman v. Felt, 39 Cal. 109, p. 2782.
Hoffman v. Gosnell, 75 Md. 577, 24 Atl. 28, p. 1106.
Hoffman v. Mackall, 5 Ohio St. 124, 130, 64 Am. Dec. 637, p. 1859.
Hoffman v. Postill, L. R. 4 Ch. 673, p. 249, 253, 261, 272.
Hoffman v. Rice, 38 Md. 284, p. 2193.
Hoffman v. Stigers, 28 Iowa, 302, p. 2631.
Hoffman v. Strohecker, 7 Watts, 86, 90, 32 Am. Dec. 740, p. 1107, 1108.
Hoffman v. Vallejo, 45 Cal. 564, p. 1703, 1772.
Hoffman House v. Stokes, 50 App. Div. 163, 63 N. Y. Supp. 784, p. 1911.
Hoffman Steam Coal Co. v. Cumberland Coal Co., 16 Md. 456, p. 1785.
Hoff's Appeal, 24 Pa. St. 200, p. 2405.
Hofsas v. Cummings, 141 Cal. 525, 75 Pac. 110, p. 1895.
Hogan v. Ellis, 39 Fla. 463, 22 South. 727, 63 Am. St. Rep. 167, p. 1451.
Hogan v. Jaques, 19 N. J. Eq. 123, 97 Am. Dec. 644, p. 1989.
Hogan v. Kavanaugh, 138 N. Y. 417, 34 N. E. 292, p. 2283.
Hogan v. Stayhorn, 65 N. C. 279, p. 1989.
Hogden v. Guttery, 58 Ill. 431, p. 1111.
Hoge v. Fidelity Loan & Trust Co., (Va.) 48 S. E. 494, p. 227.
Hoge v. Hoge, 1 Watts, 163, 213, 26 Am. Dec. 52, p. 1653, 2035, 2037.
Hoge v. Hollister, 8 Baxt. 533, p. 2658.
Hogg v. Hoag, 107 Fed. 807, p. 2065.
Hogg v. Kirby, 8 Ves. 215, 223, p. 2688.
Hogg v. Link, 90 Ind. 346, 350, p. 93, 1651, 1652.
Hogg v. Wilkins, 1 Grant Cas. 67, p. 2040.
Hoggart v. Cutts, Craig & P. 197, p. 2642.
Hoghton v. Hoghton, 15 Beav. 278, 305, p. 1738, 1751, 1776, 1778.
Hoile v. Bailey, 58 Wis. 434, 448, 17 N. W. 322, p. 2369.
Hoit v. Russell, 56 N. H. 559, p. 1147.
Hokanson v. Gunderson, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354, p. 1080, 2359.
Hoke v. Herman, 21 Pa. St. 301, p. 2214.
Hoke v. Hoke, 12 W. Va. 427, p. 2065, 2100.
Holbrook v. Campau, 22 Mich. 288, p. 2275.
Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212, p. 1566.
Holbrook v. Dickenson, 56 Ill. 497, p. 1111.
Holbrook v. New Jersey Zinc Co., 57 N. Y. 616, 622, 623, p. 543, 1232, 1245.

Holbrook v. Payne, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456, p. 2568.
Holbrook v. Tobey, 66 Me. 419, 22 Am. Rep. 581, p. 737.
Holcomb v. Thompson, 50 Kan. 598, 32 Pac. 1091, p. 2402, 2404.
Holdane v. Cold Spring, 21 N. Y. 474, p. 1440.
Holdeman v. Jennings, 14 Ark. 329, p. 750.
Holden v. New York and Erie Bank, 72 N. Y. 286, 292, p. 1152, 1156, 1159, 1165, 1166, 1168, 1169, 1175, 1177, 1178, 1897, 2017, 2030, 2032.
Holden v. Pike, 24 Me. 427, p. 1402, 2447.
Holden v. Torrey, 31 Vt. 690, p. 1444.
Holden's Adm'rs v. McMakin, 1 Pars. Cas. 270, p. 2656.
Holdich v. Holdich, 2 Younge & C. 18, 22, 23, p. 387, 819, 835.
Holdron v. Simmons, 28 Ala. 629, p. 462, 464.
Holdship v. Patterson, 7 Watts, 547, p. 1846.
Holdsworth v. Shannon, 113 Mo. 508, 21 S. W. 85, 35 Am. St. Rep. 719, p. 1672.
Hole v. Bradbury, 12 Ch. Div. 886, p. 2552.
Hole v. Thomas, 7 Ves. 589, p. 2681.
Holford v. Phipps, 3 Beav. 434, p. 2054.
Holford v. Wood, 4 Ves. 76, p. 889.
Holgate v. Jennings, 24 Beav. 623, p. 2322.
Holladay v. Willis, 101 Va. 274, 43 S. E. 616, p. 2374, 2379.
Holladay Case, The, 27 Fed. 849, p. 983.
Holland, In re, [1902] 2 Ch. 360, p. 2141.
Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420, p. 1938, 1969.
Holland v. Anderson, 38 Mo. 55, 58, p. 222, 342.
Holland v. Brown, 140 N. Y. 344, 35 N. E. 577, p. 1038.
Holland v. Challen, 110 U. S. 15, 16, 19, 3 Sup. Ct. 495, p. 363, 385, 451, 504.
Holland v. Citizens' Sav. Bank, 16 R. I. 734, 19 Atl. 654, 8 L. R. A. 553, p. 2426.
Holland v. Cruft, 20 Pick. 321, p. 1331.
Holland v. Cruft, 3 Gray, 162, 180, p. 2305, 2325.
Holland v. Holland, L. R. 4 Ch. 449, p. 2088.
Holland v. Hughes, 16 Ves. 111, p. 2073.
Holland v. John, 60 N. J. Eq. 435, 43 Atl. 172, p. 1738.
Holland v. Johnson, 51 Ind. 346, p. 2714, 2722.
Holland v. Mayor etc., 11 Md. 186, 69 Am. Dec. 195, p. 2757.
Holland v. Peck, 2 Ired. Eq. 255, p. 1971.
Holland v. Trotter, 22 Gratt. 136, p. 1470, 1641, 1652, 2709.
Holley v. Adams, 16 Vt. 203, 42 Am. Dec. 508, p. 2233, 2238.
Holliday v. Arthur, 25 Iowa, 19, p. 2369.
Holliday v. Franklin Bank, 16 Ohio, 533, p. 1140, 1272.
Hollingsworth v. Fry, 4 Dall. 345, 348, p. 558.
Hollingsworth v. Pearson, 53 Iowa, 53, p. 2796.
Hollins v. Brierfield etc. Iron Co., 150 U. S. 371, 379, 14 Sup. Ct. 127, 128, 37 L. ed. 1113, p. 505, 507, 2010, 2012.
Hollinshead v. Simms, 51 Cal. 158, p. 2034.
Hollis v. Drew Theological Seminary, 95 N. Y. 166, p. 1969.
Hollis v. Edwards, 1 Vern. 159, p. 2761.
Hollis v. Finks, (Tex. Civ. App.) 78 S. W. 555, p. 1639.
Hollis v. François, 5 Tex. 195, 51 Am. Dec. 760, p. 2198.
Hollis v. Hollis, 4 Baxt. 524, p. 2534.
Holliway v. Holliway, 77 Mo. 392, p. 672, 1718.
Hollocher v. Hollocher, 62 Mo. 267, p. 1739, 2729.
Holloway v. Headington, 8 Sim. 324, 325, p. 1869, 1872.
Holloway v. Holloway, 13 Beav. 209, p. 2690.
Holloway v. Holloway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339, p. 352.

Holloway v. Lowe, 7 Port. 488, p. 1703.
Holloway v. Radcliffe, 23 Beav. 163, p. 2332.
Holm v. Atlas Nat. Bank, 84 Fed. 119, 28 C. C. A. 297, p. 1176.
Holman v. Johnson, Cowp. 341, 343, p. 1713, 1720.
Holman v. Loynes, 4 De Gex, M. & G. 270, p. 182, 1765, 1767, 1769.
Holman v. Patterson's Heirs, 29 Ark. 357, p. 1144, 2498, 2511, 2533.
Holman's Estate, In re, 42 Oreg. 345, 70 Pac. 908, p. 1739.
Holmes, In re, 37 App. Div. 15, 55 N. Y. Supp. 708, 159 N. Y. 532, 53 N. E. 1126, p. 2020.
Holmes, In re, 67 L. T. 335, p. 2159.
Holmes v. Buckner, 67 Tex. 107, 2 S. W. 452, p. 1344.
Holmes v. Caden, 57 Vt. 111, p. 1024.
Holmes v. Chester, 26 N. J. Eq. 79, p. 2749.
Holmes v. Clark, 10 Iowa, 423, p. 1540.
Holmes v. Coates, 159 Mass. 226, 34 N. E. 190, p. 1943, 1979.
Holmes v. Crowell, 73 N. C. 613, 627, p. 1429, 1436, 1438.
Holmes v. Field, 12 Ill. 424, p. 1684.
Holmes v. Fresh, 9 Mo. 200, 206, p. 1672, 2373.
Holmes v. Gilman, 138 N. Y. 376, 34 Am. St. Rep. 463, 34 N. E. 205, 20 L. R. A. 566, p. 2020.
Holmes v. Goghill, 7 Ves. 499, 12 Ves. 206, p. 960.
Holmes v. Grant, 8 Paige, 243, p. 2372, 2377.
Holmes v. Holmes, 12 Barb. 137, p. 738.
Holmes v. Holmes, 1 Brown Ch. 555, p. 908.
Holmes v. Holmes, 106 Ga. 858, 33 S. E. 216, p. 2032.
Holmes v. Holmes, 2 Jones Eq. 334, p. 2739.
Holmes v. Holmes, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444, p. 1739.
Holmes v. Holmes, 3 Paige, 363, p. 2736.
Holmes v. Holmes, 36 Vt. 525, p. 290, 321, 326.
Holmes v. Hull, 50 Nebr. 656, 70 N. W. 241, p. 2195.
Holmes v. Kidd, 3 Hurl. & N. 891, p. 1246.
Holmes v. McGinty, 44 Miss. 94, p. 2417.
Holmes v. Mathews, 9 Moore P. C. C. 413, p. 2379.
Holmes v. Mead, 52 N. Y. 332, 339, p. 177, 1968.
Holton v. Meighen, 15 Minn. 69, p. 2376.
Holmes v. Newman, (Kan.) 75 Pac. 501, p. 1124.
Holmes v. Penney, 3 Kay & J. 90, 99, p. 1793, 1796, 1842.
Holmes v. Pickett, 51 S. C. 271, 29 S. E. 82, p. 1828.
Holmes v. Powell, 8 De Gex, M. & G. 572, p. 1018, 1022, 1036, 1041, 1292.
Holmes v. Stateler, 57 Ill. 209, p. 307, 2702, 2703.
Holmes v. Steele, 28 N. J. Eq. 173, p. 2702, 2710.
Holmes v. Stix, 104 Ky. 351, 47 S. W. 243, p. 1328.
Holmes v. Stout, 4 N. J. Eq. 492, 10 N. J. Eq. 419, p. 1037, 1147, 1346.
Holmes v. Upton, L. R. 9 Ch. 214, p. 2698.
Holmes v. Walter, 118 Wis. 409, 95 N. W. 380, p. 1836.
Holmes's Appeal, 77 Pa. St. 50, p. 1586, 1590, 1609, 1618.
Holmes's Estate, In re, 3 Giff. 337, 345, p. 1767.
Holmes' Heirs v. Adm'r of Holmes, 28 Vt. 765, p. 2172.
Holridge v. Gillespie, 2 Johns. Ch. 30, p. 2028, 2372.
Holroyd v. Marshall, 10 H. L. Cas. 191, p. 191, 193, 2472, 2576, 2580.
Holscher's Heirs, In re, (Iowa) 101 N. W. 759, p. 2047.
Holsman v. Boiling Springs etc. Co., 14 N. J. Eq. 335, 342-345, p. 382, 451, 2684.
Holst v. Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442, p. 1596, 1597.
Holt v. Agnew, 67 Ala. 360, p. 1781.
Holt v. Corporation of Rochdale, L. R. 10 Eq. 354, 361, p. 2686.
Holt v. Creamer, 34 N. J. Eq. 181, p. 2383.

Holt v. Holt, 1 Cas. Ch. 190, p. 2027.
Holt v. Hunt, 18 Tex. Civ. App. 363, 44 S. W. 889, p. 1279.
Holt v. Parsons, (Ga.) 45 S. E. 690, p. 1449, 1787.
Holt v. Rogers, 8 Pet. 420, p. 2778.
Holt v. Thurman, 111 Ky. 84, 63 S. W. 280, 98 Am. St. Rep. 398, p. 2555.
Holt v. Wilson, 75 Ala. 58, p. 1909.
Holthaus v. Hornbostle, 60 Mo. 439, p. 2139, 2143.
Holthausen, Ex parte, L. R. 9 Ch. 722, p. 2539.
Holton v. Meighen, 15 Minn. 69, p. 2369.
Holton v. Noble, 83 Cal. 7, 23 Pac. 58, p. 1563.
Holtz v. Schmidt, 34 N. Y. Super. Ct. 28, p. 293.
Holworthy v. Mortlock, 1 Cox, 141, p. 307.
Holyoke v. Mayo, 50 Me. 385, p. 554.
Home Fire Ins. Co. v. Barber, (Nebr.) 93 N. W. 1024, p. 2118.
Home for Incurables v. Noble, 172 U. S. 383, 19 Sup. Ct. 226, p. 1543.
Home Ins. Co. v. Gibson, 72 Miss. 58, 17 South. 13, p. 1158.
Home Ins. Co. v. Stanchfield, 1 Dill. 424, 429, 431–438. 2 Abb. 1, p. 325, 514, 515, 517.
Home Land & Cattle Co. v. McNamara, 111 Fed. 822, 49 C. C. A. 642, p. 743.
Homer v. Grosholz, 38 Md. 521, p. 1106.
Homer v. Homer, L. R. 8 Ch. Div. 758, p. 1543.
Homer v. Homer, 107 Mass. 82, 85, p. 701, 958, 1901, 2024.
Homer v. Shelton, 2 Met. 194, 206, p. 1926.
Home Sav. & State Bank v. Peoria Agricultural & Trotting Soc., 206 Ill. 9, 99 Am. St. Rep. 132, 69 N. E. 17, p. 1163, 1314, 1376.
Home Sav. Bank v. Bierstadt, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146, p. 2425.
Hommel v. Devinney, 39 Mich. 522, p. 1146.
Homœopathic Mut. Life Ins. Co. v. Marshall, 32 N. J. Eq. 103, p. 2153, 2195.
Hon v. Hon, 70 Ind. 135, p. 1905, 1993, 2005, 2040.
Hone's Ex'rs v. Van Schaick, 20 Wend. 564, p. 1895.
Honeywood v. Forster, 30 Beav. 14, p. 789, 790, 791, 854.
Honner v. Merton, 3 Russ. 65, p. 1787.
Honnett v. Williams, 66 Ark. 148, 49 S. W. 495, p. 1840.
Honore v. Hutchings, 8 Bush, 687, p. 2377.
Honore's Ex'r v. Bakewell, 6 B. Mon. 67, 43 Am. Dec. 147, p. 1045, 1052, 1054, 2521.
Hoock v. Bowman, 42 Nebr. 80, 47 Am. St. Rep. 691, 60 N. W. 387, p. 1597.
Hood v. Aston, 1 Russ. 412, p. 2669.
Hood v. Clapham, 19 Beav. 90, p. 2322.
Hood v. Cone, 7 Paige, 471, 476, p. 2325.
Hood v. Dorer, 107 Wis. 149, 82 N. W. 546, p. 1941, 1944, 1957, 1970.
Hood v. Easton, 2 Giff. 692, p. 2429.
Hood v. Fahnestock, 1 Pa. St. 470, 44 Am. Dec. 147, p. 994, 1048.
Hood v. Fahnestock, 8 Watts, 489, 34 Am. Dec. 489, p. 1166, 1384.
Hook v. Fentress, Phill. Eq. 299, 233, p. 570.
Hood v. Haden, 82 Va. 588, p. 2208.
Hood v. Hammond, 128 Ala. 569, 30 South. 540, 86 Am. St. Rep. 159, p. 2498, 2511, 2512.
Hood v. Hood, 85 N. Y. 561, p. 2305, 2309, 2315.
Hood v. New York etc. R. R. Co., 23 Conn. 609, p. 307, 2703.
Hood v. North East. R'y, L. R. 8 Eq. 666, 5 Ch. 525, p. 2676, 2766.
Hood v. Oglander, 34 Beav. 513, p. 1519, 1929.
Hood-Barrs v. Cathcart, [1894] 2 Q. B. 559, 562, 570, p. 2159, 2183.
Hood-Barrs v. Heriot, [1896] A. C. 174, p. 2156, 2159.
Hoodless v. Reid, 112 Ill. 105, p. 725.
Hood's Estate, In re, 98 N. Y. 363, p. 1835.
Hooker v. Hammill, 7 Nebr. 234, p. 1102.
Hooker v. Nichols, 116 N. C. 157, 21 S. E. 207, p. 1097.

Hooker v. Pierce, 2 Hill (N. Y.) 650, p. 1131, 1364.
Hooker v. Pynchon, 8 Gray, 550, p. 749.
Hoole v. Attorney-General, 22 Ala. 190, p. 1065.
Hooley v. Hatton, 1 Brown Ch. 390, note, 2 Lead. Cas. Eq., 4th Am. ed., 721, 722, p. 883, 885.
Hooper, Ex parte, 1 Mer. 7, p. 192, 2538.
Hooper v. Armstrong, 69 Ala. 343, p. 2498.
Hooper v. Brodrick, 11 Sim. 47, p. 2698.
Hooper v. Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262, p. 629, 637, 1194, 1259, 1285, 1293, 2497, 2500, 2511.
Hooper v. Holmes, 11 N. J. Eq. 122, p. 1906.
Hooper v. Hooper, 9 Cush. 122, 127, p. 538.
Hooper v. Savannah etc. R. R. Co., 69 Ala. 529, p. 744.
Hooper v. Scheimer, 23 How. 235, 16 L. ed. 452, p. 495.
Hooper v. Smart, L. R. 18 Eq. 683, p. 1539.
Hooper v. Smith, 57 Ala. 557, p. 2255.
Hooper v. Strahan, 71 Ala. 75, p. 2498, 2516.
Hooper v. Wilson, 12 Vt. 695, p. 2353.
Hooper v. Young, 140 Cal. 274, 98 Am. St. Rep. 56, 74 Pac. 140, p. 2364.
Hoopes v. Bailey, 28 Miss. 328, p. 2377.
Hoopes v. Dundas, 10 Pa. St. 75, p. 1683, 1684.
Hoopes v. Knell, 31 Md. 550, p. 1106.
Hooton v. Ransom, 6 Mo. App. 19, p. 2182, 2194.
Hoots v. Williams, 116 Ala. 372, 22 South. 497, p. 1366.
Hoover v. Calhoun, 16 Gratt. 109, p. 2775.
Hoover v. Columbia Nat. Bank, 58 Nebr. 420, 78 N. W. 717, p. 1230.
Hoover v. Hoover, 5 Pa. St. 351, p. 2221.
Hoover v. Hoover, 129 Pa. St. 201, 19 Atl. 854, p. 2000.
Hoover v. Montclair etc. R'y, 29 N. J. Eq. 4, p. 2662.
Hoover v. Reilly, 2 Abb. 471, p. 1486.
Hoover v. Wise, 91 U. S. 308, p. 1158.
Hope v. Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366, p. 1065, 1271, 1279, 1343.
Hope v. Carnegie, L. R. 1 Ch. 320, p. 2703.
Hope v. Hope, 3 Beav. 317, p. 297.
Hope v. Hope, 4 De Gex, M. & G. 328, p. 2614, 2616, 2617.
Hope v. Hope, 26 L. J. Ch. 417, p. 1680.
Hope v. Jones, 24 Cal. 89, p. 2261, 2262.
Hope v. Lawrence, 50 Barb. 258, p. 1436.
Hope v. Lyddell, 21 Beav. 183, p. 1054, 1315.
Hope v. Stone, 10 Minn. 141 (Gil. 114), p. 1338.
Hope v. Wilkinson, 14 Lea, 21, 52 Am. Rep. 149, p. 2220, 2222.
Hope Fire Ins. Co. v. Cambreling, 1 Hun, 493, p. 1174, 1179.
Hopfensack v. Hopfensack, 61 How. Pr. 498, p. 2663.
Hopgood v. Ernest, 3 De Gex, J. & S. 116, 121, p. 1010, 1017, 1295, 1296.
Hopgood v. Parkin, L. R. 11 Eq. 74, p. 2089.
Hopkins, Ex parte, L. R. 9 Ch. 506, p. 2166.
Hopkins, In re, L. R. 19 Ch. Div. 61, p. 2658.
Hopkins v. Beebe, 26 Pa. St. 85, 88, p. 2568, 2653.
Hopkins v. Burr, 24 Colo. 502, 65 Am. St. Rep. 238, 52 Pac. 670, p. 2020.
Hopkins v. Crossley, (Mich.) 96 N. W. 499, p. 1970.
Hopkins v. Garrard, 7 B. Mon. 312, p. 1032, 1145.
Hopkins v. Gilman, 22 Wis. 476, p. 345, 2773, 2782.
Hopkins v. Glunt, 111 Pa. St. 290, 2 Atl. 183, p. 1927, 1929.
Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 23 L. ed. 392, p. 1986.
Hopkins v. Hemsworth, [1898] 2 Ch. 347, 67 Law J. Ch. 526, 78 Law T., N. S., 832, 47 Wkly. Rep. 26, p. 1215.

Hopkins v. Hopkins, 1 Atk. 581, 590, 591, 592, p. 1825, 1826.
Hopkins v. Hopkins, 86 Md. 681, 37 Atl. 371, p. 216.
Hopkins v. McLaren, 4 Cow. 667, p. 1064.
Hopkins v. Roberts, 54 Md. 312, p. 2769.
Hopkins v. Upshur, 20 Tex. 89, 70 Am. Dec. 375, p. 1977.
Hopkins v. Wooley, 81 N. Y. 77, p. 2447, 2451, 2452.
Hopkins v. Worcester etc. Canal Prop'rs, L. R. 6 Eq. 437, p. 2659, 2660.
Hopkinson v. Dumas, 42 N. H. 296, p. 1849, 1993.
Hopkinson v. Forster, L. R. 19 Eq. 74, p. 2569.
Hopkinson v. Lord Burghley, L. R. 2 Ch. 447, p. 279, 287, 2052.
Hopkinson v. Rolt, 9 H. L. Cas. 514, 25 Beav. 461, p. 2382, 2385, 2386.
Hopler v. Cutler, (N. J. Eq.) 34 Atl. 746, p. 1281, 1282, 1285.
Hopper v. Calhoun, 52 Kan. 703, 35 Pac. 816, 39 Am. St. Rep. 363, p. 2404, 2406.
Hopper v. Hopper, 16 N. J. Eq. 147, p. 2760.
Hopper v. Lutkins, 4 N. J. Eq. 149, p. 569.
Hopper v. Parkinson, 5 Nev. 233, p. 1284.
Hoppin v. Doty, 25 Wis. 573, 591, p. 986, 987, 1149.
Hopping v. Burnam, 2 Iowa, 39, p. 1145.
Hoppock v. Johnson, 14 Wis. 303, p. 1160.
Hoppock v. Ramsey, 28 N. J. Eq. 413, p. 1403.
Hoppock v. United etc. R. R., 27 N. J. Eq. 286, p. 245, 250, 260, 270.
Hoppough v. Struble, 60 N. Y. 430, p. 93, 1524, 2722.
Hopwood v. Hopwood, 22 Beav. 493, 3 Jur., N. S., 549, p. 910.
Hopwood v. Hopwood, 7 H. L. Cas. 728, p. 896.
Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469, p. 1490.
Hora v. Hora, 33 Beav. 88, p. 1921.
Horbach v. Hill, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. ed. 670, p. 2373.
Hord v. Chandler, 13 B. Mon. 403, p. 585.
Hord v. Harlan, 143 Mo. 469, 45 S. W. 274, p. 1271.
Horde v. Earl of Suffolk, 2 Mylne & K. 59, p. 1949.
Hore v. Becher, 12 Sim. 465, p. 1477.
Horeas v. Healy, 15 Barb. 296, p. 1845.
Horlock, In re, [1895] 1 Ch. 516, p. 874.
Horlock v. Horlock, 2 De Gex, M. & G. 644, p. 2158.
Horlock v. Wiggins, L. R. 39 Ch. Div. 142, p. 921.
Horn v. Bennett, 135 Ind. 158, 34 N. E. 965, 24 L. R. A. 800, p. 2392.
Horn v. Cole, 51 N. H. 287, 289, 12 Am. Rep. 111, p. 1416, 1429, 1435, 1437, 1441, 1444.
Horn v. Jones, 28 Cal. 194, p. 1075, 2748.
Horn v. Keteltas, 46 N. Y. 605, p. 2376, 2377, 2380.
Horn v. Ludington, 32 Wis. 73, p. 231, 355, 588, 2781.
Horn v. Pullmann, 72 N. Y. 268, p. 1738.
Horn v. Star Foundry Co., 23 W. Va. 522, p. 1711.
Horn v. Volcano etc. Co., 13 Cal. 62, 73 Am. Dec. 569, p. 1803.
Hornby v. Matcham, 16 Sim. 325, p. 1654, 2429.
Horncastle v. Charlesworth, 11 Sim. 315, p. 2741.
Horne v. Lyeth, 4 Har. & J. 431, 434, p. 1886.
Horne v. Thompson, 1 Sausse & S. 615, p. 758.
Horner v. Flintoff, 9 Mees. & W. 678, 681, p. 743.
Horner v. McGaughy, 62 Pa. St. 189, 191, p. 872, 873, 876.
Horning v. Wiederspalen, 28 N. J. Eq. 387, p. 2486, 2489.
Horning's Ex'rs' Appeal, 90 Pa. St. 388, p. 1108, 1130.
Hornsby v. Lee, 2 Madd. 16, p. 2172.
Hornsey District Council v. Smith, [1897] 1 Ch. 843, p. 1838.
Horrell v. Waldron, 1 Vern. 26, p. 2204.

Horsburg v. Baker, 1 Pet. 232, 236, p. 274, 515, 757, 765.
Horsley v. Garth, 2 Gratt. 471, 44 Am. Dec. 393, p. 1105, 1120.
Horst v. Dague, 34 Ohio St. 371, p. 2574, 2585.
Horstman v. Gerker, 49 Pa. St. 282, 88 Am. Dec. 501, p. 1298.
Horstmann v. Flege, 172 N. Y. 381, 65 N. E. 202, p. 836.
Horton v. Brocklehurst, 29 Beav. 504, p. 2052.
Horton v. Handvil, 41 N. J. Eq. 57, 3 Atl. 72, p. 1609.
Horton v. Horner, 14 Ohio, 437, p. 2520.
Horton v. Hubbard, 83 Mich. 123, 47 N. W. 115, p. 1268.
Horton v. Moseley, 17 Ala. 794, p. 2255, 2256.
Horwood v. West, 1 Sim. & St. 387, p. 1925.
Hosea v. Jacobs, 98 Mass. 65, p. 1978.
Hosking v. Nicholls, 1 Younge & C. Ch. 478, p. 2208.
Hosking v. Smith, L. R. 13 App. Cas. 582, p. 1375.
Hoskins v. Carter, 66 Iowa, 638, 24 N. W. 249, p. 1357.
Hoskins v. Hoskins, Prec. Ch. 263, p. 943.
Hosleton v. Dickinson, 51 Iowa, 244, p. 1639, 2730.
Hosley v. Holmes, 27 Mich. 416, p. 1146.
Hosmer v. Campbell, 98 Ill. 578, p. 1099, 1130.
Hospes v. Almstedt, 83 Mo. 473, p. 1403.
Hospes v. Northwestern Mfg. Co., 48 Minn. 174, 50 N. W. 1117, 31 Am. St. Rep. 637, 15 L. R. A. 470, p. 2014.
Hostetter v. Alexander, 22 Minn. 559, p. 1228.
Hostetter v. Nowinkle, 1 Dill. 329, p. 2691.
Hotchkin v. Third Nat. Bank, 127 N. Y. 329, 27 N. E. 1050, p. 1621.
Hotchkiss v. Elting, 36 Barb. 38, p. 2756.
Hotchkiss v. Fitzgerald P. P. P. Co., 41 W. Va. 357, 23 S. E. 576, p. 352.
Hotchkiss & Upson Co. v. Union Nat. Bank, 68 Fed. 76, p. 1221.
Hotham's Trusts, In re Lord, L. R. 12 Eq. 76, p. 2049.
Hottenstein v. Clement, 3 Grant Cas. 316, p. 560.
Hottenstein v. Lerch, 104 Pa. St. 454, p. 1024, 1034, 1039, 1048.
Hotz's Estate, 38 Pa. St. 422, 80 Am. Dec. 490, p. 1683, 1684.
Hough v. Cook etc. Co., 73 Ill. 23, 24 Am. Rep. 230, p. 2729.
Hough v. Harvey, 71 Ill. 72, p. 2090.
Hough v. Osborne, 7 Ind. 140, p. 2392, 2396.
Hough v. Richardson, 3 Story, 659, p. 1559, 1563, 1567, 1582, 1583, 1585, 1591, 1596.
Houghtaling v. Hills, 59 Iowa, 289, 13 N. W. 305, p. 1621.
Houghton, Ex parte, 17 Ves. 251, 253, p. 1995, 1996.
Houghton v. Bankart, 3 De Gex, F. & J. 16, p. 1549.
Houghton v. Bartholomew, 10 Met. 138, p. 1101.
Houghton v. Davenport, 74 Me. 590, p. 2030.
Houghton v. Graybill, 82 Va. 573, p. 1588.
Houghton v. Hapgood, 13 Pick. 154, 158, p. 1412, 1849, 2443.
Houghton v. Lees, 1 Jur., N. S., 862, 863, p. 634, 2589, 2768.
Houghton v. Todd, 58 Nebr. 360, 78 N. W. 634, p. 1175.
Houlditch v. Wallace, 5 Clark & F. 629, p. 1226.
Houldsworth v. City of Glasgow Bank, L. R. 5 App. C. 317, 323, p. 1574.
Hoult v. Donahue, 21 W. Va. 294, p. 1103, 1133, 1375.
Houlton v. Nichol, 93 Wis. 393, 67 N. W. 715, 57 Am. St. Rep. 928, 33 L. R. A. 166, p. 1699.
House v. Grant, 4 Lans. 296, p. 2235, 2236, 2247.
House v. Thompson, 3 Head, 512, p. 655.
Housel v. Cremer, 13 Nebr. 298, p. 1332.
Houseman v. Girard etc. Ass'n, 81 Pa. St. 256, 261, p. 1163.
Houseman v. Grossman, 177 Pa. St. 453, 35 Atl. 736, p. 2286.
Houser v. Cruikshank, 122 Ala. 256, 25 South. 206, 82 Am. St. Rep. 76, p. 2443.

Houser v. Houser, 43 Ga. 415, p. 2005.
Houser v. Jordan, 26 Tex. Civ. App. 398, 63 S. W. 1049, p. 1907.
Houser v. Lamont, 55 Pa. St. 311, 93 Am. Dec. 755, p. 2369, 2373.
Houssels v. Jacobs, 178 Mo. 579, 77 S. W. 857, p. 2551.
Houston v. Bryan, 78 Ga. 181, 6 Am. St. Rep. 252, 1 S. E. 252, p. 1755.
Houston v. Dixon, 66 Tex. 79, 1 S. W. 375, p. 2503.
Houston v. Embry, 1 Sneed, 480, p. 2144.
Houston v. Howie, 84 N. C. 349, p. 2300.
Houston v. Maddux, 179 Ill. 377, 70 Am. St. Rep. 98, 53 N. E. 599, reversing 73 Ill. App. 203, p. 2268.
Houston v. National M. B. & L. Ass'n, 80 Miss. 31, 92 Am. St. Rep. 565, 31 South. 540, 92 Am. St. Rep. 576–585, p. 1756.
Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827, p. 1579.
Houston v. Timmerman, 17 Oreg. 499, 11 Am. St. Rep. 848, p. 1076.
Houston & T. C. R. R. Co. v. Chaffin, 60 Tex. 555, p. 1333, 1355.
Houston etc. R. R. Co. v. Bremond, 66 Tex. 159, 18 S. W. 448, p. 2418.
Hout v. Hout, 20 Ohio St. 119, p. 1468.
Houzik v. Delaglise, 65 Wis. 494, 27 N. W. 171, 56 Am. Rep. 642, p. 1025.
Hovenden v. Lord Annesley, 2 Schoales & L. 607, 617, 639, p. 1580, 1732.
Hovey v. Blakeman, 4 Ves. 596, p. 2095.
Hovey v. Blanchard, 13 N. H. 145, p. 1152, 1168.
Hovey v. Elliott, 118 N. Y. 124, 132, 23 N. E. 475, p. 1066, 1077, 2465, 2468, 2470, 2473.
Hovey v. Hovey, 61 N. H. 599, p. 852.
Hovorka v. Havlik, (Nebr.) 93 N. W. 990, p. 1781.
How v. Mortell, 28 Ill. 479, p. 2708, 2709.
How v. Tenants of Bromsgrove, 1 Vern. 22, p. 362, 393, 455.
How v. Weldon, 2 Ves. Sr. 516, 518, p. 1740.
Howard v. Am. Peace Soc., 49 Me. 288, 306, p. 552, 553, 1967, 1974.
Howard v. Bryant, 9 Gray, 239, p. 2172.
Howard v. Carpenter, 11 Md. 259, p. 1467.
Howard v. Castle, 6 Term Rep. 642, p. 1693.
Howard v. Chase, 104 Mass. 249, p. 1055, 1262.
Howard v. Clark, 71 Vt. 424, 45 Atl. 1042, 76 Am. St. Rep. 782, p. 1099, 1130, 1400, 1406.
Howard v. Conway, 1 Coll. C. C. 87, p. 1547.
Howard v. Delgado County, 121 Fed. 26, 57 C. C. A. 270, p. 622, 2471.
Howard v. Digby, 8 Bligh, N. S., 224, 245, 265–269, 2 Clark & F. 634, p. 2147, 2163.
Howard v. Earl of Shrewsbury, L. R. 2 Ch. 760, p. 1634.
Howard v. Edgell, 17 Vt. 9, p. 1665, 1667, 1671.
Howard v. Gould, 28 Vt. 523, 67 Am. Dec. 728, p. 1609, 1613, 1618.
Howard v. Harris, 1 Vern. 190, 2 Lead Cas. Eq., 4th Am. ed., 1945, 1949, 1952, 1983, p. 633, 2370, 2436.
Howard v. Henriques, 3 Sand. 725, p. 2690.
Howard v. Hopkins, 2 Atk. 371, p. 749, 750.
Howard v. Howard, 3 Met. 548, p. 1405.
Howard v. Hudson, 2 El. & B. 1, p. 1422, 1439, 1441, 1443.
Howard v. Iron & Land Co., 62 Minn. 298, 64 N. W. 896, p. 2471, 2472.
Howard v. Jones, 5 Ired. Eq. 75, 79, 81, p. 215.
Howard v. Kimball, 65 N. C. 175, 6 Am. Rep. 739, p. 2775.
Howard v. Massengale, 13 Lea, 577, p. 2481.
Howard v. Moffatt, 2 Johns. Ch. 206, 208, p. 646.
Howard v. Moore, 4 Sneed, 317, p. 2770.
Howard v. Robinson, 5 Cush. 119, 123, p. 2349.
Howard v. Shaw, 10 Wash. 151, 38 Pac. 746, p. 1098, 1113, 1299, 1301.
Howard v. Simkins, 70 Ga. 322, p. 2191.
Howard v. Turner, 155 Pa. St. 349, 26 Atl. 723, 35 Am. St. Rep. 883, p. 1645.

Howard v. Wacker, 92 Tenn. 452, 21 S. W. 897, p. 1914.
Howard v. Watson, 76 Iowa, 229, 41 N. W. 45, p. 821, 829, 852.
Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 Am. Dec. 478, 4 Sand. 565, p. 1050, 1052, 1054, 1055, 1130, 1147, 1163, 1166, 2447.
Howards v. Davis, 6 Tex. 183, p. 1756.
Howards v. Selden, 4 Hughes, 310, 5 Fed. 465, 473, p. 353.
Howarth v. Dewell, 6 Jur., N. S., 1360, p. 1924.
Howe, In re, 1 Paige, 125, 19 Am. Dec. 395, p. 191, 1269, 1270, 2470, 2475.
Howe v. Earl of Dartmouth, 7 Ves. 137, 150, 151, p. 2071, 2073, 2205, 2322.
Howe v. Harding, 76 Tex. 17, 13 S. W. 41, 18 Am. St. Rep. 17, p. 2503, 2509.
Howe v. Hartness, 11 Ohio St. 449, 78 Am. Dec. 312, p. 1079.
Howe v. Howe, 97 Me. 422, 54 Atl. 908, p. 2561.
Howe v. Howe, 99 Mass. 88, p. 1725, 1728.
Howe v. Hunt, 31 Beav. 420, p. 345.
Howe v. Mittleberg, 96 Mo. App. 490, 70 S. W. 397, p. 2550.
Howe v. Nickerson, 14 Allen, 400, 406, p. 536, 2764.
Howe v. Stortz, 27 W. Va. 555, p. 2200.
Howe v. Taylor, 6 Oreg. 284, 291, 292, p. 462, 463, 571, 1463.
Howe v. Ward, 4 Greenl. 195, p. 1804.
Howe v. Wildes, 34 Me. 566, p. 2193.
Howe v. Wilson, 91 Mo. 45, 3 S. W. 390, 60 Am. Rep. 226, p. 1968, 1974.
Howell v. Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371, p. 250, 275.
Howell v. Baker, 4 Johns. Ch. 118, p. 1653.
Howell v. Biddlecom, 62 Barb. 131, p. 1618.
Howell v. City of Buffalo, 2 Abb. App. 412, 416, p. 434, 436, 454, 2755, 2757.
Howell v. George, 1 Madd. 1, p. 1518, 1539.
Howell v. Hooks, 4 Ired. Eq. 188, p. 2209.
Howell v. Lewis, 61 L. J. (Ch.) 89, p. 2626.
Howell v. Moores, 127 Ill. 67, 19 N. E. 863, p. 238, 459, 462, 466, 567, 579, 1856, 2268.
Howell v. Pool, 92 N. C. 450, p. 1756.
Howell v. Ransom, 11 Paige, 538, p. 1770.
Howell v. Tompkins, 42 N. J. Eq. 305, 11 Atl. 333, p. 2330, 2332.
Howell v. Western R. R., 94 U. S. 463, p. 725.
Howells v. Hettrick, 160 N. Y. 308, 54 N. E. 677, p. 1329, 1331.
Howells v. Jenkins, 2 Johns. & H. 706, 1 De Gex, J. & G. 617, 619, p. 782, 811, 813, 854, 857.
Howells v. Pacific States Sav. etc. Co., 21 Utah, 45, 60 Pac. 1025, 81 Am. St. Rep. 659, p. 1668.
Howe Machine Co. v. Farrington, 82 N. Y. 121, p. 1622.
Howey v. Goings, 13 Ill. 95, 54 Am. Dec. 427, p. 2739.
Howison v. Alabama Coal & Iron Co., 70 Fed. 683, 17 C. C. A. 339, 30 U. S. App. 473, p. 1154.
Hows v. Butterworth, (Tenn. Ch. App.) 62 S. W. 1114, p. 1339.
Howse v. Chapman, 4 Ves. 542, p. 1948.
Howser v. Cruikshank, 122 Ala. 256, 25 South. 206, 82 Am. St. Rep. 76, p. 2435, 2437, 2449.
Howze v. Barber, 29 S. C. 466, 7 S. E. 817, p. 1926.
Howze v. Dew, 90 Ala. 178, 7 South. 239, 24 Am. St. Rep. 783, p. 2473.
Howze v. Howze, 14 Tex. 232, p. 2302.
Howze v. Mallett, 4 Jones Eq. 194, p. 896, 909, 914, 947.
Hoxie v. Carr, 1 Sum. 173, 192, 193, p. 982, 986, 1078.
Hoxie v. Hoxie, 7 Paige, 187, p. 1921.
Hoxie v. Price, 31 Wis. 82, p. 1149.
Hoxsey v. Hoxsey, 37 N. J. Eq. 46, p. 1926.
Hoy v. Allen, 27 Iowa, 208, p. 1270, 1279.
Hoy v. Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687, p. 981, 987, 1014, 1130, 1132, 1147, 2451, 2455.
Hoy v. Hansborough, Freem. (Miss.) 533, p. 2765.
Hoyes v. Kindersley, 2 Smale & G. 195, 197, p. 2142.

Hoyle v. Plattsburgh etc. R. R., 54 N. Y. 314, 328, 13 Am. Rep. 595, p. 2085.
Hoyt v. Hoyt, 85 N. Y. 142, 146, 149, p. 2486, 2487, 2489, 2491, 2492.
Hoyt v. Hoyt, 61 Vt. 413, 18 Atl. 313, p. 1743.
Hoyt v. Jones, 31 Wis. 389, 404, p. 1337, 1355.
Hoyt v. Latham, 143 U. S. 553, 12 Sup. Ct. 568, 36 L. ed. 259, p. 2086.
Hoyt v. Mackenzie, 3 Barb. Ch. 320, p. 2689.
Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585, p. 2130.
Hoyt v. Thompson, 5 N. Y. 320, 347, p. 1095, 2552.
Hoyt v. Tuxbury, 70 Ill. 331, p. 2778.
H's Estate, In re, L. R. 1 Ch. Div. 276, p. 2660.
H. Stern, Jr. & Bros. Co. v. Wing, (Mich.) 97 N. W. 791, p. 2014.
Hubbard, Matter of, 82 N. Y. 90, 92, 93, 95, p. 2612, 2613, 2614.
Hubbard v. Burrell, 41 Wis. 365, p. 2030.
Hubbard v. Fisher, 25 Vt. 539, p. 2100.
Hubbard v. Goodwin, 3 Leigh, 492, p. 1834.
Hubbard v. Hubbard, 2 Hem. & M. 38, p. 2742.
Hubbard v. Knight, 52 Nebr. 400, 72 N. W. 473, p. 1051.
Hubbard v. Long, 20 Iowa, 149, p. 1145.
Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153, p. 1690.
Hubbard v. Savage, 8 Conn. 215, p. 2383.
Hubbard v. Weare, 79 Iowa, 678, 44 N. W. 915, p. 1573.
Hubbard v. Young, 10 Beav. 203, p. 2322.
Hubbell v. Currier, 10 Allen, 333, p. 1384, 1637.
Hubbell v. Henrickson, 175 N. Y. 175, 67 N. E. 302, p. 2501.
Hubbell v. Medbury, 53 N. Y. 98, p. 2032.
Hubbell v. Meigs, 50 N. Y. 480, 489, p. 1563, 1577.
Hubbell v. Moulson, 53 N. Y. 225, 13 Am. Rep. 519, p. 2361, 2364, 2432.
Hubbell v. Sibley, 5 Lans. 51, p. 1861.
Hubbell v. Von Schoening, 58 Barb. 498, 49 N. Y. 326, 330, p. 2722, 2776, 2778, 2779.
Hubble v. Osborn, 31 Ind. 249, p. 2005.
Hubble v. Vaughan, 42 Mo. 138, p. 2722.
Huber v. Bossart, 70 Iowa, 718, 29 N. W. 608, p. 1343.
Huber v. Donoghue, 49 N. J. Eq. 125, 23 Atl. 495, p. 2055.
Huber's Appeal, 80 Pa. St. 348, p. 1830, 1846.
Hudelson v. Armstrong, 70 Ind. 99, p. 2608, 2609.
Hudnal v. Wilder, 4 McCord, 294, 17 Am. Dec. 744, p. 1323.
Hudnall v. Ham, 183 Ill. 486, 56 N. E. 172, 75 Am. St. Rep. 124, p. 2574.
Hudson v. Bartram, 3 Madd. 440, p. 2779.
Hudson v. Beauchamp, 3 Bligh, 20, p. 1728.
Hudson v. Caryl, 44 N. Y. 553, p. 355.
Hudson v. King, 2 Heisk. 560, p. 1670.
Hudson v. Randolph, 66 Fed. 216, 13 C. C. A. 402, 23 U. S. App. 681, p. 504, 1117, 1121, 1176.
Hudson v. Warner, 2 Har. & G. 415, p. 985, 991, 1055.
Hudson v. Wheeler, 34 Tex. 356, p. 1648.
Hudson v. White, 17 R. I. 519, 23 Atl. 57, p. 1997.
Hudson v. Wood, 119 Fed. 764, p. 507.
Hudson Bros. Com. Co. v. Glencoe etc. Co., 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722, p. 1398.
Hudson River R. R. v. Loeb, 7 Rob. (N. Y.) 418, p. 2683.
Hudspeth v. Thomason, 46 Ala. 470, p. 1463.
Huebsch v. Scheel, 81 Ill. 281, p. 1403.
Hueser v. Sharman, 89 Iowa, 355, 48 Am. St. Rep. 390, 56 N. W. 525, p. 2425.
Huested v. Ingraham, 75 N. Y. 251, 257, p. 2474.
Huey v. Prince, 187 Pa. St. 151, 40 Atl. 982, 42 Wkly. Notes Cas. 441, p. 1108.
Huff v. Crawford, 89 Tex. 214, 34 S. W. 606, p. 1342.

Huff v. Farwell, 67 Iowa, 298, 25 N. W. 252, p. 2448.
Huff v. Maroney, 23 Tex. Civ. App. 465, 56 S. W. 754, p. 1324, 1329.
Huff v. Ripley, 58 Ga. 11, p. 217, 1640, 1643.
Huff v. Wright, 39 Ga. 41, p. 2191.
Huffman v. Huffman, 1 Lea, 491, p. 2756.
Huffman v. Hummer, 17 N. J. Eq. 264, p. 615.
Huffman v. Western Mortg. & Inv. Co., 13 Tex. Civ. App. 169, 36 S. W. 306, p. 2410.
Huger v. Huger, 3 Desaus. Eq. 18, p. 2620.
Hugg v. Camden, 29 N. J. Eq. 6, p. 2678.
Huggins v. King, 3 Barb. 616, p. 2709.
Hughes, Ex parte, 6 Ves. 617, p. 1764.
Hughes v. Berrien, 70 Ga. 273, p. 1323.
Hughes v. Biddulph, 4 Russ, 190, p. 282.
Hughes v. Blake, 6 Wheat. 453, p. 290.
Hughes v. Boyd, 2 Sneed, 512, p. 1684.
Hughes v. Cannon, 2 Humph. 589, p. 1115.
Hughes v. Cook, 34 Beav. 407, p. 2434.
Hughes v. Davis, 40 Cal. 117, p. 2381, 2722.
Hughes v. Debnam, 8 Jones, 127, p. 1122.
Hughes v. Edwards, [1892] A. C. 583, p. 2056.
Hughes v. Farmers' Sav. Bldg. etc. Ass'n, (Tenn.) 46 S. W. 362, p. 1828.
Hughes v. Garth, Amb. 421, p. 1393.
Hughes v. Hannah, 39 Fla. 356, 365, 379, 22 South. 613, p. 357, 426.
Hughes v. Hatchett, 55 Ala. 539, 631, p. 2536, 2659.
Hughes v. Jones, 3 De Gex, F. & J. 307, 315, p. 649.
Hughes v. Jones, 116 N. Y. 75, 15 Am. St. Rep. 386, 22 N. E. 446, 5 L. R. A. 632, p. 2624.
Hughes v. Kearney, 1 Schoales & L. 132, 135, 1 Lead. Cas. Eq. 471, 472, p. 2510, 2513, 2516.
Hughes v. Metropolitan R'y Co., L. R. 2 H. L. 439, p. 756.
Hughes v. Peters, 1 Cold. 67, p. 2198.
Hughes v. Piedmont etc. Ins. Co., 55 Ga. 111, p. 2601, 2763.
Hughes v. Powers, 99 Tenn. 480, 42 S. W. 1, p. 1102.
Hughes v. Robotham, Cro. Eliz. 302, p. 1395.
Hughes v. Settle, (Tenn. Ch. App.) 36 S. W. 577, p. 1156.
Hughes v. Sheaff, 19 Iowa, 335, 342, p. 2374.
Hughes v. United States, 4 Wall. 232, p. 2729.
Hughes v. Washington, 72 Ill. 84, p. 1761.
Hughes v. Wells, 9 Hare, 749, 772, 773. p. 1468, 2148, 2184.
Hughes v. Williams, 3 Macn. & G. 683, 690, p. 655, 2786.
Hughes v. Williams, 12 Ves. 493, p. 2428, 2429.
Hughes v. Williams, 99 Va. 312, 38 S. E. 138, p. 2065.
Hughlett v. Harris, 1 Del. Ch. 349, 352, 12 Am. Dec. 104, p. 226, 383, 425, 451.
Hugo v. Williams, L. R. 14 Eq. 224, p. 1545.
Huguenin v. Baseley, 13 Ves. 105. p. 2657.
Huguenin v. Baseley, 14 Ves. 273, 2 Lead. Cas. Eq., 4th Am. ed., 1156, 1174, 1192, 1242; Eng. Ed. 1156, 1174–1176, 1189–1191, p. 1607, 1634, 1649, 1729, 1730, 1737, 1750, 1751, 1752.
Huguley Mfg. Co. v. Galeton Cotton Mills, 94 Fed. 269, 36 C. C. A. 236, p. 2342, 2428.
Huish's Charity, In re, L. R. 10 Eq. 5, p. 1657.
Hukill v. Guffey, 37 W. Va. 425, 16 S. E. 544, p. 759.
Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151, p. 755.
Hukill v. Yoder, 189 Pa. St. 233, 43 Wkly. Notes Cas. 347, 42 Atl. 122, p. 664.
Hulett v. Fairbanks, 40 Ohio St. 233, p. 755.
Hulett v. Whipple, 58 Barb. 224, p. 1266, 1271, 2502, 2518.
Huling v. Cabell, 9 W. Va. 522, 27 Am. Rep. 562, p. 2575, 2584.
Hulings v. Guthrie, 4 Pa. St. 123, p. 1272.
Hull v. Alexander, 26 Iowa, 569, p. 1410, 2404.

Hull v. Barrows, 4 De Gex, J. & S. 150, p. 2690.
Hull v. Bell, 54 Ohio, 228, 43 N. E. 584, p. 354.
Hull v. Clark, 22 Miss. (14 Smedes & M.) 187, p. 234.
Hull v. Diehl, 21 Mont. 71, 52 Pac. 782, p. 1299, 1357.
Hull v. Dills, 19 Fed. 658, p. 509.
Hull v. Fields, 76 Va. 594, p. 1591.
Hull v. Hayward, 13 S. Dak. 291, 79 Am. St. Rep. 890, 83 N. W. 270, p. 2407, 2408.
Hull v. Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405, p. 1726.
Hull v. McCall, 13 Iowa, 467, p. 2434.
Hull v. Noble, 40 Me. 459, 480, p. 973, 977, 1007, 1019, 1023, 1146.
Hull v. Russell, 3 Saw. 506, p. 697.
Hull v. Sturdivant, 46 Me. 34, 41, p. 551, 749, 2778.
Hull v. Swarthout, 29 Mich. 249, p. 1337.
Hullhorst v. Scharner, 14 Nebr. 57, 17 N. W. 259, p. 1734.
Hullman v. Honcomp, 5 Ohio St. 237, p. 1976.
Hull's Adm'r v. Hull's Heirs, 35 W. Va. 155, 29 Am. St. Rep. 800, 13 S. E. 49, p. 2523.
Hulme v. Neosho Val. Inv. Co., 63 Kan. 886, 66 Pac. 239, p. 1299.
Hulme v. Tenant, 1 Brown Ch. 16, 1 Lead. Cas. Eq. 679, 684, 692–700, 703–705, 709–713, 732, 735–765, p. 183, 1724, 2133, 2144, 2148, 2179, 2182, 2184, 2185.
Hulse v. Wright, Wright, 61, 65, p. 570.
Humane Fire Co.'s Appeal, 88 Pa. St. 389, p. 1948, 1976.
Humbard's Heirs v. Humbard's Heirs, 3 Head, 100, p. 2768.
Humbertson v. Humbertson, 2 Vern. 737, p. 1885, 1886.
Humble v. Curtis, 160 Ill. 193, 43 N. E. 749, affirming 57 Ill. App. 513, p. 1304.
Hume v. Dixon, 37 Ohio St. 66, p. 1266.
Hume v. Franzen, 73 Iowa, 25, 34 N. W. 490, p. 986.
Hume v. Lopes, [1892] A. C. 112, p. 2069.
Hume v. Pocock, L. R. 1 Ch. 379, 1 Eq. 423, p. 1591.
Hume v. Richardson, 4 De Gex, F. & J. 29, p. 2073.
Hume v. Ware, 87 Tex. 380, 28 S. W. 935, p. 987.
Hummer v. Schott, 21 Md. 307, p. 2500.
Humphery v. Richards, 2 Jur., N. S., 432, p. 2146, 2149.
Humphrey v. Copeland, 54 Ga. 543, p. 2191.
Humphrey v. Humphrey, 1 Sim., N. S., 536, p. 2143.
Humphreys v. Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140, p. 564.
Humphreys v. Burleson, 72 Ala. 1, p. 2257.
Humphreys v. Butler, 51 Ark. 351, 11 S. W. 479, p. 2030.
Humphreys v. Crane, 5 Cal. 173, p. 683, 2606.
Humphreys v. Harrison, 1 Jacob & W. 581, p. 2682.
Humphreys v. Humphreys, 2 Cox, 184, p. 2208, 2228.
Humphreys v. Mattoon, 43 Iowa, 556, p. 1648.
Humphreys v. National Ben. Association, 139 Pa. St. 264, 11 L. R. A. 564, 20 Atl. 1047, p. 1159.
Humphreys v. Newman, 51 Me. 40, p. 1127.
Humphries v. Bartee, 10 Smedes & M. 282, 295, 296, p. 229, 460, 2708.
Hun v. Cary, 82 N. Y. 65, 70, 37 Am. Rep. 546, p. 2061, 2090, 2112, 2114, 2122.
Hundley v. Mount, 8 Smedes & M. 387, p. 1120.
Hungerford v. Earle, 2 Vern. 261, p. 1434.
Hungerford v. Sigerson, 20 How. 156, p. 514, 2702.
Hunley v. Hunley, 15 Ala. 91, p. 335, 580, 2255, 2258.
Hunsacker v. Sturgis, 29 Cal. 142, 145, p. 1761.
Hunt v. Acre, 28 Ala. 580, p. 2756.
Hunt v. Allen, 73 Vt. 322, 50 Atl. 1103, p. 1099, 1117.
Hunt v. Beach, 5 Madd. 351, 360, p. 937.
Hunt v. Danforth, 2 Curt. 592, 603, p. 148, 222, 223, 513, 517.

Hunt v. Dunn, 74 Ga. 124, p. 982.
Hunt v. Elmes, 2 De Gex, F. & J. 578, 587, 588, 28 Beav. 631, p. 1005, 1008, 1011, 1016, 1045, 1296.
Hunt v. Ewing, 12 Lea, 519, p. 2446.
Hunt v. Farmers' L. & T. Co., 8 How. Pr. 416, p. 2716.
Hunt v. Field, 9 N. J. Eq. 36, 57 Am. Dec. 365, p. 2791.
Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491, p. 1931, 1943, 1949, 1955, 1957, 1961, 1968, 1973.
Hunt v. Frazier, 6 Jones Eq. 90, p. 2726.
Hunt v. Friedman, 63 Cal. 510, p. 1995.
Hunt v. Gontrum, 80 Md. 64, 30 Atl. 620, p. 2056.
Hunt v. Hamilton, 9 Dana, 90, p. 1635, 2271.
Hunt v. Hunt, 4 De Gex, F. & J. 221, 233, 235, p. 669, 1679.
Hunt v. Hunt, 119 Mass. 474, p. 1872.
Hunt v. Hunt, 124 Mich. 502, 83 N. W. 371, p. 1851.
Hunt v. Hunt, 11 Nev. 442, p. 1926, 1929.
Hunt v. Hunt, 72 N. Y. 217, 228,-230, 28 Am. Rep. 129, p. 146, 1641, 1652.
Hunt v. Hunt, 14 Pick. 374, 383, 25 Am. Dec. 400, p. 1402, 1404.
Hunt v. Johnson, 19 N. Y. 279, p. 1111.
Hunt v. Luck, [1901] 1 Ch. 45, 70 Law J Ch. 30, 83 Law T., N. S., 479, 49 Wkly. Rep. 155, affirmed on appeal, [1902] 1 Ch. 428, p. 1033, 1040, 1047.
Hunt v. Makemson, 56 Tex. 9, p. 2435, 2437, 2502.
Hunt v. Marsh, 80 Mo. 396, p. 2501, 2512, 2513, 2514.
Hunt v. Matthews, 1 Vern. 408, p. 1654, 2165.
Hunt v. Maynard, 6 Pick. 489, p. 534, 537.
Hunt v. Moore, 2 Pa. St. 105, p. 1567, 1729.
Hunt v. Peake, Johns. 705, 6 Jur., N. S., 1071, p. 2685.
Hunt v. Potter, 58 Miss. 96, p. 2276.
Hunt v. Roberts, 40 Me. 187, p. 179, 551, 2037.
Hunt v. Rousmaniere, 8 Wheat. 174, 212, 213, 1 Pet. 161, 2 Mason, 342, p. 683, 1483, 1486, 1489, 1531.
Hunt v. Rowland, 28 Iowa, 349, p. 665.
Hunt v. Scott, 1 De Gex & S. 219, p. 2205.
Hunt v. Sneed, 64 N. C. 176, p. 2284.
Hunt v. Stiles, 10 N. H. 466, p. 2392.
Hunt v. Townsend, 4 Sand. Ch. 570, p. 2787.
Hunter, Ex parte, Rice Eq. 294, p. 2109.
Hunter, In re, [1897] 2 Ch. 105, reversing In re Hunter [1897] 1 Ch. 518, p. 1940, 1949.
Hunter v. Atkins, 3 Mylne & K. 113, p. 1732, 1765, 1767.
Hunter v. Att'y-General, [1899] A. C. 309, 324, p. 1940, 1949, 1951.
Hunter v. Bilyeu, 30 Ill. 228, 246, p. 1523, 1529.
Hunter v. Daniel, 4 Hare, 420, 433, p. 2776.
Hunter v. Hatch, 45 Ill. 178, p. 2369, 2376.
Hunter v. Hunter, 19 Barb. 631, p. 1872.
Hunter v. Hunter, 95 Iowa, 728, 58 Am. St. Rep. 455, 64 N. W. 656, p. 821, 829.
Hunter v. Kennedy, 1 Ir. Ch. 148, p. 1093.
Hunter v. Lawrence, 11 Gratt. 111, 62 Am. Dec. 640, p. 1188.
Hunter v. McDevitt, (N. Dak.) 97 N. W. 869, p. 1199, 2481, 2482.
Hunter v. McLaughlin, 43 Ind. 38, p. 1563.
Hunter v. Mills, 29 S. C. 72, 6 S. E. 907, p. 783.
Hunter v. Nolf, 71 Pa. St. 282, p. 1697.
Hunter v. Steinbridge, 12 Ga. 192, p. 1926.
Hunter v. Sumrall, 5 Litt. 62, p. 1393.
Hunter v. U. S., 30 U. S. (5 Pet.) 173, p. 237.
Hunter v. Walters, L. R. 7 Ch. 75, p. 1287, 1296.
Hunter v. Walters, L. R. 11 Eq. 292, p. 1261, 1650.
Hunter v. Watson, 12 Cal. 363, 377, 73 Am. Dec. 543, p. 1095, 1111, 1128, 1270, 1277.
Hunterdon Freeholders v. Henry, 41 N. J. Eq. 388, 4 Atl. 858, p. 1845.
Hunters v. Waite, 3 Gratt. 26, p. 1801.
Hunter's Will, 6 Ohio, 499, p. 1635.

Huntington v. Allen, 44 Miss. 654, p. 2749.
Huntington v. Cent. Pac. R. R., 2 Saw. 503, p. 2755.
Huntington v. Jones, 72 Conn. 45, 43 Atl. 564, p. 1843.
Huntington v. Mather, 2 Barb. 538, p. 188, 2462.
Huntington v. Mattfield, (Tex. Civ. App.) 55 S. W. 361, p. 1034, 1048.
Huntington v. Nicoll, 3 Johns. 566, p. 226.
Huntington v. Palmer, 104 U. S. 482, 26 L. ed. 833, p. 2121, 2128, 2185.
Huntington v. Rogers, 9 Ohio St. 511, 516, p. 1520.
Huntington v. Spear, 131 Ala. 414, 30 South. 787, p. 1836.
Hunton v. Equitable Life Assur. Soc., 45 Fed. 661, p. 501.
Hunton v. Wood, (Va.) 43 S. E. 186, p. 1106, 1115.
Hunt's Appeal, 105 Pa. St. 128, p. 2309, 2310.
Hupsch v. Resch, 45 N. J. Eq. 657, 18 Atl. 372, p. 1515.
Hurck v. Erskine, 45 Mo. 484, p. 2394.
Hurd v. Kelly, 78 N. Y. 588, 597, 34 Am. Rep. 567, p. 1427, 1437, 1444.
Hurdt v. Courtenay, 4 Metc. (Ky.) 139, p. 1804.
Hurlbert v. T. D. Kellogg Lumber & Mfg. Co., 115 Wis. 225, 91 N. W. 673, p. 1566.
Hurlbut v. Hurlbut, 49 Hun, 189, 1 N. Y. Supp. 854, p. 1869, 1879.
Hurlbut v. Kantzler, 112 Ill. 482, p. 343.
Hurlbut v. Phelps, 30 Conn. 42, p. 77, 635.
Hurley v. Hollyday, 35 Md. 469, p. 2526.
Hurley v. Estes, 6 Nebr. 386, p. 2360.
Hurley v. O'Neill, 26 Mont. 269, 67 Pac. 626, p. 982, 1027, 1028.
Hurley v. Osler, 44 Iowa, 642, p. 1384.
Hurn v. Kelly, 79 Va. 415, p. 1087, 1089.
Hurricane Tel. Co. v. Mohler, 51 W. Va. 1, 41 S. E. 421, p. 244, 251, 260, 263, 264, 272.
Hursey v. Hursey, (W. Va.) 49 S. E. 367, p. 2380.
Hurst v. Beach, 5 Madd. 351, 352, 358, 360, p. 884, 886, 891, 933, 934, 937, 939, 2203, 2237.
Hurst v. Hurst, (Ky.) 76 S. W. 325, p. 692.
Hurst v. Hurst, L. R. 9 Ch. 762, p. 275, 283.
Hurst v. Thompson, 73 Ala. 158, p. 756.
Hurt v. Cooper, 63 Tex. 362, p. 1863.
Hurt v. Hollingsworth, 100 U. S. 100, 103, 25 L. ed. 571, p. 494.
Hurt v. Prillaman, 79 Va. 257, p. 1268.
Hurt v. Wilson, 38 Cal. 263, p. 2558.
Hurtt v. Fisher, 1 Har. & G. 88, 96, p. 621, 2315.
Husband v. Epling, 81 Ill. 172, 25 Am. Rep. 273, p. 2191.
Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790, p. 2048.
Husheon v. Husheon, 71 Cal. 412, 12 Pac. 410, p. 2379.
Huson v. Wallace, 1 Rich. Eq. 1, 2, 4, 7, p. 2028.
Huss v. Morris, 63 Pa. St. 367, p. 1468, 1469, 2726.
Hussey v. Fisher, 94 Me. 301, 47 Atl. 525, p. 2347.
Hussey v. Gallagher, 61 Ga. 86, p. 2677.
Husted v. Ingraham, 75 N. Y. 251, 257, p. 2470.
Huston v. Fatka, 30 Ind. App. 693, 66 N. E. 74, p. 726.
Huston v. Huston, 37 Iowa, 668, p. 881.
Huston v. Markley, 49 Iowa, 162, p. 1873.
Hutcheson v. Grubbs, 80 Va. 251, p. 698.
Hutcheson v. Hammond, 3 Brown Ch. 128, 148, p. 1986, 2327.
Hutcheson v. Hodnett, 115 Ga. 990, 42 S. E. 422, p. 2050.
Hutching v. Davis, 68 Ohio St. 160, 67 N. E. 251, p. 2305, 2315, 2317, 2327.
Hutchins v. Carleton, 19 N. H. 487, p. 1407, 2418.
Hutchins v. Chapman, 37 Tex. 612, p. 1335.
Hutchins v. George, 44 N. J. Eq. 126, 14 Atl. 108, p. 1968, 1975.
Hutchins v. Heywood, 50 N. H. 491, p. 1828, 1839.

Hutchinson v. Ainsworth, 73 Cal. 458, 15 Pac. 82, 2 Am. St. Rep. 823, p. 1516.
Hutchinson v. Brown, 1 Clarke Ch. 408, p. 1733.
Hutchinson v. First Nat. Bank, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537, p. 1106.
Hutchinson v. Fuller, (S. C.) 45 S. E. 164, p. 1499.
Hutchinson v. Gilbert, 86 Tenn. 464, 7 S. W. 126, p. 2490, 2491, 2494.
Hutchinson v. Hampton, 1 Mont. Ter. 39, p. 2663.
Hutchinson v. Harttmann, 15 Kan. 133, p. 1340.
Hutchinson v. Hutchinson, 8 Pac. Law J. 636, p. 1992.
Hutchinson v. Maxwell, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944, 57 L. R. A. 384, p. 1848.
Hutchinson v. Simon, 57 Miss. 628, p. 2551.
Hutchinson v. Skelton, 2 Macq. 492, 495, p. 856.
Hutchinson v. Swartsweller, 31 N. J. Eq. 205, p. 1404.
Hutchinson v. Tindall, 3 N. J. Eq. 357, p. 1729.
Hutchinson v. Tenant, In re, L. R. 8 Ch. Div. 540, p. 1923, 1924, 1925.
Hutchinson v. Underwood, 27 Tex. 255, p. 2198.
Huthmacher v. Harris's Adm'r, 38 Pa. St. 491, p. 1477.
Hutson v. Furnas, 31 Iowa, 154, p. 2725.
Hutson v. Townsend, 6 Rich. Eq. 249, p. 2612.
Hutter v. Ellwanger, 4 Lans. 8, 9, p. 2563, 2567.
Hutton v. Annan, [1898] A. C. 289, p. 2072.
Hutton v. Cunningham, 28 Ind. App. 295, 62 N. E. 644, p. 2000.
Hutton v. Laws, 55 Iowa, 710, p. 2269.
Hutton v. Moore, 26 Ark. 382, 396, p. 2519, 2529, 2530.
Hutton v. Rossiter, 7 De Gex, M. & G. 9, 18, 19, 22, 23, p. 1562, 1584, 1634.
Hutton Bros. v. Gordon, 2 Misc. Rep. 267, 23 N. Y. Supp. 770, p. 739.
Hutzler v. Groff, (Tex.) 48 S. W. 206, p. 1994.
Hutzler v. Phillips, 26 S. C. 136, 4 Am. St. Rep. 637 and note, 1 S. E. 502, p. 2540.
Huxley v. Rice and King, 40 Mich. 73, p. 1640, 1652, 2034.
Huyler's Ex'rs v. Atwood, 26 N. J. Eq. 504, p. 2195, 2405, 2407.
Hyatt v. Zion, (Va.) 48 S. E. 1, p. 1415, 1419.
Hyde, In re, 47 Kan. 277, 27 Pac. 1001, p. 2270.
Hyde v. Baldwin, 17 Pick. 303, 308, p. 186, 811, 815, 820.
Hyde v. Cooper, 13 Rich. Eq. 250, p. 2769.
Hyde v. Hartford Fire Ins. Co., (Nebr.) 97 N. W. 629, p. 2470.
Hyde v. Mangan, 88 Cal. 319, 26 Pac. 180, p. 1023.
Hyde v. Miller, 168 N. Y. 590, 60 N. E. 1113, affirming 60 N. Y. Supp. 974, 45 App. Div. 396, p. 2409.
Hyde v. Tanner, 1 Barb. 75, p. 1523.
Hyde v. White, 5 Sim. 524, p. 1745, 2601.
Hyden v. Hyden, 6 Baxt. 486, p. 1999.
Hyde's Ex'r v. Hyde, 64 N. J. Eq. 6, 53 Atl. 593, p. 1952, 1975.
Hydraulic etc. Co. v. Saville, 1 Mo. App. 96, p. 2562.
Hyer v. Little, 20 N. J. Eq. 443, p. 1728, 2729.
Hyett v. Mekin, 25 Ch. Div. 735, p. 2320.
Hyland v. Baxter, 98 N. Y. 610, p. 2618.
Hylton v. Hylton, 2 Ves. Sr. 548, 549, p. 1773, 1774, 1775.
Hyman v. Cameron, 46 Miss. 725, p. 2642.
Hyman v. Devereaux, 63 N. C. 624, p. 2417.
Hyman v. Kelly, 1 Nev. 179, p. 2360.
Hyman v. Wakeham, (Mich.) 94 N. W. 1062, p. 1729, 1739.
Hyman v. Wheeler, 33 Fed. 630, p. 420, 455.
Hymers v. Branch, 6 Mo. App. 511, p. 2771, 2775.
Hyndman v. Hyndman, 19 Vt. 9, 46 Am. Dec. 171, p. 1755, 2372.
Hyne v. Osborn, 62 Mich. 235, 28 N. W. 821, p. 630.
Hyslop v. Clarke, 14 Johns. 458, p. 1858.

I.

Ibbitson Estate, In re, L. R. 7 Eq. 226, p. 2309.
Ibbottson v. Rhodes, 2 Vern. 554, p. 992, 1294, 1387.
Idaho etc. Land Imp. Co. v. Bradbury, 132 U. S. 509, 515, 10 Sup. Ct. 179, p. 501.
Ide v. Bascomb, (Colo. App.) 72 Pac. 62, p. 2121.
Ide v. Sayer, 129 Ill. 230, 21 N. E. 810, p. 567.
Iglehart v. Armiger 1 Bland, 519, 524, 525, p. 2500, 2505, 2520.
Iglehart v. Crane, 42 Ill. 261, p. 1130, 1132, 2447, 2453, 2455.
Iles v. Martin, 69 Ind. 114, p. 2048, 2053.
Ilett v. Collins, 103 Ill. 74, p. 2499, 2513.
Illies v. Frerichs, 11 Tex. Civ. App. 575, 32 S. W. 915, p. 1355.
Illinois Cent. R. Co. v. Bryant, 70 Miss. 665, 12 South. 592, p. 1155.
Illinois Central R. Co. v. Garrison, 81 Miss. 257, 95 Am. St. Rep. 469, 32 South. 996, p. 391, 417, 432.
Illinois Central R. R. v. McCullough, 59 Ill. 166, p. 1009, 1023, 1031, 1145.
Illinois Cent. R. R. Co. v. Southern Seating & Cabinet Co., 104 Tenn. 568, 78 Am. St. Rep. 933, 58 S. W. 303, 50 L. R. A. 729, p. 727, 739.
Illinois Nat. Bank v. Trustees of Schools, (Ill.) 71 N. E. 1070, p. 2424.
Illinois Steel Co. v. O'Donnell, 156 Ill. 624, 41 N. E. 185, 47 Am. St. Rep. 245, 31 L. R. A. 265, p. 2013.
Illinois Trust & Sav. Bank v. Alexander Stewart Lumber Co., 119 Wis. 54, 94 N. W. 777, p. 2461.
Illsley v. Portland etc. R. R. Co., 56 Me. 531, 537, p. 556.
Imbert, Ex parte, 1 De Gex & J. 152, p. 195, 304, 2478, 2561.
Imlay v. Huntington, 20 Conn. 146, 175, p. 1886, 1887, 2152, 2190.
Imperial Fire Ins. Co. v. Gunning, 81 Ill. 236, p. 380, 2706.
Imperial Land Co., In re, L. R. 4 Ch. Div. 566, p. 2080.
Imperial Mercantile etc. Association v. Coleman, L. R. 6 H. L. 189, p. 1764.
Imperial Mercantile etc. Ass'n v. Coleman, L. R. 6 Ch. 558, p. 2084.
Imperial Shale Brick Co. v. Jewett, 169 N. Y. 143, 62 N. E. 167, p. 347.
Inchbald v. Robinson, L. R. 4 Ch. 388, 395, 397, p. 2684, 2687.
Inches v. Hill, 106 Mass. 575, p. 1851, 2054.
Inchiquin v. French, 1 Cox, 1, p. 1902.
Incledon v. Northcote, 3 Atk. 430, 436, p. 827, 2164.
Incorporated Soc. v. Price, 1 Jones & L. 498, p. 1962.
Incorporated Soc. v. Richards, 1 Dru. & War. 258, 1 Con. & L. 58, p. 1967.
Ind, Coope & Co. v. Emmerson, L. R. 12 App. Cas. 300, p. 1368, 1369.
Independent District of Pella v. Beard, 83 Fed. 5, 13–16, p. 518.
Independent School Dist. v. Mardis, 106 Iowa, 295, 76 N. W. 794, p. 1230.
Inderwick v. Inderwick, 13 Sim. 652, p. 1909.
India Rubber Co. v. Consol. Rubber Tire Co., 117 Fed. 354, p. 320.
India Wharf v. Central Wharf, 117 Mass. 504, p. 2750.
Indiana B. & W. R. Co. v. McBroom, 114 Ind. 198, 15 N. E. 831, p. 988.
Indiana Bicycle Co. v. Turrle, 74 Conn. 489, 51 Atl. 538, p. 1161.
Indiana, Bloomington & W. R. R. Co. v. Bird, 116 Ind. 217, 18 N. E. 837, 9 Am. St. Rep. 842, p. 1385.
Indiana, I. & I. R. Co. v. Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290, 297, p. 416, 445, 1197.
Indianapolis, Bloomington & W. R'y v. McLaughlin, 77 Ill. 275, p. 2191.
Indianapolis Gas Co. v. City of Indianapolis, 90 Fed. 196, p. 251.
Indianapolis, Peru & C. R. R. v. Tyng, 63 N. Y. 653, 655, p. 1577, 1625.
Indianapolis Rolling Mill Co. v. Indianapolis, 29 Ind. 245, p. 2694.
Industrial Lumber Co. v. Texas Pine Land Ass'n, 31 Tex. Civ. App. 375, 72 S. W. 875, p. 2471.
Ingalls v. Bond, 66 Mich. 338, 33 N. W. 404, p. 1096.

Ingalls v. Morgan, 10 N. Y. 178, p. 2447.
Ingenhuett v. Hunt, (Tex. Civ. App.) 39 S. W. 310, p. 1328, 1330.
Ingersoll v. Coram, 127 Fed. 418, p. 511.
Ingersoll v. Roe, 65 Barb. 346, p. 1780.
Ingham, In re, [1893] 1 Ch. 352, p. 1196, 1296.
Ingle v. Culbertson, 43 Iowa, 265, p. 1859, 1860.
Ingle v. Hartman, 37 Iowa, 274, p. 1761, 1762.
Ingle v. Partridge, 32 Beav. 661, p. 2094.
Ingle v. Richards, 28 Beav. 361, p. 1757, 2311.
Ingle v. Richards, 6 Jur., N. S., 1178, p. 1753.
Ingle v. Vaughn Jenkins, [1900] 2 Ch. 368, p. 1398.
Inglefield v. Coghlan, 2 Coll. C. C. 247, p. 2145.
Ingles v. Patterson, 36 Wis. 373, p. 1524, 2722, 2782.
Inglessi v. Spartali, 29 Beav. 564, p. 283.
Ingle's Trusts, In re, L. R. 11 Eq. 578, p. 1544.
Inglis v. Sailor's Snug Harbor, 3 Pet. 99, p. 1954.
Ingraham v. Baldwin, 9 N. Y. 45, p. 1725.
Ingraham v. Disborough, 47 N. Y. 421, p. 1225, 1239, 1241.
Ingram v. Fraley, 29 Ga. 553, p. 1892, 1926, 1929.
Ingram v. Ingram, 172 Ill. 287, 50 N. E. 198, affirming 71 Ill. App. 497, p. 2405.
Ingram v. Ingram, cited in Kirkham v. Smith, 1 Ves. Sr. 258, 259, p. 775.
Ingram v. Kirkpatrick, 6 Ired. Eq. 463, 51 Am. Dec. 428, p. 1856.
Ingram v. Morgan, 4 Humph. 66, 40 Am. Dec. 626, p. 1330.
Ingram v. Thorp, 7 Hare, 67, p. 1633.
Inhab. of Cranford Tp. v. Watters, 61 N. J. Eq. 248, 48 Atl. 316, p. 237.
Inhabs. of Freeport v. Bartol, 3 Greenl. 340, p. 1908.
Inhabitants of Worcester v. Eaton, 11 Mass. 368, 375–379, p. 1712.
Inloes's Lessee v. Harvey, 11 Md. 519, p. 1065.
Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710, p. 1175.
Innes v. Johnson, 4 Ves. 568, 574, p. 2207, 2209, 2213.
Innes v. Sayer, 7 Hare, 377, 3 Macn. & G. 606, p. 960, 1468, 1469.
Innis v. Templeton, 95 Pa. St. 262, 40 Am. Rep. 643, p. 1447, 2197.
Installment B. & L. Co. v. Wentworth, 1 Wash. St. 467, 25 Pac. 298, p. 224, 230.
Ins. Co. v. Bailey, 13 Wall. 616, 620, 621, 623, 20 L. ed. 501, p. 151, 210, 220, 221, 514, 516, 1637, 1640, 2706, 2707, 2730.
Ins. Co. v. Eggleston, 96 U. S. 572, p. 1452.
Insurance Co. v. Raden, 87 Ala. 311, 5 South. 876, 13 Am. St. Rep. 56, p. 1494.
Insurance Co. v. Stanchfield, 1 Dill. 424, p. 325, 515, 517.
International Dev. Co. v. Howard, 24 Ky. Law Rep. 266, 68 S. W. 459, p. 1051.
International Trust Co. v. Cartersville I. G. & W. Co., 63 Fed. 341, p. 216.
International Trust Co. v. Davis & Farnum Mfg. Co., 70 N. H. 118, 46 Atl. 1054, p. 1265.
Interstate B. & L. Ass'n v. Ayers, 177 Ill. 9, 52 N. E. 342, p. 1156.
Interstate B. & L. Ass'n v. McCartha, 43 S. C. 72, 20 S. E. 807, p. 1105, 1121, 1124, 1126.
Interstate Nat. Bank v. Claxton, (Tex. Civ. App.) 77 S. W. 44, p. 2018.
Interstate Sav. & L. Ass'n v. Badgley, 115 Fed. 390, p. 638, 652.
Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126, p. 753, 763.
Ireland v. City of Rochester, 51 Barb. 415, 435, p. 404, 454.
Ireland v. Hart, [1902] 1 Ch. 522, p. 1256.
Ireland v. Ireland, 18 Hun, 362, p. 1845.
Ireland v. Ireland, 84 N. Y. 321, p. 1896.

Ireland v. Miller, 71 Mich. 119, 39 N. W. 16, p. 2275.
Ireland v. Nichols, 1 Sweeny, 208, p. 586.
Ireland v. Wilson, 1 Ir. R. Ch. 623, p. 2737.
Ireland v. Woolman, 15 Mich. 253, p. 2447.
Irick v. Black, 17 N. J. Eq. 189, 198, 199, p. 228, 460, 461, 466, 2793, 2796.
Irick v. Fulton, 3 Gratt. 193, p. 1515.
Irish v. Antioch College, 126 Ill. 638, 9 Am. St. Rep. 638, 18 N. E. 768, p. 1862.
Irish v. Nutting, 47 Barb. 370, p. 2233.
Irnham v. Child, 1 Brown Ch. 92, p. 1487, 1506.
Irons v. Smallpiece, 2 Barn. & Ald. 551, p. 2242.
Iroquois Furnace Co. v. Wilkin Mfg. Co., (C. C. A.) 181 Ill. 582, 54 N. E. 987, p. 731, 732, 743.
Irvin v. Bleakley, 67 Pa. St. 24, 28, p. 2776.
Irvin v. Creditors of Bond, 41 Ga. 630, p. 2264.
Irvin v. Garner, 50 Tex. 48, p. 2502, 2511.
Irvin v. Gregory, 13 Gray, 215, 218, p. 2777.
Irvin v. Ironmonger, 2 Russ. & M. 531, p. 2222.
Irvine v. Dunham, 111 U. S. 327, 4 Sup. Ct. 501, 28 L. ed. 444, p. 2107.
Irvine v. Grady, 85 Tex. 120, 19 S. W. 1028, p. 1167.
Irvine v. Greever, 32 Gratt. 411, p. 2142.
Irvine v. Marshall, 20 How. 565, 15 L. ed. 998, p. 518.
Irvine v. Marshall, 7 Minn. 286, p. 2004.
Irvine v. Muse, 10 Heisk. 477, p. 2502, 2512.
Irvine v. Palmer, 91 Tenn. 463, 30 Am. St. Rep. 893, 19 S. W. 326, p. 881.
Irvine v. Sullivan, L. R. 8 Eq. 673, p. 1925.
Irving, In re, L. R. 7 Ch. Div. 419, p. 2574, 2585.
Irving v. Cunningham, 77 Cal. 52, 18 Pac. 878, p. 1080, 1086.
Irving v. Irving, 21 Misc. Rep. 743, 47 N. Y. Supp. 1052, p. 1834.
Irving v. Thomas, 18 Me. 418, 424, p. 1592.
Irving Nat. Bank v. Alley, 79 N. Y. 536, 540, p. 1437.
Irving's Lessee v. Smith, 17 Ohio, 226, p. 1081, 1105.
Irwin v. Cooper, 111 Iowa, 728, 82 N. W. 757, p. 236.
Irwin v. Davidson, 3 Ired. Eq. 311, p. 2429.
Irwin v. Dixion, 9 How. 10, p. 2685.
Irwin v. Irwin, 50 Miss. 363, 368, p. 222.
Irwin v. Irwin, 34 Pa. St. 525, p. 1653.
Irwin v. Sample, (Ill.) 72 N. E. 687, p. 1750.
Irwin v. Tabb, 17 Serg. & R. 419, 423, p. 817.
Irwin v. Williar, 110 U. S. 510, 4 Sup. Ct. 160, p. 1676.
Irwin v. Wollpert, 128 Ill. 527, 21 N. E. 501, p. 2488.
Irwin's Appeal, 35 Pa. St. 294, p. 2095.
Isaac v. Defriez, Amb. 595, 17 Ves. 373, p. 1942.
Isaac v. Emory, 64 Md. 333, 1 Atl. 713, p. 1971.
Isaacs, In re, [1894] 3 Ch. 506, p. 2314.
Isaacs v. Skrainka, 95 Mo. 517, 8 S. W. 427, p. 1585.
Isenberg v. East India House Co., 3 De Gex, J. & S. 263, p. 2698.
Isett v. Lucas, 17 Iowa, 503, 85 Am. Dec. 572, p. 2392.
Isett v. Stuart, 80 Ill. 404, 22 Am. Rep. 194, p. 567.
Isham v. Bennington Iron Co., 19 Vt. 230, p. 1114.
Isham v. Gilbert, 3 Conn. 166, 170, 171, p. 321, 326, 331, 333.
Isler v. Brock, 134 N. C. 428, 46 S. E. 951, p. 2069.
Ives v. Ashley, 97 Mass. 198, p. 1779.
Ives v. Canby, 48 Fed. 718, p. 2218.
Ives v. Harris, 7 R. I. 413, p. 2154.
Ives v. Medcalfe, 1 Atk. 63, 64, p. 264, 1653.
Ives v. North Canaan, 33 Conn. 402, p. 1436.
Ivimey v. Stocker, L. R. 1 Ch. 396, p. 2687.

Ivory v. Burns, 56 Pa. St. 300, p. 1902, 1903.
Izod v. Izod, 32 Beav. 242, p. 1890.

J.

Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. 130, p. 739.
Jack v. Weienmett, 115 Ill. 105, 3 N. E. 445, 56 Am. Rep. 129, p. 1331.
Jackman v. Mitchell, 13 Ves. 581, p. 1790, 2728, 2730.
Jackman v. Nowling, 69 Ind. 188, p. 2192.
Jacks v. Estee, 139 Cal. 507, 73 Pac. 247, p. 1725.
Jackson, In re, 21 Ch. Div. 786, p. 2620.
Jackson v. Andrews, 59 N. Y. 244, p. 1540, 2726.
Jackson v. Andrews, 7 Wend. 152, 156, p. 1064.
Jackson v. Ashton, 11 Pet. 229, p. 2770.
Jackson v. Baker, 2 Edw. Ch. 471, p. 744.
Jackson v. Bell, 31 N. J. Eq. 554, 32 N. J. Eq. 411, p. 2702, 2706, 2710.
Jackson v. Blodget, 5 Cow. 202, p. 2417.
Jackson v. Bronson, 19 Johns. 325, p. 2360.
Jackson v. Burgott, 10 Johns. 457, 459, 6 Am. Dec. 349, p. 1358.
Jackson v. Butler, 2 Atk. 306, 9 Mod. 297, p. 2727.
Jackson v. Caldwell, 1 Cow. 622, p. 981.
Jackson v. Carswell, 34 Ga. 279, p. 2358, 2474.
Jackson v. Cary, 16 Johns. 302, p. 1829.
Jackson v. Cator, 5 Ves. 688, p. 304.
Jackson v. Chamberlain, 8 Wend. 620, 625, p. 1276, 1381.
Jackson v. Churchill, 7 Cow. 287, 17 Am. Dec. 514, p. 820, 828, 829, 852.
Jackson v. Cleveland, 15 Mich. 94, 90 Am. Dec. 266, p. 2004.
Jackson v. Condict, 57 N. J. Eq. 522, 41 Atl. 374, p. 2450.
Jackson v. Darcy, 1 N. J. Eq. 194, p. 569.
Jackson v. Dickenson, 15 Johns. 309, 8 Am. Dec. 236, p. 1068, 1081.
Jackson v. Dickinson, [1903] 1 Ch. 947, p. 2092.
Jackson v. Dubois, 4 Johns. 216, p. 1270.
Jackson v. Ferris, 15 Johns. 346, p. 2046.
Jackson v. French, 3 Wend. 337, 20 Am. Dec. 699, p. 277.
Jackson v. Given, 8 Johns. 137, 5 Am. Dec. 328, p. 1111.
Jackson v. Green, 4 Johns. 186, p. 2476.
Jackson v. Harby, 65 Tex. 710, p. 1860.
Jackson v. Hill, 25 Ark. 223, p. 2167, 2169.
Jackson v. Hobhouse, 2 Mer. 483, 487, 488, p. 2150, 2156.
Jackson v. Hubbard, 36 Conn. 10, p. 2190.
Jackson v. Jackson, 7 Clark & F. 977, p. 1657.
Jackson v. Jackson, 4 Mo. 210, p. 2279.
Jackson v. Jackson, 1 Smale & G. 184, p. 2773.
Jackson v. Jackson, 9 Ves. 597, p. 680.
Jackson v. King, 4 Cow. 207, 15 Am. Dec. 354, p. 1728.
Jackson v. Leaf, 1 Jacob & W. 229–232, p. 2718.
Jackson v. Leek, 19 Wend. 339, p. 1152.
Jackson v. Lever, 3 Brown Ch. 605, p. 2774.
Jackson v. Ligon, 3 Leigh, 160, 187, p. 2775, 2779.
Jackson v. Lodge, 36 Cal. 28, p. 2354.
Jackson v. Losee, 4 Sand. Ch. 381, p. 1064.
Jackson v. Luce, 14 Ohio, 514, p. 1140, 1272.
Jackson v. Ludeling, 21 Wall. 616, 22 L. ed. 492, p. 2114, 2125.
Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246, p. 696, 2369, 2370.
Jackson v. Lynn, 94 Iowa, 151, 58 Am. St. Rep. 386, 62 N. W. 704, p. 1371.
Jackson v. McChesney, 7 Cow. 360, 17 Am. Dec. 521, p. 268.
Jackson v. McLean, 36 Fed. 213, p. 2084.

Jackson v. McLean, 100 Mo. 130, 13 S. W. 393, p. 2084.
Jackson v. McNabb, 39 Ark. 111, p. 2258.
Jackson v. Magbee, 21 Fla. 622, p. 1516.
Jackson v. Myers, 3 Johns. 388, 396, 3 Am. Dec. 504, p. 1829.
Jackson v. Parker, Amb. 687, p. 2436.
Jackson v. Payne, 2 Met. (Ky.) 567, p. 1544.
Jackson v. Phillips, 14 Allen, 539, 556, 557, 593, p. 176, 535, 538, 1933, 1934, 1948, 1954, 1978.
Jackson v. Pool, 73 Ga. 801, p. 2105.
Jackson v. Post, 15 Wend. 588, 9 Cow. 120, p. 1276, 1358, 1359, 1381, 1799, 1800.
Jackson v. Reid, 30 Kan. 10, 1 Pac. 308, p. 1284, 1344, 1357.
Jackson v. Rice, 3 Wend. 180, 20 Am. Dec. 683, p. 1095, 1120.
Jackson v. Rowe, 4 Russ. 514, p. 1393.
Jackson v. Rowe, 2 Sim. & St. 472, p. 1001, 1005, 1017.
Jackson v. Rutherford, 73 Ala. 155, p. 2474.
Jackson v. Rutledge, 3 Lea, 626, 31 Am. Rep. 655, p. 2502, 2509.
Jackson v. Sedlitz, 136 Mass. 342, p. 1845.
Jackson v. Sharp, 9 Johns. 163, 6 Am. Dec. 267, p. 1155.
Jackson v. Small, 34 Ind. 241, p. 621.
Jackson v. Stanley, 87 Ala. 270, 6 South. 193, p. 2498, 2513, 2514.
Jackson v. Summerville, 13 Pa. St. 359, p. 1385.
Jackson v. Town, 4 Cow. 599, 15 Am. Dec. 405, p. 1276.
Jackson v. Twenty-third St. R'y, 88 N. Y. 520, p. 2242.
Jackson v. Van Valkenburgh, 8 Cow. 260, p. 1009, 1111, 1142, 1343, 1358.
Jackson v. Veeder, 11 Johns. 169, 171, p. 1657.
Jackson v. Waldstein, (Tex. Civ. App.) 27 S. W. 26, p. 985, 987.
Jackson v. Warren, 32 Ill. 331, p. 1065, 1069, 2347.
Jackson v. Willard, 4 Johns. 41, p. 2360.
Jackson v. Winslow, 9 Cow. 13, p. 1336.
Jackson Square L. & S. Ass'n v. Bartlett, 95 Md. 661, 53 Atl. 426, 93 Am. St. Rep. 416, p. 1844.
Jacob v. Revell, [1902] 2 Ch. 858, p. 1585, 1606.
Jacobs, In re, 18 Bank. Reg. 48, p. 1791.
Jacobs v. Allard, 42 Vt. 303, 1 Am. Rep. 331, p. 2686.
Jacobs v. Amyatt, 1 Madd. 376, note, p. 2146, 2171.
Jacobs v. Mexican Sugar Co., 130 Fed. 589, p. 500, 506.
Jacobs v. Morange, 47 N. Y. 57, p. 1482.
Jacobs v. Peterborough etc. R. R. Co., 8 Cush. 223, 225, p. 535, 536.
Jacobs v. Richards, 18 Beav. 300, p. 1726.
Jacobs v. Richards, 5 De Gex, M. & G. 55, p. 1725.
Jacob's Appeal, 107 Pa. St. 137, p. 1281.
Jacob's Estate, In re, 119 Iowa, 176, 93 N. W. 94, p. 2269.
Jacobson v. Blackhurst, 2 Johns. & H. 486, p. 2642.
Jacobson v. Legrange, 3 Johns. 199, p. 878.
Jacobson v. Nealand, 122 Iowa, 372, 98 N. W. 158, p. 1990, 1991.
Jacobus v. Jacobus, 37 N. J. Eq. 17, p. 2058.
Jacomb v. Knight, 3 De Gex, J. & S. 533, p. 2698.
Jacques, In re, [1903] 1 Ch. 267, p. 908, 909.
Jacques v. Chambers, 2 Coll. C. C. 435, 440, p. 2210.
Jacques v. Weeks, 7 Watts, 261, 267, 268, 272, 274, 287, p. 974, 977, 980, 981, 984, 994, 1017, 1031, 1032, 1033, 1044, 1048, 1107, 1109, 1123, 1136.
Jacubs v. Rylance, L. R. 17 Eq. 341, p. 2089, 2097.
Jaeckel v. Pease, 6 Idaho, 131, 53 Pac. 399, p. 2191.
Jaeger v. Hardy, 48 Ohio St. 335, 27 N. E. 863, p. 997.
Jaffray v. Brown, 17 Hun, 575, p. 1072, 1088.
Jaffray v. Tower, 63 N. J. Eq. 530, 53 Atl. 182, p. 1007.

Jaffrey v. Brown, 29 Fed. 476, p. 1621.
Jager v. Vollinger, 174 Mass. 521, 55 N. E. 458, p. 2404.
Jaggar v. Winslow, 30 Minn. 263, 15 N. W. 242, p. 1560.
James, Ex parte, L. R. 9 Ch. 609, 614, p. 1488, 1495, 1503, 1540.
James, Ex parte, 8 Ves. 337, 348, p. 1753, 1754, 1758.
James v. Allen, 3 Mer. 17, 19, p. 1933, 1950, 1986.
James v. Allen, (N. J. Eq.) 57 Atl. 1091, p. 2018.
James v. Brown, 11 Mich. 25, p. 1130, 2455.
James v. Bydder, 4 Beav. 600, p. 1872.
James v. Cowing, 82 N. Y. 449, p. 2048, 2053.
James v. Cutler, 54 Wis. 172, 10 N. W. 147, p. 1542.
James v. Faulk, 54 Ala. 184, p. 2255.
James v. Fulcrod, 5 Tex. 512, 55 Am. Dec. 743, p. 1900.
James v. Groff, 157 Mo. 402, 57 S. W. 1081, p. 2024.
James v. Hanks, 202 Ill. 114, 66 N. E. 1034, p. 2318.
James v. Hubbard, 1 Paige, 228, 234, p. 2447.
James v. James, 55 Ala. 525, p. 1754, 1755, 2086.
James v. James, L. R. 13 Eq. 421, p. 2690, 2696.
James v. James, L. R. 16 Eq. 153, p. 2542.
James v. Johnson, 6 Johns. Ch. 417, 423, p. 1299, 1400, 1402.
James v. Kerr, 40 Ch. Div. 449, p. 1703, 1731.
James v. May, L. R. 6 H. L. 328, p. 2101.
James v. Mayrant, 4 Desaus. Eq. 591, 6 Am. Dec. 630, p. 2188, 2197.
James v. Morey, 2 Cow. 246, 286, 298, 300, 313, 14 Am. Dec. 475, p. 1113, 1123, 1224, 1257, 1396, 1400, 1403.
James v. Morgan, 1 Lev. 111, p. 1667.
James v. Newton, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. 122, p. 2563, 2564.
James v. Pritchard, 7 Mees. & W. 216, p. 2647.
James v. Rumsey, L. R. 11 Ch. Div. 398, p. 1782, 2728.
James v. Smith, [1891] 1 Ch. 384, p. ——.
Jameson v. Stein, 21 Beav. 5, p. 1561, 2592, 2593.
Jamieson v. Bruce, 6 Gill & J. 72, 26 Am. Dec. 557, p. 2348.
Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762, p. 1676, 1708.
Jamison v. Brady, 6 Serg. & R. 466, 9 Am. Dec. 460, p. 2139, 2145.
Jamison v. Dimock, 95 Pa. St. 52, p. 1024, 2780.
Jamison v. May, 13 Ark. 600, p. 2703.
Janes v. Dawson, 19 Ala. 672, p. 2103.
Janes v. Falk, 50 N. J. Eq. 468, 35 Am. St. Rep. 783, 26 Atl. 138, p. 1873, 1878.
Janes v. Throckmorton, 57 Cal. 368, p. 1911, 2306, 2309.
Janesville Bridge Co. v. Stoughton, 1 Pinn. 667, p. 571.
Janey v. Bird's Adm'rs, 3 Leigh, 510, p. 664.
Janney v. Buel, 55 Ala. 408, p. 229, 469.
Janney v. Spedden, 38 Mo. 395, p. 564, 568.
Janson v. Solarte, 2 Younge & C. 127, 132, 136, p. 270, 273, 275.
Janvrin v. Janvrin, 60 N. H. 169, p. 1007.
Jaques v. Golightly, 2 W. Black. 1073, p. 1721.
Jaques v. Meth. Epis. Ch., 17 Johns. 548, 8 Am. Dec. 447, p. 2152, 2196.
Jaques v. Weeks, 7 Watts, 261, 270, 275, p. 1272, 1279, 1358, 2370.
Jaques v. Withy, 1 H. Black. 65, p. 1721.
Jaquith v. Hudson, 5 Mich. 123, p. 750.
Jarrell v. Jarrell, 27 W. Va. 743, p. 1516.
Jarboe v. Hey, 122 Mo. 341, 26 S. W. 968, p. 1845.
Jarboe v. Kepler, 4 Ind. 177, p. 2709.
Jarman v. Farley, 7 Lea, 141, p. 2502, 2512.
Jarman's Estate, In re, L. R. 8 Ch. Div. 584, p. 1933, 1943, 1949, 1950.
Jarrah Timber & Wood Paving Co., Ltd., v. Samuel, [1902] 2 Ch. 479, (1903) 2 Ch. 1, p. 2371.

Jarvis v. Aikens, 25 Vt. 635, p. 1134.
Jarvis v. Binkley, 206 Ill. 541, 69 N. E. 582, p. 2551.
Jarvis v. Dutcher, 16 Wis. 307, p. 2478, 2540, 2542.
Jarvis v. Prentice, 19 Conn. 272, p. 2144.
Jason v. Eyres, 2 Ch. Cas. 33, p. 2370.
Jasper v. Hazen, 4 N. Dak. 1, 58 N. W. 454, 23 L. R. A. 58, p. 2380.
Jasper County v. Tavis, 76 Mo. 13, p. 1191.
Jaudon v. Ducker, 27 S. C. 295, 3 S. E. 465, p. 2494.
Jauretche v. Proctor, 48 Pa. St. 466, p. 1927.
Jay, Ex parte, L. R. 9 Ch. 133, p. 2662.
Jaycox v. Smith, 45 N. Y. Suppl. 299, 17 App. Div. 146, p. 1080.
Jeacock v. Falkener, 1 Brown Ch. 295, 1 Cox, 37, p. 874.
Jeakins v. Frazier, 64 Kan. 267, 67 Pac. 864, p. 1499.
Jeans v. Cooke, 24 Beav. 513, p. 2002.
Jefferies v. Michell, 20 Beav. 15, p. 877.
Jefferson v. Coleman, 110 Ind. 515, 11 N. E. 465, p. 2457.
Jefferson v. Jefferson, 96 Ill. 551, p. 2780.
Jefferson v. Leithauser, 60 Minn. 251, 62 N. W. 277, p. 1155.
Jeffery v. De Vitre, 24 Beav. 276, p. 1921.
Jefferys v. Dickson, L. R. 1 Ch. 183, p. 2436, 2661.
Jefferys v. Fairs, L. R. 4 Ch. Div. 448, p. 1508, 1591.
Jefferys v. Jefferys, Craig & P. 138, 141, p. 619, 634, 1869, 1872, 2768.
Jefferys v. Smith, 1 Jacob & W. 298, p. 2657.
Jeffery's Trusts, In re, L. R. 2 Eq. 68, p. 2208, 2224.
Jeffray v. Tower, 63 N. J. Eq. 530, 53 Atl. 182, p. 1058.
Jeffreys v. Conner, 28 Beav. 328, p. 2322.
Jeffries v. Clark, 23 Kan. 448, p. 1435.
Jeffries v. Evans, 6 B. Mon. 119, 43 Am. Dec. 158, p. 1226.
Jeffries v. Jeffries, 117 Mass. 184, p. 2771, 2775.
Jeffries v. Wiester, 2 Saw. 135, p. 1761, 1762.
Jeffs v. Day, L. R. 1 Q. B. 372, p. 2713.
Jehle v. Brooks, 112 Mich. 131, 70 N. W. 440, p. 2404.
Jemison v. Scottish-American Mortgage Co., 19 Tex. Civ. App. 232, 46 S. W. 886, p. 1051.
Jemmison v. Gray, 29 Iowa, 537, p. 742, 746.
Jenckes v. Cook, 9 R. I. 520, p. 2008.
Jencks v. Alexander, 11 Paige, 619, 623, 625, p. 1798, 1803, 2432.
Jenkins v. Bacon, 30 Mich. 154, p. 2749.
Jenkins v. Baker, 36 Misc. Rep. 55, 72 N. Y. Supp. 546, p. 1868.
Jenkins v. Bodley, 1 Smedes & M. Ch. 338, p. 1315, 1393, 2736.
Jenkins v. Bushby, 35 Law J. Ch. 400, p. 246.
Jenkins v. Doolittle, 69 Ill. 415, p. 2034.
Jenkins v. Einstein, 3 Biss. 128, p. 1770.
Jenkins v. Eldredge, 3 Story, 181, 293, Fed. Cas. No. 7,266, p. 1535, 1654, 1659.
Jenkins v. Fahey, 73 N. Y. 355, p. 2771, 2775.
Jenkins v. Freyer, 4 Paige, 47, p. 2447.
Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134, p. 701, 958, 2024.
Jenkins v. German Luth. Cong., 58 Ga. 125, p. 1482.
Jenkins v. Harrison, 66 Ala. 345, p. 2775, 2777.
Jenkins v. Hawkins, 34 W. Va. 799, 12 S. E. 1090, p. 2397.
Jenkins v. Jones, L. R. 2 Eq. 323, p. 2213.
Jenkins v. Kemis, 1 Ch. 103, p. 1461.
Jenkins v. Lochard's Adm'rs, 66 Ala. 377, p. 2794.
Jenkins v. McConico, 26 Ala. 213, p. 2153.
Jenner v. Morris, L. R. 1 Ch. 603, p. 2728.
Jenkins v. Morris, L. R. 14 Ch. Div. 674, p. 1726, 1727.
Jenkins v. Pye, 12 Pet. 241, 253, 254, p. 1742, 1751, 1777, 1778.

Jenkins v. Southern R'y Co., 109 Ga. 35, 34 S. E. 355, p. 1052.
Jenkins v. Stetson, 9 Allen, 128, p. 1743.
Jenkins v. Whyte, 62 Md. 427, p. 2099, 2100, 2618.
Jenkinson v. Pepys, cited 15 Ves. 521, 1 Ves. & B. 528, p. 1518.
Jenks v. Shaw, 99 Iowa, 604, 61 Am. St. Rep. 256, 68 N. W. 900, p. 1227, 1301.
Jenks v. Steere, 23 R. I. 160, 49 Atl. 698, p. 2287.
Jenks v. Williams, 115 Mass. 217, p. 308, 541, 542.
Jenkyn v. Vaughan, 3 Drew. 419, p. 1801.
Jenkyns v. Bushby, L. R. 2 Eq. 547, p. 277, 278, 281.
Jenner v. Jenner, 2 De Gex, F. & J. 359, p. 1776.
Jenner v. Turner, 16 Ch. Div. 188, p. 1681.
Jenness v. Robinson, 10 N. H. 215, p. 2434.
Jenner v. Morris, 3 De Gex, F. & J. 45, 51, 52, 55, p. 2603.
Jennings v. Bank of California, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233, p. 1228, 1229.
Jennings v. Bloomfield, 199 Pa. St. 638, 49 Atl. 135, p. 992, 1051.
Jennings v. Brighton etc. Board, 4 De Gex, J. & S. 735, p. 2674.
Jennings v. Broughton, 5 De Gex, M. & G. 126, 17 Beav. 234, p. 1450, 1508, 1559, 1563, 1566, 1568, 1582, 1587, 1591, 1595, 1633, 1788.
Jennings v. Davis, 31 Conn. 134, p. 2190.
Jennings v. Dixey, 36 N. J. Eq. 490, p. 1051.
Jennings v. Hennessy, 26 Misc. Rep. 265, 55 N. Y. Supp. 833, p. 1866.
Jennings v. Jennings, 21 Ohio St. 56, p. 825, 857.
Jennings v. Kiernan, 35 Oreg. 349, 55 Pac. 443, 56 Pac. 72, p. 1062, 1081, 1352.
Jennings v. McConnel, 17 Ill. 148, p. 2266.
Jennings v. Moore, 83 Mich. 231, 47 N. W. 127, 21 Am. St. Rep. 601, p. 2393.
Jennings v. Moore, 2 Vern. 609, p. 1138, 1198.
Jennings v. Smith, 29 Ill. 116, p. 823.
Jennings v. Taylor, 102 Va. 191, 45 S. E. 913, p. 2568.
Jennings v. Ward, 2 Vern. 520, p. 2370.
Jennings v. Willer, (Tex. Civ. App.) 32 S. W. 24, p. 733, 741.
Jennings v. Wood, 20 Ohio, 261, p. 1122.
Jennison v. Hapgood, 7 Pick. 1, 19 Am. Dec. 258, p. 2273.
Jennisons v. Leonard, 21 Wall. 302, p. 2778.
Jenz v. Gugel, 26 Ohio St. 527, p. 2197.
Jeremiah v. Pitcher, 20 Misc. Rep. 513, 45 N. Y. Supp. 758, p. 1907.
Jermy v. Preston, 13 Sim. 356, p. 2320.
Jermyn v. Moffett, 75 Pa. St. 399, p. 2553, 2584.
Jerome v. Carbonate Nat. Bank, 22 Colo. 37, 43 Pac. 215, p. 1037, 1038, 1274.
Jerome v. Ross, 7 Johns. Ch. 315, 333, 11 Am. Dec. 484, p. 2693.
Jeron v. Bush, 1 Vern. 342, Ames' Cas. on Trusts, 217, p. 1833.
Jerrard v. Saunders, 2 Ves. 187, 254, 454, 458, p. 267, 695, 1310, 1311, 1315, 1367, 1368, 2736.
Jersey City v. Gardner, 33 N. J. Eq. 622, p. 2667.
Jersey City v. Lembeck, 31 N. J. Eq. 255, p. 2749.
Jervis v. Berridge, L. R. 8 Ch. 351, p. 1507, 1658, 2590.
Jervis v. Duke, 1 Vern. 19, p. 1681.
Jervis v. Smith, 7 Abb. Pr., N. S., 217, p. 2787.
Jervis v. Smith, 1 Hoff. Ch. 470, p. 240, 2601.
Jervis v. White, 7 Ves. 413, p. 2728, 2729.
Jervis v. Wolferstan, L. R. 18 Eq. 18, p. 2101.
Jervoise v. Duke of Northumberland, 1 Jacob & W. 559, p. 1884, 1885, 1886, 1887.
Jervoise v. Jervoise, 17 Beav. 566, 570, 571, p. 785, 2164.
Jesser v. Armentrout's Ex'r, 100 Va. 666, 42 S. E. 681, p. 1992.

Jesson v. Jesson, 2 Vern. 255, p. 917.
Jessopp v. Watson, 1 Mylne & K. 665, p. 179, 2326.
Jessup v. Hulse, 21 N. Y. 168, p. 1858.
Jesup v. Illinois Cent. R. R. Co., 43 Fed. 483, p. 2084.
Jesus College v. Bloom, 3 Atk. 262, 263, Amb. 54, p. 224, 308, 316, 331, 334, 338, 339.
Jeter v. Barnard, 42 Ga. 43, p. 2264.
Jeudwine v. Agate, 3 Sim. 120, 141, p. 749.
Jew v. Wood, 3 Beav. 579, p. 2646.
Jew v. Wood, Craig & P. 185, p. 2643.
Jewell v. Clay, 107 Iowa, 52, 77 N. W. 511, p. 2019.
Jewett v. Bowman, 29 N. J. Eq. 174, p. 217, 1643.
Jewett v. Guild, 42 Me. 246, p. 550.
Jewett v. Miller, 10 N. Y. 402, 61 Am. Dec. 751, p. 1424, 1444, 1754.
Jewett v. Palmer, 7 Johns. Ch. 65, 11 Am. Dec. 401, p. 1333, 1335, 1336, 1337, 1348.
Jewett v. Tomlinson, 137 Ind. 326, 36 N. E. 1006, p. 2358, 2364.
Jewett Car Co. v. Kirkpatrick Constr. Co., 107 Fed. 622, p. 495.
Jewson v. Moulson, 2 Atk. 417, 421, p. 193, 645, 2547.
J. G. Wagner Co. v. Cawker, 112 Wis. 532, 88 N. W. 532, p. 733, 741.
Jinks v. Moppin, (Tex. Civ. App.) 80 S. W. 390, p. 1031.
Jobe v. Chedister, 5 Lea, 346, p. 2502, 2514.
Jobson v. Palmer, [1893] 1 Ch. 71, p. 2060.
Jockusch v. Towsey, 51 Tex. 129, p. 1914.
Jodrell v. Jodrell, 9 Beav. 45, p. 2163.
John v. Battle, 58 Tex. 591, p. 986.
John v. Smith, 102 Fed. 218, 42 C. C. A. 275, affirming 91 Fed. 827, p. 1946, 1954, 1958, 1976.
John Armsfield Co. v. Edw. B. Grossman & Co., 98 Ill. App. 180, p. 642, 660.
Johnes v. Lockhart, 3 Brown Ch. 383, note, p. 2146.
Johns v. McLester, 137 Ala. 283, 34 South. 174, 97 Am. St. Rep. 27, p. 2121.
Johns v. Norris, 22 N. J. Eq. 102, p. 659, 665.
Johns v. Reardon, 3 Md. Ch. 57, 5 Md. 81, p. 1114.
Johns v. Scott, 5 Md. 81, p. 997, 1146.
Johns v. Sergeant, 45 Miss. 332, p. 2059.
Johns v. Sewell, 33 Ind. 1, p. 1346, 2521.
Johns v. Smith, 56 Miss. 727, p. 2612.
Johns v. Wilson, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. ed. 613, p. 2405.
John's Appeal, 102 Pa. St. 59, p. 1673.
John's Estate, In re, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242, p. 1948, 1958.
John's Will, In re, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242, p. 1946, 1956, 1976.
Johnson, In re, 15 Ch. Div. 548, Ames' Cas. on Trusts, 426, p. 2103.
Johnson, In re, L. R. 1 Ch. 325, p. 2660.
Johnson v. Anderson, 30 Ark. 745, p. 2384.
Johnson v. Anderson, 7 Baxt. 251, p. 1993.
Johnson v. Arnold, 1 Ves. Sr. 169, p. 2310.
Johnson v. Atkinson, 3 Anstr. 798, p. 2640, 2646.
Johnson v. Avery, 60 Minn. 262, 62 N. W. 283, 51 Am. St. Rep. 529, p. 1668.
Johnson v. Barrett, 117 Ind. 551, 19 N. E. 199, 10 Am. St. Rep. 83, p. 2424.
Johnson v. Beard, 93 Ala. 96, 9 South. 535, p. 1230.
Johnson v. Bennett, 39 Barb. 237, p. 1753, 2315.
Johnson v. Blake, 124 N. C. 106, 32 S. E. 397, p. 1839.
Johnson v. Bloodgood, 1 Johns. Cas. 51, 1 Am. Dec. 93, p. 2549.
Johnson v. Boice, 40 La. Ann. 273, 4 South. 163, 8 Am. St. Rep. 528, p. 1131, 1226, 1229.
Johnson v. Bowden, 37 Tex. 621, p. 2772, 2780.
Johnson v. Bragge, [1901] 1 Ch. 28, p. 1515.
Johnson v. Bratton, 112 Mich. 319, 70 N. W. 1021, p. 2383.
Johnson v. Burden, 40 Vt. 567, 94 Am. Dec. 436, p. 1098, 1117.
Johnson v. Burks, 103 Mo. App. 221, 77 S. W. 133, p. 2501, 2509.

Johnson v. Cain, 15 Kan. 532, p. 2270.
Johnson v. Candage, 31 Me. 28, p. 2394, 2437.
Johnson v. Carpenter, 7 Minn. 120, 176, p. 1228, 2419.
Johnson v. Cawthorn, 1 Dev. & B. Eq. 32, 27 Am. Dec. 250, p. 2518.
Johnson v. Clark, 18 Kan. 157, 164, p. 1019, 1023, 1100, 1145.
Johnson v. Colley, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721, p. 2231, 2232, 2240, 2242.
Johnson v. Conn. Bank, 21 Conn. 148, 157, p. 148, 215, 308, 2667.
Johnson v. Cook, 24 Wash. 274, 64 Pac. 729, p. 731, 746, 748.
Johnson v. Cooper, 2 Yerg. 524, 24 Am. Dec. 502, p. 2754, 2756.
Johnson v. Cornett, 29 Ind. 59, p. 2419.
Johnson v. Crook, L. R. 12 Ch. Div. 639, 649, p. 57, 66.
Johnson v. Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142, p. 2196.
Johnson v. Cushing, 15 N. H. 298, 41 Am. Dec. 694, p. 1467.
Johnson v. Deloney, 35 Tex. 42, p. 1903.
Johnson v. De Pauw University, 25 Ky. Law Rep. 950, 76 S. W. 851, p. 1980.
Johnson v. Diversey, 82 Ill. 446, p. 697.
Johnson v. Dougherty, 18 N. J. Eq. 406, p. 701, 958, 2024.
Johnson v. Duncan, 67 Ga. 61, p. 826, 855.
Johnson v. Dyer, 19 Tex. Civ. App. 602, 47 S. W. 727, p. 1372, 2503, 2511.
Johnson v. Equitable Securities Co., 114 Ga. 604, 40 S. E. 787, 56 L. R. A. 933, p. 1276.
Johnson v. Farnum, 56 Ga. 144, p. 2659.
Johnson v. Fesemeyer, 3 De Gex & J. 13, 22, p. 1769.
Johnson v. First Nat. Bank, 79 Wis. 414, 24 Am. St. Rep. 722, 48 N. W. 712, p. 1155.
Johnson v. Fleet, 14 Wend. 176, 180, p. 1894.
Johnson v. Ford, 109 Fed. 501, p. 510.
Johnson v. Gallagher, 3 De Gex, F. & J. 494, 509–520, 521, p. 183, 1724, 2132, 2179, 2182, 2185.
Johnson v. Gibson, 116 Ill. 294, 6 N. E. 205, p. 1345.
Johnson v. Godden, 33 Ark. 600, p. 2529.
Johnson v. Graves, 27 Ark. 557, p. 1327.
Johnson v. Gunter, 6 Bush, 534, p. 2662.
Johnson v. Hahn, 4 Nebr. 139, p. 2757.
Johnson v. Harney, 84 N. Y. 363, 38 Am. Rep. 515, p. 2794, 2795.
Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471, p. 1108, 1110, 1121, 1122, 1124, 1126, 1127.
Johnson v. Hibbard, 27 Utah, 342, 75 Pac. 737, p. 2551.
Johnson v. Holifield, 79 Ala. 423, 58 Am. Rep. 596, p. 1934, 1972.
Johnson v. Hosford, 110 Ind. 572, 10 N. E. 407, p. 2435, 2437.
Johnson v. Houston, 47 Mo. 227, p. 2350.
Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773, p. 1544, 2782.
Johnson v. Hyde, 25 N. J. Eq. 454, 33 N. J. Eq. 632, p. 2695.
Johnson v. Irwin, 16 Wash. 652, 48 Pac. 345, p. 1080, 1088.
Johnson v. Johnson, 1 Jacob & W. 472, 475, p. 2174.
Johnson v. Johnson, 5 Ala. 90, p. 1775.
Johnson v. Johnson, 8 Baxt. 261, p. 2726.
Johnson v. Johnson, 12 Bush, 485, p. 567.
Johnson v. Johnson, 2 Coll. C. C. 441, p. 2322.
Johnson v. Johnson, 40 Md. 189, p. 2762.
Johnson v. Johnson, 16 Minn. 512, p. 2004.
Johnson v. Johnson, 81 Mo. 331, p. 2418.
Johnson v. Johnson, 14 Sim. 313, p. 2209, 2226.
Johnson v. Johnson, 92 Tenn. (8 Pickle) 559, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179, p. 1953, 1977.

Johnson v. Jones, 16 Colo. 138, 26 Pac. 584, p. 986.
Johnson v. Jones, 13 Smedes & M. 580, p. 1605, 1628.
Johnson v. Kershaw, 1 De Gex & S. 260, p. 1856.
Johnson v. Lander, L. R. 7 Eq. 228, p. 2168, 2173.
Johnson v. Lawrence, 95 N. Y. 154, 165, p. 1835, 1918, 2100.
Johnson v. Lehigh Val. Traction Co., 130 Fed. 932, p. 758.
Johnson v. Leman, 131 Ill. 609, 19 Am. St. Rep. 63, 23 N. E. 435, 7 L. R. A. 656, p. 2103.
Johnson v. Lyon, 14 Iowa, 431, p. 2702.
Johnson v. McGrew, 42 Iowa, 555, p. 2500.
Johnson v. McKinnon, (Fla.) 34 South. 272, p. 2528, 2529, 2532, 2533.
Johnson v. Maxey, 43 Ala. 521, p. 2651.
Johnson v. Mayne, 4 Iowa, 180, p. 1974.
Johnson v. Medlicott, 3 P. Wms. 131, p. 1733.
Johnson v. Merry Mount Granite Co., 53 Fed. 569, p. 496.
Johnson v. Mills, 1 Ves. Sr. 282, p. 2204.
Johnson v. Monell, 13 Iowa, 300, p. 2402, 2404.
Johnson v. Munday, 104 Fed. 594, 44 C. C. A. 64, p. 212.
Johnson v. Murphy, 60 Ala. 288, p. 1641.
Johnson v. Mutual Life Ins. Co., (Ky.) 69 S. W. 751, p. 1446.
Johnson v. National B. & L. Ass'n, 125 Ala. 465, 28 South. 2, 82 Am. St. Rep. 257, p. 1563.
Johnson v. Newman, 43 Tex. 628, p. 1355.
Johnson v. Newton, 11 Hare, 160, p. 2058.
Johnson v. Nott, 1 Vern. 271, p. 1731.
Johnson v. Nunnerly, 30 Ark. 153, p. 2498, 2528.
Johnson v. Ogilby, 3 P. Wms. 277, p. 1703.
Johnson v. Peterson, 90 Minn. 503, 97 N. W. 384, p. 2529.
Johnson v. Phifer, 6 Nebr. 401, p. 1732, 1733.
Johnson v. Poulson, 32 N. J. Eq. 390, p. 2493.
Johnson v. Powers, 139 U. S. 156, 157, 11 Sup. Ct. 525, p. 508.
Johnson v. Prairie, 91 N. C. 159, p. 2162.
Johnson v. Quarles, 46 Mo. 423, p. 1994.
Johnson v. Rice, 8 Me. 157, 161, p. 2454, 2455.
Johnson v. Richardson, 38 N. H. 353, p. 2383.
Johnson v. Roanoke etc. Co., 82 Va. 284, 289, p. 2600.
Johnson v. Roe, 1 McCrary, 162, 1 Fed. 692, p. 508.
Johnson v. Robinson, 20 Minn. 170, p. 2752.
Johnson v. Ronald, 4 Munf. 77, p. 1902.
Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889, p. 2359, 2364.
Johnson v. Schloesser, 146 Ind. 509, 45 N. E. 509, 58 Am. St. Rep. 367, 36 L. R. A. 59, p. 1106.
Johnson v. Shrewsbury etc. R'y, 3 De Gex, M. & G. 914, 923, p. 669, 1696, 1714, 2675.
Johnson v. Smart, 2 Giff. 151, p. 1590.
Johnson v. Smith, 1 Ves. Sr. 314, p. 2244.
Johnson v. Spies, 5 Hun, 468, p. 2238.
Johnson v. Stevens, 13 How. Pr. 132, p. 2756.
Johnson v. Stillings, 35 Me. 427, p. 2193.
Johnson v. Sugg, 13 Smedes & M. 346, p. 2513.
Johnson v. Telford, 1 Russ. & M. 244, 248, p. 790, 791, 802, 806.
Johnson v. Thompson, 129 Mass. 398, p. 2403.
Johnson v. Thorndike, 56 Me. 32, 37, p. 555.
Johnson v. Thweatt, 18 Ala. 471, p. 1052, 1057, 1058, 1144.
Johnson v. Toulmin, 18 Ala. 50, 52 Am. Dec. 212, p. 1391, 1392.
Johnson v. Townsend, 77 Tex. 639, 14 S. W. 233, p. 2503, 2521.
Johnson v. Tucker, 2 Tenn. Ch. 398, p. 2657, 2659.
Johnson v. Vail, 4 N. J. Eq. 423, p. 2196.

Johnson v. Valido Marble Co., 64 Vt. 337, 25 Atl. 441, p. 988, 1099, 1130, 1167.
Johnson v. Webster, 4 De Gex, M. & G. 474, p. 1405, 1409.
Johnson v. White, 11 Barb. 194, p. 2440.
Johnson v. Williams, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243, p. 1341.
Johnson v. Williams, 4 Minn. 260, 268, p. 2448, 2455.
Johnson v. Wilson & Co., 137 Ala. 468, 34 South. 392, 97 Am. St. Rep. 52, p. 1103, 1122.
Johnson v. Zink, 52 Barb. 396, p. 2426.
Johnson v. Zink, 51 N. Y. 333, p. 2401, 2402, 2404.
Johnson's Adm'r v. Longmire, 39 Ala. 143, p. 1972.
Johnson's Ex'r v. Clark, 5 Ark. 340, p. 2373.
Johnston, In re, [1894] 3 Ch. 204, p. 1851.
Johnston v. Canby, 29 Md. 211, p. 1358.
Johnston v. Duncan, 67 Ga. 61, p. 2264.
Johnston v. Gray, 16 Serg. & R. 361, 365, 16 Am. Dec. 577, p. 2370.
Johnston v. Gwathmey, 4 Litt. 317, 14 Am. Dec. 135, p. 1050, 1054, 1145.
Johnston v. Johnston, 96 Md. 144, 53 Atl. 792, p. 1996, 1997.
Johnston v. Johnston, 173 Mo. 91, 95 Am. St. Rep. 486, 73 S. W. 202, 61 L. R. A. 166, p. 1993.
Johnston v. La Motte, 6 Rich. Eq. 347, p. 1692.
Johnston v. Lewis, 4 Abb. Pr., N. S., 150, p. 2647.
Johnston v. Little, (Ala.) 37 South. 592, p. 2007.
Johnston v. Reilly, (N. J. Eq.) 57 Atl. 1049, p. 2037.
Johnston v. Renton, L. R. 9 Eq. 181, p. 1252.
Johnston v. Rowlands, 2 De Gex & S. 356, p. 1925.
Johnston v. S. F. Sav. Union, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129, p. 651.
Johnston v. Spicer, 107 N. Y. 185, 198, 13 N. E. 753, p. 1848, 2602.
Johnston v. Straus, 4 Hughes, 636, 26 Fed. 57, 67, p. 506.
Johnston v. Swann, cited Amb. 585, p. 1949.
Johnston v. Zane's Trustees, 11 Gratt. 552, 570, p. 1841.
Johnstone v. Beattie, 10 Clark & F. 42, p. 2613, 2614.
Johnstone v. Cox, L. R. 16 Ch. Div. 571, p. 1210, 1211.
Johnstone v. Lord Harrowby, 1 De Gex, F. & J. 183, 1 Johns. 425, p. 884, 885.
Johnstone v. Lumb, 15 Sim. 308, p. 2162.
Johnstone's Settlement, In re, L. R. 14 Ch. Div. 162, p. 2214, 2215.
Johnston's Estate, 185 Pa. St. 179, 64 Am. St. Rep. 621, 39 Atl. 879, p. 1835.
Joice v. Taylor, 6 Gill & J. 54, 25 Am. Dec. 325, p. 1567, 1577.
Joiner v. Duncan, 174 Ill. 252, 51 N. E. 323, p. 1022.
Joiner v. Perkins, 59 Tex. 300, p. 2502, 2512, 2521.
Joint Stock Discount Co. v. Brown, L. R. 8 Eq. 381, 3 Eq. 139, p. 2121.
Jolland v. Stainbridge, 3 Ves. 478, p. 986, 993, 1141.
Jolly v. Arbuthnot, 4 De Gex & J. 224, p. 2662.
Jones, Ex parte, L. R. 12 Ch. Div. 484, 488, 488–490, p. 114, 2181, 2603.
Jones v. Bacon, 68 Me. 34, 28 Am. Rep. 1, p. 553.
Jones v. Bamford, 21 Iowa, 217, p. 1124, 1145, 1152, 1163.
Jones v. Beach, 2 De Gex, M. & G. 886, p. 684, 2608.
Jones v. Bennet, 39 Ky. (9 Dana) 333, p. 752.
Jones v. Berkshire, 15 Iowa, 248, 83 Am. Dec. 412, p. 1100, 1120.
Jones v. Bolles, 9 Wall. 364, p. 517, 1635, 1637.
Jones v. Boston Mill Corp'n, 4 Pick. 507, 509, 511, 512, 16 Am. Dec. 358, p. 534, 536, 2764.
Jones v. Bradshaw, 16 Gratt. 355, p. 262.
Jones v. Bramford, 21 Iowa, 217, p. 1171.
Jones v. Breinzer, 70 Minn. 525, 73 N. W. 255, p. 1020, 1024.

Jones v. Brewington, 58 Mo. 210, p. 2475.
Jones v. Bridge, 2 Sweeny, 431, p. 1734.
Jones v. Brinker, 20 Mo. 87, p. 2279.
Jones v. Byrnes' Ex'x, 94 Va. 751, 27 S. E. 591, p. 1273.
Jones v. Caldwell, 97 Pa. St. 42, p. 2306, 2309, 2312.
Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812, p. 1636.
Jones v. Caswell, 3 Johns. Cas. 29, 2 Am. Dec. 134, p. 1692.
Jones v. Cheesebrough, 75 N. W. 97, p. 2019.
Jones v. Clifford, L. R. 3 Ch. Div. 779, 792, p. 543, 1539.
Jones v. Clifton, 101 U. S. 225, 25 L. ed. 908, p. 2139, 2142.
Jones v. Collier, 2 Eden, 730, p. 835.
Jones v. Collins, Amb. 730, p. 833.
Jones v. Collins, 16 Wis. 594, p. 2750.
Jones v. Comm'rs of Granville, 77 N. C. 280, p. 2678.
Jones v. Craigmiles, 114 N. C. 613, 19 S. E. 638, p. 2196.
Jones v. Creveling's Ex'rs, 19 N. J. L. 127, 21 N. J. L. 573, p. 884, 886, 889, 890.
Jones v. Davies, 7 Hurl. & N. 507, p. 1395.
Jones v. Davies, L. R. 8 Ch. Div. 205, p. 2313.
Jones v. Davis, 121 Ala. 348, 25 South. 789, p. 1264, 2512, 2513.
Jones v. Degge, 84 Va. 685, 5 S. E. 799, p. 2199.
Jones v. De Graffenreid, 60 Ala. 145, 151, p. 2753, 2754, 2756.
Jones v. Dexter, 130 Mass. 380, 39 Am. Rep. 459, p. 2024, 2028, 2032.
Jones v. Deyer, 16 Ala. 221, p. 2236.
Jones v. Doss, 27 Ark. 518, p. 2519.
Jones v. Dougherty, 10 Ga. 273, p. 2657.
Jones v. Estate of Keep, 23 Wis. 45, p. 2607.
Jones v. Farrell, 1 De Gex & J. 208, p. 195, 2561.
Jones v. Fox, 20 W. Va. 370, p. 213.
Jones v. Frost, L. R. 7 Ch. 773, 776, p. 1447.
Jones v. Garcia, 1 Turn. & R. 297, p. 437.
Jones v. Georgia R. R., 62 Ga. 718, p. 2750.
Jones v. Gibbons, 9 Ves. 407, 410, 7 R. R. 247, 250, p. 1215.
Jones v. Goodrich, 10 Sim. 327, p. 2655, 2657.
Jones v. Gorman, 7 Ired. Eq. 21, p. 1712.
Jones v. Graham, 36 Ark. 383, p. 2258.
Jones v. Grant, 10 Paige, 348, p. 2718.
Jones v. Greatwood, 16 Beav. 527, p. 1921.
Jones v. Gregory, 2 De Gex, J. & S. 83, p. 1635.
Jones v. Green, L. R. 5 Eq. 555, p. 2214.
Jones v. Green, (Tenn. Ch. App.) 36 S. W. 729, p. 1953, 1977.
Jones v. Green, 1 Wall. 330, p. 2789.
Jones v. Green, 3 Younge & J. 298, 304, p. 540, 727, 729, 736, 750.
Jones v. Habersham, 107 U. S. 174, 182, 2 Sup. Ct. 336, 27 L. ed. 401, 3 Woods, 443, p. 1939, 1946, 1960, 1973, 1978.
Jones v. Hardesty, 10 Gill & J. 404, p. 1231.
Jones v. Hardy, 127 Ala. 221, 28 South. 564, 2 Ames' Cas. Eq. Jur. 91, p. 380, 454.
Jones v. Heavens, L. R. 4 Ch. Div. 636, p. 749, 2675.
Jones v. Hetherington, 45 Iowa, 681, p. 983.
Jones v. Higgins, L. R. 2 Eq. 538, 544, p. 1447, 2150, 2096.
Jones v. Hudson, 23 S. C. 494, p. 1326, 1344, 1373.
Jones v. Janes, 56 Ga. 325, p. 2503.
Jones v. Johnson, 10 Bush, 649, p. 2121, 2125.
Jones v. Johnson Harvester Co., 8 Nebr. 451, p. 1102.
Jones v. Jones, 28 Ark. 19, 20, p. 181, 229, 464.
Jones v. Jones, 140 Cal. 587, 74 Pac. 143, p. 2034.
Jones v. Jones, 8 Gill, 197, p. 785, 789, 798, 800, 803.
Jones v. Jones, 3 Mer. 161, p. 1635.
Jones v. Jones, 11 Phila. 559, p. 2778, 2780.
Jones v. Jones, 8 Sim. 633, p. 1185, 1190, 1215.

Jones v. Kearney, 1 Dru. & War. 134, p. 1724.
Jones v. Keen, 115 Mass. 170, p. 2663.
Jones v. Keep, 23 Wis. 45, p. 682.
Jones v. Kennedy, (Miss.) 35 South. 465, p. 2471.
Jones v. Kent, 80 N. Y. 585, p. 1912.
Jones v. Lamar, 34 Fed. 454, p. 1408, 1409, 1410.
Jones v. Langhorn, 3 Bibb, 453, p. 1844.
Jones v. Lapham, 15 Kan. 540, 545, 546, p. 997, 1100, 1145, 1287, 1372, 1477.
Jones v. Lewis, 2 Ves. Sr. 240, p. 1471.
Jones v. Lloyd, L. R. 18 Eq. 265, 274, 275, p. 2025.
Jones v. Lock, L. R. 1 Ch. 25, 28, p. 619, 1868, 1875.
Jones v. Lockard, 89 Ala. 575, 8 South. 103, p. 2498, 2521.
Jones v. Lowery Bkg. Co., 104 Ala. 252, 16 South. 11, p. 1207.
Jones v. McDougal, 32 Miss. 179, p. 2037.
Jones v. McKee, 3 Pa. St. 496, 6 Pa. St. 425, 428, p. 1653.
Jones v. MacKenzie, 122 Fed. 390, p. 214.
Jones v. McMahan, 30 Tex. 719, 728, p. 571, 588.
Jones v. McMasters, 20 How. 8, 22, 15 L. ed. 805, p. 495.
Jones v. McNarrin, 68 Me. 334, 28 Am. Rep. 66, p. 1072, 1088.
Jones v. McNealy, (Ala.) 35 South. 1022, p. 1541.
Jones v. McPhillips, 82 Ala. 102, 2 South. 468, p. 2048.
Jones v. Marks, 47 Cal. 242, 248, p. 1095, 1144.
Jones v. Martin, 3 Anstr. 882, p. 1679.
Jones v. Mason, 5 Rand. 577, 16 Am. Dec. 761, p. 896, 909, 910, 935, 938, 945.
Jones v. Massey, 14 S. C. 292, p. 2800.
Jones v. Mayor, 90 N. Y. 387, p. 2585.
Jones v. Merionethshire etc. Soc., [1891] 2 Ch. 587, [1892] 1 Ch. 173, p. 1704.
Jones v. Mitchell, 1 Sim. & St. 290, 294, p. 1986, 2326.
Jones v. Morgan, 1 Brown Ch. 206, 222, p. 1848.
Jones v. Munroe, 32 Ga. 181, p. 1494.
Jones v. Mutual Fidelity Co., 123 Fed. 506, p. 506.
Jones v. Myrick's Ex'rs, 8 Gratt. 179, p. 2447.
Jones v. Neale, 2 Pat. & H. 339, p. 2756.
Jones v. Newhall, 115 Mass. 244, 247, 15 Am. Rep. 97, p. 215, 219, 535, 536, 2760.
Jones v. New York Guaranty Co., 101 U. S. 625, 25 L. ed. 1030, p. 2382.
Jones v. Noble, 3 Bush, 694, p. 2779.
Jones v. North, L. R. 19 Eq. 426, p. 2676.
Jones v. Obenchain, 10 Gratt. 259, p. 1872.
Jones v. Pacific etc. Co., 13 Nev. 359, 29 Am. Rep. 308, p. 2568.
Jones v. Petaluma, 36 Cal. 230, 232, p. 2776.
Jones v. Phelps, 2 Barb. Ch. 440, p. 1263.
Jones v. Powles, 3 Mylne & K. 581, 596–598, p. 266, 1375.
Jones v. Price, 11 Sim. 557, p. 2490.
Jones v. Probate Court, (R. I.) 55 Atl. 881, p. 2312.
Jones v. Pugh, 1 Phill. Ch. 96, p. 279.
Jones v. Reeder, 22 Ind. 111, p. 2041.
Jones v. Reese, 65 Ala. 134, p. 2189.
Jones v. Reid, 12 W. Va. 350, 29 Am. Rep. 455, p. 2143, 2147.
Jones v. Renshaw, 130 Pa. St. 327, 18 Atl. 651, p. 1976.
Jones v. Richardson, 10 Met. 481, 488, p. 2472, 2576.
Jones v. Robb, (Tex. Civ. App.) 80 S. W. 395, p. 1070.
Jones v. Robbins, 29 Me. 351, 361, 50 Am. Dec. 593, p. 761, 2769, 2778.
Jones v. Sackett, 36 Mich. 192, p. 2534.
Jones v. Salter, 2 Russ. & M. 208, p. 1841.
Jones v. Savage, 53 N. Y. Supp. 308, 24 Misc. Rep. 158, p. 1230.
Jones v. Selby, Prec. Ch. 300, p. 2232, 2242, 2244.
Jones v. Shackelford, 2 Bibb, 410, p. 345.
Jones v. Sherrard, 2 Dev. & B. Eq. 179, 189, p. 2443.

Jones v. Smith, 1 Hare, 43, 55, 60-70, 1 Phill. Ch. 244, 256, p. 991, 1001, 1004, 1008, 1017, 1025, 1033, 1039, 1045, 1047, 1054, 1059, 1174, 1292.
Jones v. Smith, 22 Mich. 360, p. 1301, 2419, 2420, 2752, 2754.
Jones v. Smith, 33 Miss. 215, p. 1647.
Jones v. Smith, 2 Ves. 372, 378, p. 189, 1460, 2463.
Jones v. Somerville, 78 Miss. 269, 28 South. 940, 84 Am. St. Rep. 627, p. 1639.
Jones v. Southall, 32 Beav. 31, p. 2211.
Jones v. Stanley, 2 Eq. Cas. Abr. 685, pl. 9, p. 1201, 1347.
Jones v. Stubey, 5 Har. & J. 372, p. 2704.
Jones v. Thomas, 2 Smale & G. 186, p. 2635.
Jones v. Thompson, 5 Del. Ch. 374, p. 1730.
Jones v. Thorn, 45 W. Va. 186, 32 S. E. 173, p. 1994.
Jones v. Tripp, Jacob, 322, p. 1772.
Jones v. Van Doren, 130 U. S. 684, 9 Sup. Ct. Rep. 685, 32 L. ed. 1077, p. 1649, 2034.
Jones v. Walker, 103 U. S. 444, 26 L. ed. 404, p. 2104.
Jones v. Ward, 10 Yerg. 160, p. 2090.
Jones v. Warren, (N. C.) 46 S. E. 740, p. 1542.
Jones v. Watford, 64 N. J. Eq. 785, 53 Atl. 397, affirming 62 N. J. Eq. 339, 50 Atl. 180, p. 1941, 1946, 1958, 1975, 2047.
Jones v. Weakley, 99 Ala. 441, 12 South. 420, 42 Am. St. Rep. 84, 19 L. R. A. 700, p. 2237, 2240.
Jones v. Williams, Amb. 651, p. 1948.
Jones v. Williams, 24 Beav. 47, p. 1017, 1292.
Jones v. Williams, 1 Coll. C. C. 156, p. 2489.
Jones v. Wilkinson, 2 Kan. App. 361, 42 Pac. 735, p. 1020.
Jones v. Winthrop, 66 Me. 242, p. 556.
Jones' Adm'rs v. Moore, 102 Ky. 591, 44 S. W. 126, p. 1864.
Jones's Appeal, 57 Pa. St. 369, p. 2154.
Jones's Appeal, 8 Watts & S. 141, 143, 147, 42 Am. Dec. 282, p. 2061, 2095, 2096.
Jones' Heirs v. Perry, 10 Yerg. 59, 30 Am. Dec. 430, p. 2756.
Jones's Will, In re, L. R. 2 Ch. Div. 362, p. 2141.
Jope v. Morshead, 6 Beav. 213, p. 2741.
Jordan v. Black, 2 Murph. 30, p. 1226.
Jordan v. Cheney, 74 Me. 359, p. 2394.
Jordan v. Cooper, 3 Serg. & R. 564, 578, 579, 585, 589, p. 559, 604.
Jordan v. Faircloth, 27 Ga. 372, 376, p. 148, 157.
Jordan v. Forlong, 19 Ohio St. 89, p. 1403.
Jordan v. Hyatt, 3 Barb. 275, p. 1653.
Jordan v. Mead, 12 Ala. 247, p. 1104.
Jordan v. Phillips & Crew Co., 126 Ala. 561, 29 South. 831, p. 212, 1839.
Jordan v. Sawkins, 1 Ves. Jr. 402, p. 1530.
Jordan v. Sayre, 29 Fla. 100, 10 South. 823, p. 2418.
Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556, p. 553, 1493, 1494.
Jordan v. Stevens, 55 Mo. 361, p. 2750.
Jordan v. Taylor, 98 Fed. 643, p. 511.
Jordan v. Volkenning, 72 N. Y. 300, 306, p. 1566, 1641, 1652.
Jordan v. Wells, 3 Woods, 527, p. 2661.
Jordon v. Western U. T. Co., (Kan.) 76 Pac. 396, p. 417.
Jorgenson v. Minneapolis Threshing Co., 64 Minn. 489, 67 N. W. 364, p. 1275.
Joseph v. McGill, 52 Iowa, 127, p. 2671.
Joseph v. Wild, 146 Ind. 249, 45 N. E. 467, p. 987.
Joseph Schlitz Brewing Co. v. City of Superior, 117 Wis. 297, 93 N. W. 1120, p. 390, 452.
Josey v. Davis's Adm'r, 55 Ark. 318, 18 S. W. 185, p. 1021.
Joslin v. Cowee, 60 Barb. 48, p. 1331, 1385.
Joslyn v. St. Paul Distilling Co., 44 Minn. 183, 46 N. W. 337, p. 1220, 1244.
Joslyn v. Schwend, 89 Minn. 71, 93 N. W. 705, p. 1087.
Joslyn v. Wyman, 5 Allen, 62, p. 2383.
Jourolman v. Massengill, 86 Tenn. 81, 5 S. W. 719, p. 1847, 1897.

Joy v. Campbell, 1 Schoales & L. 328, 339, 341, p. 1713, 2060, 2095.
Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. ed. 843, p. 1050, 2596.
Joyce v. De Moleyns, 2 Jones & L. 374, p. 1315, 1316, 1367, 2736.
Joyce v. Haines, 33 N. J. Eq. 99, p. 2047.
Joyner v. Sugg, 132 N. C. 580, 44 S. E. 122, p. 1398.
Joynes v. Statham, 3 Atk. 388, p. 1517, 1519, 1521, 1659, 2369, 2379, 2767.
Jubber v. Jubber, 9 Sim. 503, p. 1909.
Judah v. Judd, 5 Day, 534, p. 1212.
Judd v. Pratt, 13 Ves. 168, 15 Ves. 390, p. 785, 807, 808.
Judd v. Seekins, 62 N. Y. 266, p. 1402.
Judd v. Woodruff, 2 Root, 298, p. 1098, 1118.
Judge of Probate v. Mathes, 60 N. H. 433, p. 2071.
Judge v. Reese, 24 N. J. Eq. 387, p. 2369, 2380.
Judge v. Wilkins, 19 Ala. 765, p. 1668.
Judson v. Corcoran, 17 How. 612, p. 1216, 1218, 1237, 1254, 1257, 1258, 1382.
Judson v. Dada, 79 N. Y. 373, 379, p. 1054, 1095, 2410, 2444.
Judy v. Farmers' etc. Bank, 81 Mo. 404, p. 2059.
Judy v. Gilbert, 77 Ind. 96, 40 Am. Rep. 289, p. 2780.
Julian v. Central Trust Co., 53 C. C. A. 438, 115 Fed. 956, p. 2459.
Jumel v. Jumel, 7 Paige, 591, p. 1054, 1409, 2407, 2447, 2704.
Jumper v. Commercial Bank, 48 S. C. 430, 26 S. E. 725, p. 215.
Jung v. Nerez, 71 Tex. 396, 9 S. W. 344, p. 398.
Jungk v. Reed, 12 Utah, 196, 42 Pac. 292, p. 1176.
Justh v. Bank of Commonwealth, 56 N. Y. 478, 484, p. 2019.
Justice v. Justice, 115 Ind. 201, 16 N. E. 615, p. 1268.
Justice v. Scott, 4 Ired. Eq. 108, p. 2705.
Justices of the Inferior Court etc. v. Hemphill, 9 Ga. 65, 67, p. 567.
Justis v. English, 30 Gratt. 565, p. 2147, 2153.
Juvenal v. Jackson, 14 Pa. St. 519, 524, p. 1334.
Juzaw v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448, p. 1510, 1563, 1665, 1668, 1670.

K.

Kahle v. Evangelical Lutheran Joint Synod, 81 Minn. 7, 83 N. W. 460, p. 1960, 1971.
Kahn v. Gumberts, 9 Ind. 430, p. 2041.
Kahn v. Klaus, 64 Kan. 24, 67 Pac. 542, p. 2034.
Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47, p. 1159.
Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203, p. 1709, 1711, 1714, 1716.
Kahnweiler v. Anderson, 78 N. C. 133, p. 2562, 2568.
Kahre v. Rundle, 38 Nebr. 315, 56 N. W. 888, p. 1032.
Kain v. Gibboney, 101 U. S. 362, 3 Hughes C. C. 397, p. 1952, 1961, 1971, 1978.
Kain v. Smith, 11 Hun, 552, p. 2663.
Kain v. Smith, 80 N. Y. 458, p. 2662.
Kaine v. Denniston, 22 Pa. St. 202, p. 1060.
Kalamazoo Nat. Bank v. Johnson, 5 Tex. Civ. App. 535, 24 S. W. 350, p. 1103, 1115.
Kalbfleisch v. Kalbfleisch, 67 N. Y. 354, p. 2493.
Kallman v. Greenebaum, 92 Cal. 403, 27 Am. St. Rep. 150, 28 Pac. 674, p. 1790.
Kamena v. Huelbig, 23 N. J. Eq. 78, p. 1226, 2418.
Kamer v. Bryant, 103 Ky. 723, 46 S. W. 14, p. 988.
Kammermayer v. Helz, 107 Wis. 101, 82 N. W. 689, p. 215.
Kanada v. North, 14 Mo. 615, p. 1764.
Kane v. Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417, p. 1647.
Kane v. Gott, 24 Wend. 641, 660, 35 Am. Dec. 641, p. 185, 621, 1895.
Kane v. Kane, L. R. 16 Ch. Div. 207, p. 2141, 2146.
Kane v. Roberts, 40 Md. 590, p. 1106, 1803.
Kane v. Schuylkill Fire Ins. Co., 199 Pa. St. 205, 48 Atl. 989, p. 246.
Kane v. Vanderburgh, 1 Johns. Ch. 11, 12, p. 2681, 2682.
Kane County v. Herrington, 50 Ill. 232, p. 1448, 2006.

Kannady v. McCarron, 18 Ark. 166, p. 2345.
Kansas City Inv. Co. v. Fulton, 4 Kan. App. 115, 46 Pac. 188, p. 1022.
Kansas City N. W. R. R. Co. v. Caton, 9 Kan. App. 272, 60 Pac. 544, p. 330.
Kansas St. Bk. v. First St. Bk., 62 Kan. 788, 64 Pac. 634, p. 2020, 2023.
Kansas Valley Bank v. Rowell, 2 Dill. 371, Fed. Cas. No. 7,611, p. 2383.
Kantrowitz v. Prather, 31 Ind. 92, 99 Am. Dec. 587, p. 2191.
Kapes v. McPherson, (N. J. Eq.) 32 Atl. 710, p. 1207.
Karberg's Case, [1892] 3 Ch. 1, p. 1574.
Karker v. Haverly, 50 Barb. 79, p. 2776, 2779.
Karnes v. Lloyd, 52 Ill. 113, p. 2347.
Karns v. Olney, 80 Cal. 90, 13 Am. St. Rep. 101, 22 Pac. 57, p. 1096.
Karr v. Burns, 1 Kan. App. 232, 40 Pac. 1087, p. 1069.
Kase v. Painter, 77 Ill. 543, p. 2191.
Kaster v. Mason, (N. Dak.) 99 N. W. 1083, p. 2589.
Kastner v. Pibilinski, 96 Ind. 229, p. 1448.
Katz v. Moore, 13 Md. 566, p. 2702.
Kauffelt v. Bower, 7 Serg. & R. 64, 10 Am. Dec. 428, p. 2504.
Kauffman v. Robey, 60 Tex. 30, 48 Am. Rep. 264, p. 1155, 1163, 1167.
Kaufman v. Gries, 141 Cal. 295, 74 Pac. 846, p. 1929.
Kausler v. Ford, 47 Miss. 289, p. 2522, 2523, 2525, 2527.
Kay v. Crook, 3 Smale & G. 407, p. 2592.
Kay v. Scates, 37 Pa. St. 31, 78 Am. Dec. 399, p. 1831.
Kaye, In re, L. R. 1 Ch. 387, p. 1833, 2613.
Kayser v. Mongham, 8 Colo. 232, 6 Pac. 803, p. 347, 354.
Keagle v. Pessell, 91 Mich. 618, 52 N. W. 58, p. 1665.
Kean v. Asch, 27 N. J. Eq. 57, p. 2678.
Keane v. Kyne, 66 Mo. 216, p. 2754, 2756.
Kearney v. Jeffries, 48 Miss. 343, p. 244, 245, 250, 255, 260, 270.
Kearney v. Kearney, 17 N. J. Eq. 59, p. 2103.
Kearney v. Macomb, 16 N. J. Eq. 189, p. 798, 800, 803, 804.
Kearney v. Sacer, 37 Md. 264, p. 1550.
Kearney v. Tanner, 17 Serg. & R. 94, 17 Am. Dec. 648, p. 2408.
Kearney v. Taylor, 15 How. 494, p. 1692.
Kearney v. Vaughan, 50 Mo. 284, p. 1337, 1338, 1469, 2619.
Kearney Bank v. Froman, 129 Mo. 427, 31 S. W. 769, 50 Am. St. Rep. 456, p. 1164.
Kearsley v. Woodcock, 3 Hare, 185, p. 1841.
Keat v. Allen, 2 Vern. 588, p. 1678.
Keate v. Phillips, L. R. 18 Ch. Div. 560, p. 2539.
Keates v. Lyon, L. R. 4 Ch. 218, 224, p. 1200.
Keating v. Sparrow, 1 Ball & B. 373, p. 764.
Keating v. Voss, 61 Ind. 466, p. 2543.
Keck v. Bieber, 148 Pa. St. 645, 24 Atl. 170, 33 Am. St. Rep. 846, p. 729, 744.
Keeble v. Keeble, 85 Ala. 552, 5 South. 149, p. 727, 732, 736.
Keech v. Sandford, Sel. Cas. Ch. 61, 1 Lead. Cas. Eq. 48, 49, 62, p. 182, 2024, 2027.
Keedle v. Flack, 27 Nebr. 836, 44 N. W. 34, p. 2405, 2413.
Keefe v. Fairfield, (Mass.) 68 N. E. 342, p. 760.
Keefe v. Malone, 3 McAr. 236, p. 2294.
Keeler v. Eastman, 11 Vt. 293, p. 2681.
Keeler v. Taylor, 53 Pa. St. 467, 91 Am. Dec. 221, p. 1688, 1690.
Keeling v. Hoyt, 31 Nebr. 453, 48 N. W. 66, p. 1102, 1115.
Keen v. Briggs, 46 Me. 469, p. 552.
Keen v. Coleman, 39 Pa. St. 299, 80 Am. Dec. 524, p. 1724.
Keen v. Hartman, 48 Pa. St. 497, 86 Am. Dec. 606, 88 Am. Dec. 472, p. 1448.
Keen v. James, 39 N. J. Eq. 257, 51 Am. Rep. 29, p. 1609, 1613, 1622, 1642.
Keen v. Jordan, 13 Fla. 327, 333-335, p. 1460.
Keenan v. Daniels, (S. Dak.) 99 N. W. 853, p. 1482.

Keene v. Clarke, 5 Rob. (N. Y.) 38, p. 2689.
Keene v. Kimball, 16 Gray, 545, 77 Am. Dec. 426, p. 2689.
Keene v. Munn, 16 N. J. Eq. 398, p. 2447.
Keene v. Wheatley, 9 Am. Law Reg. 33, p. 2688, 2689.
Keene's Estate, 81 Pa. St. 133, p. 1830.
Keene Syndicate v. Wichita Gas, E. L. & P. Co., (Kan.) 76 Pac. 834, p. 1689.
Keeney v. Morse, 71 App. Div. 104, 75 N. Y. Supp. 728, p. 1845.
Keep v. Miller, 42 N. J. Eq. 100, 6 Atl. 495, p. 616.
Keepers v. Fidelity Title etc. Co., 56 N. J. Law, 302, 28 Atl. 585, 44 Am. St. Rep. 397, 23 L. R. A. 184, p. 2242.
Keese v. City of Denver, 10 Colo. 113, 15 Pac. 825, p. 403, 404, 430, 445, 454.
Keeton v. Spradling, 13 Mo. 321, 323, p. 222, 224, 331, 334, 335, 349.
Keighler v. Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600, p. 1764.
Keily v. Monck, 3 Ridg. App. 205, 263, p. 1683.
Keim v. Lindley, (N. J.) 30 Atl. 1063, p. 2060.
Keirsted v. Avery, 4 Paige, 9, p. 1325.
Keisselbrach v. Livingston, 4 Johns. Ch. 114, 148, p. 77, 1522, 1523, 1528, 1531.
Keister v. Myers, 115 Ind. 312, 17 N. E. 161, p. 1494.
Keith v. Albrecht, 89 Minn. 247, 99 Am. St. Rep. 566, 94 N. W. 677, p. 2534.
Keith v. Glove Ins. Co., 52 Ill. 518, 4 Am. Rep. 634, p. 2726.
Keith v. Henkleman, 68 Ill. App. 623, p. 224.
Keith v. Henkleman, 173 Ill. 137, 50 N. E. 692, p. 224, 347.
Keith v. Horner, 32 Ill. 524, p. 2499.
Keith v. Hudson, 74 Ind. 333, p. 2796.
Keith v. Kellam, 35 Fed. 243, 246, p. 1613, 1745, 1748, 1762.
Keith v. Losier, 88 Iowa, 649, 55 N. W. 952, p. 1079.
Keith v. Miller, 174 Ill. 64, 51 N. E. 151, p. 1995, 2000.
Keith v. Scales, 124 N. C. 497, 32 S. E. 809, p. 1837, 1856, 1941, 1960, 1971, 1976.
Keith v. Trapier, Bail. Eq. 63, p. 2734.
Keith v. Wolf, 5 Bush, 646, p. 2512.
Keithley v. Wood, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265, p. 2372, 2374, 2375.
Kekewich v. Manning, 1 De Gex, M. & G. 176, p. 619, 1864, 1868, 1879.
Kekewich v. Marker, 3 Macn. & G. 310, 311, p. 2049, 2065, 2681, 2682.
Kelcey, In re, [1899] 2 Ch. 530, p.
Keleman, In re, 126 N. Y. 73, 26 N. E. 968, p. 2037.
Kellam v. Janson, 17 Pa. St. 467, p. 1276, 1381.
Kelland v. Fulford, L. R. 6 Ch. Div. 491, p. 2619.
Kellaway v. Johnson, 5 Beav. 319, p. 2087.
Keller v. Fenske, (Wis.) 101 N. W. 378, p. 2481.
Keller v. Fisher, 7 Ind. 718, p. 2778.
Keller v. Harper, 64 Md. 74, 1 Atl. 65, p. 2312.
Keller v. Kirby, (Tex. Civ. App.) 79 S. W. 82, p. 2371.
Keller v. Kunkel, 46 Md. 565, p. 1992.
Keller v. Nutz, 5 Serg. & R. 246, p. 1132.
Kelleran v. Brown, 4 Mass. 443, p. 534, 538.
Kellett v. Ida Clayton etc. Co., 99 Cal. 210, 33 Pac. 885, p. 381, 383.
Kellett v. Kellett, L. R. 3 H. L. 160, 169, p. 2216.
Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14, p. 251, 270, 271.
Kelley v. Culver's Adm'r, (Ky.) 75 S. W. 272, p. 1069.
Kelley v. Greenleaf, 3 Story, 93, 101 Fed. Cas. No. 7,657, p. 2028, 2112.
Kelley v. Hoey, 35 App. Div. 273, 55 N. Y. Supp. 94, p. 1838.
Kelley v. Jenness, 56 Me. 455, 79 Am. Dec. 623, p. 1993.
Kelley v. Kelley, 80 Wis. 486, 50 N. W. 334, p. 2294, 2298, 2300.
Kelley v. McKinney, 5 Lea, 164, p. 2727.
Kelley v. Mayor etc., 4 Hill, 263, p. 2562.

Kelley v. Ward, 94 Tex. 289, 60 S. W. 311, p. 1489, 1542.
Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697, p. 1227.
Kellogg, In re, 113 Fed. 120, p. 2360.
Kellogg v. Aherin, 48 Iowa, 299, p. 2722.
Kellogg v. Aldrich, 39 Mich. 576, p. 1643, 2275.
Kellogg v. Ames, 41 N. Y. 259, p. 1232, 1410.
Kellogg v. Chenango Valley Savings Bank, 42 N. Y. Supp. 379, 11 App. Div. 458, p. 356, 391, 417, 445, 454, 456.
Kellogg v. Fancher, 23 Wis. 21, 99 Am. Dec. 96, p. 1068, 1079.
Kellogg v. Kelly, 69 Minn. 124, 71 N. W. 924, p. 1097.
Kellogg v. Peddicord, 181 Ill. 22, 54 N. E. 623, p. 1904.
Kellogg v. Rand, 11 Paige, 59, p. 2447.
Kellogg v. Slawsen, 11 N. Y. 302, 304, p. 1858.
Kellogg v. Smith, 26 N. Y. 18, 23, p. 1007, 1016, 1224, 1305.
Kellum v. Smith, 33 Pa. St. 158, p. 2373.
Kelly v. Alabama etc. R. R., 58 Ala. 489, p. 2660.
Kelly v. Baltimore, 53 Md. 134, p. 2678.
Kelly v. Bryan, 6 Ired. Eq. 283, p. 2372.
Kelly v. Cent. Pac. R. R. Co., 74 Cal. 557, 16 Pac. 386, 5 Am. St. Rep. 470, p. 1585.
Kelly v. Christal, 81 N. Y. 619, p. 1642, 2727, 2730.
Kelly v. Devlin, 58 How. Pr. 487, p. 1696, 1699.
Kelly v. Duff, 61 N. H. 435, p. 2424.
Kelly v. Fejervary, (Iowa) 78 N. W. 828, p. 739.
Kelly v. Galbraith, 186 Ill. 593, 58 N. E. 431, p. 347.
Kelly v. Hendricks, 57 Ala. 193, p. 1434.
Kelly v. Herrick, 131 Mass. 373, p. 2796.
Kelly v. Karsner, 81 Ala. 500, 2 South. 164, p. 2498, 2510, 2511.
Kelly v. Kelly, 54 Mich. 30, 19 N. W. 580, p. 2471.
Kelly v. Kelly's Ex'rs, 6 Rand. 176 18 Am. Dec. 710, p. 879.
Kelly v. Lane, 42 Barb. 594, p. 2791.
Kelly v. Lehigh Min. & Mfg. Co., 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511, p. 234, 463, 2538, 2539.
Kelly v. Lenihan, 56 Ind. 448, p. 1285, 1293.
Kelly v. Longshore, 78 Ala. 203, p. 2435, 2437.
Kelly v. McBlaine, 6 Kan. App. 523, 50 Pac. 963, p. 1341.
Kelly v. McGuire, 15 Ark. 555, p. 1668.
Kelly v. Mills, 41 Miss. 267, 273, p. 1109, 1271, 1279.
Kelly v. Nichols, 17 R. I. 306, 21 Atl. 906, 18 R. I. 62, 25 Atl. 840, p. 1934, 1935, 1941, 1953, 1980.
Kelly v. Roberts, 40 N. Y. 432, p. 1229.
Kelly v. Ruble, 11 Oreg. 75, 4 Pac. 593, p. 2502.
Kelly v. Smith, 73 Wis. 191, 41 N. W. 69, p. 1730.
Kelly v. Solari, 9 Mees. & W. 54, p. 1477, 1511.
Kelly v. Staed, 136 Mo. 430, 58 Am. St. Rep. 648, 37 S. W. 1110, p. 2401.
Kelly v. Turner, 74 Ala. 513, p. 1486.
Kelso v. Morton, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308, p. 2358, 2363, 2364.
Kelso v. Reid, 145 Pa. St. 696, 23 Atl. 323, 27 Am. St. Rep. 716, p. 737.
Kelson v. Kelson, 10 Hare, 385, p. 1805.
Kemberley v. Jennings, 6 Sim. 340, p. 1688.
Kemble v. Farren, 6 Bing. 141, p. 743, 744, 745.
Kemble v. Kean, 6 Sim. 333, p. 1688, 2674.
Kemeys v. Hansard, Coop. 125, p. 1731.
Kemp v. Foster, 22 Mo. App. 643, p. 2100.
Kemp v. Pryor, 7 Ves. 237, 249, 250, p. 227, 316, 460, 1463.
Kemp v. Rose, 1 Giff. 258, p. 1653.
Kemp v. Sober, 1 Sim., N. S., 517, 520, p. 2673.

Kemp v. Tucker, L. R. 8 Ch. 369, p. 2702.
Kemp v. Westbrook, 1 Ves. Sr. 278, p. 2462.
Kempe v. Kempe, 5 De Gex, M. & G. 346, p. 2488.
Kemper v. Campbell, 44 Ohio St. 210, 216, 6 N. E. 566, p. 638, 648, 1104, 1123.
Kemper v. Kemper's Adm'r, 1 Duval, 401, 85 Am. Dec. 636, p. 2242.
Kempner v. Beaumont Lumber Co., 20 Tex. Civ. App. 307, 49 S. W. 412, p. 1342.
Kempshall v. Stone, 5 Johns. Ch. 193, 194, p. 343, 2782.
Kempson v. Ashbee, L. R. 10 Ch. 15, p. 1450, 1730, 1738, 1778.
Kempston's Appeal, 23 Pick. 163, p. 820.
Kenaday v. Edwards, 134 U. S. 125, 10 Sup. Ct. 523, p. 2109.
Kendall, Ex parte, 17 Ves. 514, 520, 525, 526, 527, p. 682, 683, 2786, 2787.
Kendall v. Fitts, 22 N. H. 1, 6, p. 1804.
Kendall v. Granger, 5 Beav. 300, 303, p. 176, 1933, 1950, 1986.
Kendall v. J. I. Porter Lumber Co., 69 Ark. 442, 64 S. W. 220, p. 1099.
Kendall v. Lawrence, 22 Pick. 542, p. 1027.
Kendall v. Mann, 11 Allen, 15, p. 1993.
Kendall v. New England Co., 13 Conn. 384, p. 655.
Kendall v. Niebuhr, 58 How. Pr. 156, 13 Jones & S. 542, p. 2447, 2453, 2455.
Kendall v. Woodruff, 87 N. Y. 1, 7, p. 2449, 2456.
Kendallville Refrigerator Co. v. Davis, 40 Ill. App. 616, p. 250.
Kendrick v. Eggleston, 56 Iowa, 128, 41 Am. Rep. 90, 8 N. W. 786, p. 2500, 2514.
Kendrick v. Ray, 173 Mass. 305, 73 Am. St. Rep. 389, 53 N. E. 823, p. 1906, 1910.
Keneger v. Armitage, 58 N. J. Eq. 357, 44 Atl. 167, p. 217.
Keneweg Co. v. Schilansky, 47 W. Va. 287, 34 S. E. 773, p. 983.
Kenicott v. Supervisors, 16 Wall. 452, 469, 21 L. ed. 319, p. 1227, 2419.
Kenistons v. Sceva, 54 N. H. 24, p. 2238.
Kennard v. Bernard, (Md.) 56 Atl. 793, p. 2109.
Kennard v. George, 44 N. H. 440, p. 1486.
Kennard v. Mabry, 78 Tex. 151, 14 S. W. 272, p. 1102, 1123.
Kennard v. Sax, 3 Oreg. 263, 267, p. 2197.
Kennebec etc. R. R. v. Portland etc. R. R., 54 Me. 173, p. 556.
Kenneday v. Price, 57 Miss. 771, p. 1993.
Kennedy v. Boykin, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838, p. 1105, 1125.
Kennedy v. Daly, 1 Schoales & L. 355, 379, p. 1198, 1293, 1345.
Kennedy v. De Trafford, [1897] App. Cas. 180, p. 2027.
Kennedy v. City of Troy, 14 Hun, 308, 312, p. 404, 405, 454.
Kennedy v. Daniels, 20 Mo. 104, p. 2714.
Kennedy v. Elliott, 85 Fed. 832, p. 382, 385.
Kennedy v. Green, 3 Mylne & K. 699, 719, 2 Lead. Cas. Eq., 4th Am. ed., 121, p. 999, 1000, 1001, 1111, 1152, 1154, 1159, 1162, 1174, 1178.
Kennedy v. Green, 6 Sim. 6, p. 273, 289.
Kennedy v. Johnson, 65 Pa. St. 451, 3 Am. Rep. 650, p. 847.
Kennedy v. Kennedy, 2 Ala. 571, p. 1659, 1758.
Kennedy v. Lee, 3 Mer. 441, 450, p. 749.
Kennedy v. Lyell, L. R. 23 Ch. Div. 387, affirmed, L. R. 9 App. Cas. 81, p. 277.
Kennedy v. Nedrow, 1 Dall. 415, 418, p. 828.
Kennedy v. Northup, 15 Ill. 148, 149, 152, p. 2753, 2754, 2756.
Kennedy v. Nunan, 52 Cal. 326, p. 1839, 1897, 1989.
Kennedy v. Parke, 17 N. J. Eq. 415, p. 1212.
Kennedy v. St. Paul etc. R. R., 2 Dill. 448, p. 2660.
Kennedy v. St. Paul etc. R. R., 5 Dill. 519, p. 2662.

Kennedy v. Taylor, 20 Kan. 558, p. 2005.
Kennedy v. Trott, 6 Moore P. C. C. 449, 467, p. 2738.
Kennedy v. Winn, 80 Ala. 165, p. 2045.
Kennell v. Abbott, 4 Ves. 802, p. 1654, 2327.
Kennerty v. Phosphate Co., 21 S. C. 226, 53 Am. Rep. 669, p. 1510.
Kenneth Inv. Co. v. National Bank of the Republic, (Mo.) 70 S. W. 173, p. 1176.
Kennett v. Plummer, 28 Mo. 142, p. 2350.
Kenney v. Wexham, 6 Madd. 355, 357, p. 2601, 2763.
Kennington v. Houghton, 2 Younge & C. Ch. 620, 627, p. 2798, 2799.
Kenny v. Gillet, 70 Md. 574, 17 Atl. 499, p. 669, 1695.
Kenny v. Udall, 5 Johns. Ch. 464, 3 Cow. 590, p. 646, 2167.
Kenrick v. Wood, L. R. 9 Eq. 333, p. 2158.
Kensinger v. Smith, 94 Pa. St. 384, p. 558.
Kensington, Ex parte, 2 Ves. & B. 79, p. 2538.
Kensington v. Dollond, 2 Mylne & K. 184, p. 2146.
Kensington v. Mansell, 13 Ves. 240, p. 262.
Kensington v. White, 3 Price, 164, 167, p. 388, 399, 452.
Kent v. Dean, 128 Ala. 600, 30 South. 543, p. 1019, 2033, 2037.
Kent v. Dunham, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667, p. 1935, 1944, 1953, 1979.
Kent v. Freehold etc. Co., L. R. 3 Ch. 493, p. 1451, 1574, 1788.
Kent v. Freehold etc. Co., L. R. 4 Eq. 588, p. 1573.
Kent v. Gerhard, 12 R. I. 92, 34 Am. Rep. 612, p. 2503, 2504, 2511. 2513.
Kent v. Mahaffey, 10 Ohio St. 204, p. 2006.
Kent v. Mellus, 69 Mich. 71, 37 N. W. 48, p. 982.
Kent v. Plumb, 57 Ga. 207, p. 2191.
Kent v. Plummer, 7 Me. 464, p. 1044, 1101, 1146.
Kent v. Quicksilver Min. Co., 78 N. Y. 159, 187, 188, p. 1444, 1453, 2118.
Kent v. Riley, L. R. 14 Eq. 190, 194, p. 1798, 1800.
Kentfield v. Hayes, 57 Cal. 409, p. 2715.
Kenton etc. Co. v. McAlpin, 5 Fed. 737, 740, p. 494.
Kent's Adm'r v. Cloyd's Adm'r, 30 Gratt. 555, p. 2291.
Kentucky Nat. Bank v. Stone, 93 Ky. 623, 20 S. W. 1040, p. 2098.
Kenyon v. Farris, 47 Conn. 510, 36 Am. Rep. 86, p. 2603.
Kenyon v. Kenyon, 17 R. I. 539, 23 Atl. 101, 24 Atl. 787, p. 1849.
Kenyon v. Quinn, 41 Cal. 325, p. 2715.
Kenyon v. Segar, 14 R. I. 490, p. 2437, 2441.
Kenyon v. Welty, 20 Cal. 637, 81 Am. Dec. 137, p. 1483.
Keplinger v. Maccubbin, 58 Md. 206, p. 2273.
Keppell v. Bailey, 2 Mylne & K. 517, p. 1199, 1200.
Ker v. Wauchope, 1 Bligh, 1, 25, p. 782, 794, 804, 857.
Kerberg's Case, [1892] 3 Ch. 1, p. 1562.
Kerby v. Kerby, 57 Md. 345, p. 1763, 1784.
Kerchner v. Kempton, 47 Md. 568, p. 2193.
Kerfoot v. Cronin, 105 Ill. 609, p. 1051, 1099, 1133.
Kerley v. Clay, 4 Bibb, 241, p. 2744.
Kerlin v. Knipp, 207 Pa. St. 649, 57 Atl. 34, p. 342.
Kermode v. Macdonald, L. R. 3 Ch. 584, 1 Eq. 457, p. 2208, 2488.
Kern v. A. P. Hotaling Co., 27 Oreg. 205, 40 Pac. 168, 50 Am. St. Rep. 710, p. 1265.
Kern v. Day, 45 La. Ann. 71, 12 South. 6, p. 1222.
Kern v. Hazlerigg, 11 Ind. 443, 71 Am. Dec. 360, p. 1065, 2521.
Kern v. Howell, 180 Pa. St. 315, 36 Atl. 872, 51 Am. St. Rep. 641, p. 1997.
Kern v. Strausberger, 71 Ill. 413, p. 2710.
Kernaghn v. Williams, L. R. 6 Eq. 228, p. 2677.
Kernochan, Matter of, 104 N. Y. 618, 11 N. E. 149, p. 2082.

Kernohan v. Durham, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41, p. 1011, 1304, 1305.
Kernot v. Potter, 3 De Gex, F. & J. 447, p. 2698.
Kerns v. Swope, 2 Watts, 75, p. 981, 989, 1108, 1120.
Kerr v. Camden Steamboat Co., Cheves Eq. 189, p. 2800.
Kerr v. Corporation of Preston, L. R. 6 Ch. Div. 463, p. 2703.
Kerr v. Day, 14 Pa. St. 112, 114, 53 Am. Dec. 526, p. 615, 1026, 1033, 1044, 1045, 1047, 1048, 2314.
Kerr v. Freeman, 33 Miss. 292, p. 2749.
Kerr v. Galloway, 94 Tex. 641, 64 S. W. 858, p. 2361.
Kerr v. Hill, 27 W. Va. 576, p. 2373.
Kerr v. Kitchen, 17 Pa. St. 433, p. 1050, 1058.
Kerr v. Middlesex Hospital, 2 De Gex, M. & G. 576, 583, p. 2219.
Kerr v. Purdy, 51 N. Y. 629, 50 Barb. 24, p. 2776, 2779.
Kerr v. Union Bank, 18 Md. 396, p. 2636, 2642, 2649.
Kerrick v. Bransby, 7 Brown Parl. C. 437, p. 1635.
Kerrigan v. Conelly, (N. J. Ch.) 46 Atl. 227, p. 1938, 1960, 1975.
Kerrigan v. Tabb, (N. J. Ch.) 39 Atl. 701, p. 1938, 1975.
Kershaw v. Snowden, 36 Ohio St. 181, p. 1912.
Kerslake v. McInnis, 113 Wis. 659, 89 N. W. 895, p. 763.
Kessinger v. Kessinger, 37 Ind. 341, p. 1781.
Kessler v. Ensley Co., 123 Fed. 546, p. 1449, 1451, 1453, 2128.
Kessler & Co. v. Ensley Co., 129 Fed. 397, p. 118, 2065.
Ketchum v. Bank of Commerce, 19 N. Y. 499, 502, p. 1477.
Ketchum v. Duncam, 96 U. S. 659, p. 1444.
Ketchum v. Foot, 15 Vt. 258, 40 Am. Dec. 678, p. 1229.
Ketchum v. Mobile etc. R. R., 2 Woods, 532, p. 2106, 2108.
Kettle River R'y Co. v. Eastern R'y Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111, p. 2594, 2596.
Kettleby v. Atwood, 1 Vern. 298, p. 620, 2305.
Kettlewell v. Barstow, L. R. 7 Ch. 686, p. 262, 263, 270, 284, 287, 288.
Kettlewell v. Watson, L. R. 21 Ch. Div. 685, 705, p. 1154.
Kevan v. Crawford, L. R. 6 Ch. Div. 29, p. 1799.
Key v. Bradshaw, 2 Vern. 102, p. 1678.
Key v. Griffen, 1 Rich. Eq. 67, p. 782, 857.
Key City etc. Co. v. Munsell, 19 Iowa, 303, p. 2757.
Keyes v. Bump, 59 Vt. 391, 9 Atl. 598, p. 2382.
Keyes v. Carleton, 141 Mass. 49, 55 Am. Rep. 446, 6 N. E. 524, p. 1873.
Keyes v. Wood, 21 Vt. 331, p. 2396, 2417.
Keys v. Test, 33 Ill. 316, p. 1019, 1202, 1324.
Keys v. Williams, 3 Younge & C. 55, 61, p. 2538.
Keys v. Williams, 3 Younge & C. 462, 466, 467, p. 2549, 2557.
Keyser v. Angle, 40 N. J. Eq. 481, 4 Atl. 641, p. 1333.
Keyser v. Clifton, (Tex. Civ. App.) 50 S. W. 957, p. 1058.
Keyser v. Harbeck, 3 Duer, 373, p. 1385.
Keyser v. Mitchell, 67 Pa. St. 473, p. 1840, 1846.
Keystone Elec. L., H. & P. Co. v. Peoples' E. L., H. & P. Co., 200 Pa. St. 366, 49 Atl. 951, p. 214.
Keyton v. Brawford, 5 Gratt. 39, p. 1515.
Kiah v. Grenier, 56 N. Y. 220, p. 1896.
Kibby v. Harsh, 61 Iowa, 196, 16 N. W. 85, p. 1356.
Kickbusch v. Corwith, 108 Wis. 634, 85 N. W. 148, p. 1084.
Kidd v. Dennison, 6 Barb. 10, 15, p. 2682.
Kidd v. Temple, 22 Cal. 255, p. 2354.
Kidd v. Williams, 132 Ala. 140, 31 South. 458, 56 L. R. A. 879, p. 1770, 1772.
Kidder v. Chamberlin, 41 Vt. 62, p. 1665, 1667.
Kidder v. Kidder, 33 Pa. St. 268, p. 77, 635, 882.
Kiddill v. Farnell, 3 Smale & G. 428, p. 1878.

Kidney v. Coussmaker, 12 Ves. 136, 152, p. 817, 849.
Kidwell v. Kirkpatrick, 70 Mo. 214, p. 2143, 2147.
Kiefer v. Gillett, 120 Iowa, 107, 94 N. W. 270, p. 821.
Kiefer v. Rogers, 19 Minn. 32, p. 1333.
Kieffer v. Ehler, 18 Pa. St. 388, 391, p. 1079.
Kiersted v. Avery, 4 Paige, 9, p. 1269.
Kiewert Co., Emil, v. Juneau, 78 Fed. 708, 24 C. C. A. 294, p. 2428.
Kiff v. Weaver, 94 N. C. 274, 55 Am. Rep. 601, p. 2237.
Kiffin v. Kiffin, cited 1 P. Wms. 705, p. 2616.
Kilborn v. Robbins, 8 Allen, 466, 471, p. 1409, 2444, 2447, 2451.
Kilbourn v. Sunderland, 130 U. S. 505, 514, 519, 9 Sup. Ct. 594, p. 516, 1649.
Kilbourne v. Burt & Brabb Lumber Co., 23 Ky. L. Rep. 985, 64 S. W. 631, 55 L. R. A. 275, p. 729, 731, 733, 739.
Kilbourne v. St. John, 59 N. Y. 21, 27, 17 Am. Rep. 291, p. 434, 438.
Kilby v. Godwin, 2 Del. Ch. 61, p. 2133, 2142, 2153, 2235, 2240, 2242, 2247.
Kilgore v. Cross, 1 Fed. 578, p. 1729.
Kilgore v. Kilgore, 103 Ala. 614, 15 South. 897, p. 352.
Killam v. Allen, 52 Barb. 605, p. 1895.
Killebrew v. Hines, 104 N. C. 182, 10 S. E. 159, 251, 17 Am. St. Rep. 672, p. 1097, 1147, 2351.
Killey v. Wilson, 33 Cal. 690, p. 1019, 1023, 1024, 1045.
Killian v. Badgett, 27 Ark. 166, p. 1728.
Killian v. Ebbinghaus, 110 U. S. 568, p. 514.
Killmer v. Hobart, 8 Abb. N. C. 426, 58 How. Pr. 452, p. 2663.
Kilmer v. Smith, 77 N. Y. 226, 33 Am. Rep. 613, p. 1560, 2725, 2726.
Kilpatrick v. Haley, 66 Fed. 133, 13 C. C. A. 480, 27 U. S. App. 752, p. 1410.
Kilpatrick v. Hinson, 81 Ala. 464, 1 South. 188, p. 1787.
Kilpatrick v. Johnson, 15 N. Y. 322, p. 1896.
Kilpin v. Kilpin, 1 Mylne & K. 520, 532, p. 200, 1902.
Kilvert's Trusts, In re, L. R. 12 Eq. 183, 7 Ch. 170, p. 1939.
Kilvington v. Gray, 2 Sim. & St. 396, p. 2321.
Kimball v. Ætna Ins. Co., 9 Allen, 540, 85 Am. Dec. 786, p. 1562.
Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476, p. 1133.
Kimball v. Cuddy, 117 Ill. 213, 7 N. E. 589, p. 1729, 1739.
Kimball v. Donald, 20 Mo. 577, 64 Am. Dec. 209, p. 2568.
Kimball v. Gafford, 78 Iowa, 65, 42 N. W. 583, p. 2576.
Kimball v. Grafton Bank, 20 N. H. 347, 352, p. 148.
Kimball v. Keyes, 11 Wend. 373, p. 2604.
Kimball v. Leland, 110 Mass. 325, Ames' Cas. on Trusts, 155, note, p. 1878.
Kimball v. Mobile, 3 Woods, 565, Fed. Cas. No. 7,774, p. 498.
Kimball v. Morton, 5 N. J. Eq. 26, 31, 43 Am. Dec. 621, p. 1906.
Kimball v. Norton, 59 N. H. 1, 47 Am. Rep. 171, p. 2059.
Kimball v. Ranney, 122 Mich. 160, 80 Am. St. Rep. 548, 80 N. W. 992, 46 L. R. A. 403, 80 Am. St. Rep. 555, 568, p. 1761.
Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333, p. 2068, 2077.
Kimball v. Tooke, 70 Ill. 553, p. 2776, 2779.
Kimber v. Barber, L. R. 8 Ch. 56, p. 182, 1760, 2032.
Kimberley v. Jennings, 6 Sim. 340, p. 2674, 2770.
Kimberling v. Hartly, 1 Fed. 571, p. 1065, 1079, 1083.
Kimble v. Board of Commissioners, (Ind. App.) 66 N. E. 1023, p. 2125.
Kimm v. Weippert, 46 Mo. 532, 2 Am. Rep. 541, p. 2153, 2194.
Kimmel v. Dickson, 5 S. D. 221, 49 Am. St. Rep. 869, 58 N. W. 561, 25 L. R. A. 309, p. 1915, 2020.
Kinard v. Hiers, 3 Rich. Eq. 423, 55 Am. Dec. 643, p. 1659.
Kincaid v. Dormey, 51 Mo. 552, p. 1437.
Kincaid's Trusts, In re, 1 Drew. 326, p. 2173.
Kinder v. Jones, 17 Ves. 110, p. 2693.

Kinderley v. Jervis, 22 Beav. 1, p. 1207.
King v. Baldwin, 2 Johns. Ch. 554, 17 Johns. 384, 8 Am. Dec. 415, p. 67, 211, 224, 227, 302, 321, 331, 461, 2793.
King v. Bays, Dyer, 283b, Ames' Cas. on Trusts, 216, p. 1835.
King v. Bill, 28 Conn. 593, p. 1067, 2631, 2632.
King v. Bronson, 122 Mass. 122, p. 539.
King v. Buckham, 20 N. J. Eq. 316, p. 2778.
King v. Burr, 3 Mer. 693, p. 257, 274.
King v. Cabaness, 81 Ga. 661, 7 S. E. 620, p. 1344, 1345, 1384.
King v. Carpenter, 37 Mich. 363, p. 2749, 2752, 2753, 2754.
King v. Clark, 3 Paige, 76, p. 2705.
King v. Davis, 60 Vt. 502, 11 Atl. 727, p. 1727.
King v. Denison, 1 Ves. & B. 260, 272, 273, 276, p. 192, 1909, 1988, 2486.
King v. Donnelly, 5 Paige, 46, p. 1904, 2045.
King v. Executors of Berry, 3 N. J. Eq. 44, 261, p. 578, 2281, 2282.
King v. French, 2 Saw. 441, p. 2750, 2751.
King v. Hamlet, 4 Sim. 223, 2 Mylne & K. 456, 3 Clark & F. 218, p. 1742, 1743, 2669.
King v. Howard, 27 Mo. 21, p. 2772.
King v. King, 1 De Gex & J. 663, p. 2098.
King v. King, 15 Ir. Ch. 479, p. 796.
King v. King, 3 Johns. Ch. 552, p. 2072.
King v. King, 13 R. I. 501, p. 2310.
King v. King, 6 Ves. 172, p. 2655, 2670.
King v. Knapp, 59 N. Y. 462, p. 2775.
King v. Lagrange, 50 Cal. 328, p. 841, 842.
King v. Lindsay, 3 Ired. Eq. 77, p. 1232.
King v. McLean Asylum of Massachusetts General Hospital, 64 Fed. 331, 352, 21 U. S. App. 481, (C. C. A.) 26 L. R. A. 795, p. 512.
King v. McVickar, 3 Sand. Ch. 192, p. 2454.
King v. Mullins, 1 Drew. 308, p. 2054.
King v. Pardee, 96 U. S. 90, p. 2006.
King v. Payan, 18 Ark. 583, 587, 588, p. 229, 465.
King v. Phillips, 8 Bosw. 603, p. 1621.
King v. Portis, 77 N. C. 25, p. 1120, 1264, 1272.
King v. Quincy Nat. Bank, 30 Tex. Civ. App. 92, 69 S. W. 978, p. 1355.
King v. Ray, 11 Paige, 235, p. 270, 283.
King v. Remington, 36 Minn. 15, 29 N. W. 352, p. 1782.
King v. Rossett, 2 Younge & J. 33, p. 2799.
King v. Ruckman, 21 N. J. Eq. 599, p. 615, 2775.
King v. Ruckman, 20 N. J. Eq. 316, p. 2778.
King v. Savery, 1 Smale & G. 271, 5 H. L. Cas. 627, p. 1743.
King v. Smith, 15 Ala. 264, p. 2257.
King v. Talbot, 40 N. Y. 76, 50 Barb. 453, p. 2066, 2074.
King v. Whitely, 10 Paige, 465, p. 2405, 2413.
King v. Wilcox, 11 Paige, 589, p. 2041.
King v. Wilder, 75 Ill. 275, p. 697.
King v. Williams, 66 Ark. 333, 50 S. W. 695, p. 2474.
King v. Young Men's Ass'n, 1 Woods, 386, Fed. Cas. No. 7,811, p. 192, 2522, 2524, 2527.
Kingdon v. Bridges, 2 Vern. 67, p. 1997.
Kingman v. Graham, 51 Wis. 232, 8 N. W. 181, p. 1439.
Kingman v. Perkins, 105 Mass. 111, p. 2561, 2570.
King of Hanover v. Bank of England, L. R. 8 Eq. 350, p. 2109.
King of Sicilies v. Wilcox, 1 Sim., N. S., 301, p. 266, 274.
King of Spain v. Hullet, 1 Clark & F. 333, p. 244, 255, 266.
King, The, v. Ex'rs of Sir John Deccombe, Cro. Jac. 512, Ames' Cas. on Trusts, 353, p. 1848.
King's Att'y v. Sands, Freeman's Ch. Cas. 129, Ames' Cas. on Trusts, 354, p. 1848.
Kingsbury v. Buckner, 70 Ill. 514, p. 2440.
Kingsbury v. Burnside, 58 Ill. 310, 11 Am. Rep. 67, p. 1902, 1903.
Kingsford v. Merry, 11 Ex. 577, p. 1385.
Kingsford v. Swinford, 28 L. J. Ch. 413, p. 2713.
Kinlow v. Kinlow, 72 Tex. 639, 10 S. W. 729, p. 1993.

Kinnaird v. Williams's Adm'r, 8 Leigh, 400, 31 Am. Dec. 658, p. 855.
Kinkead v. Ryan, 64 N. J. Eq. 454, 53 Atl. 1053, p. 2421.
Kinnear v. Lowell, 34 Me. 299, p. 1409.
Kinnear v. Mackey, 85 Ill. 96, p. 1445.
Kinner v. Lake Shore & M. S. R'y Co., 69 Ohio St. 339, 69 N. E. 614, p. 660, 661.
Kinney v. Consolidated etc. Min. Co., 4 Saw. 382, 383, Fed. Cas. No. 7,827, p. 653, 1322.
Kinney v. Ensmenger, 87 Ala. 340, 6 South. 72, p. 1509, 1511, 1540, 1541.
Kinney v. Kiernan, 49 N. Y. 164, p. 1385.
Kinney v. Kinney, 86 Ky. 610, 6 S. W. 593, p. 1940, 1979.
Kinney v. Redden, 2 Del. Ch. 46, p. 2775, 2779.
Kinsey v. Bennett, 37 S. C. 319, 15 S. E. 965, p. 341.
Kinsey v. Woodward, 3 Harr. (Del.) 459, p. 832.
Kinsley v. Abbott, 19 Me. 430, 434, p. 681.
Kinter v. Jenks, 43 Pa. St. 445, p. 1927.
Kintner v. Jones, 122 Ind. 148, 23 N. E. 701, p. 1890.
Kintzing v. McElrath, 5 Pa. St. 467, p. 1616.
Kip v. Bank of New York, 10 Johns. 63, p. 2082.
Kip v. Deniston, 4 Johns. 23, p. 2094.
Kip v. Monroe, 29 Barb. 579, p. 1477.
Kipper v. Glancey, 2 Blackf. 356, p. 2790.
Kirby v. Godwin, 2 Del. Ch. 61, p. 2236.
Kirby v. Goodykoontz, 26 Gratt. 298, p. 2068, 2077.
Kirby v. Harrison, 2 Ohio St. 326, 332, 59 Am. Dec. 677, p. 2774, 2779.
Kirby v. L. S. etc. R. R. Co., 120 U. S. 137, 7 Sup. Ct. 430, p. 1648.
Kirby v. Miller, 4 Cold. 3, p. 2155.
Kirby v. Pascault, 53 Md. 531, p. 2710.
Kirby v. Potter, 4 Ves. 750, p. 2207, 2208, 2209, 2210, 2218.
Kirby v. Raynes, 138 Ala. 194, 100 Am. St. Rep. 39, 35 South. 118, p. 2383.
Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, p. 1019, 1021, 1027, 1028, 1038.
Kirby v. Taylor, 6 Johns. Ch. 242, 248, p. 1775.
Kirby v. Turner, 1 Hopk. Ch. 309, p. 1775.
Kircher v. Murray, 54 Fed. 617, 626, 60 Fed. 52, 23 U. S. App. 214, p. 495.
Kirk v. Bromley Union, 2 Phill. Ch. 640, p. 2601, 2766.
Kirk v. Eddowes, 3 Hare, 509, p. 896, 904, 905, 928, 931, 933, 934, 942, 945, 946.
Kirk v. Hamilton, 102 U. S. 68, p. 1436.
Kirk v. Paulin, 7 Vin. Abr. 95, pl. 43, p. 2145.
Kirk v. Williams, 24 Fed. 437, p. 2522, 2525.
Kirkbride's Trusts, L. R. 2 Eq. 400, p. 1546.
Kirkham v. Boston, 67 Ill. 599, p. 2499.
Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042, p. 970, 971, 1022, 1026, 1106, 1145.
Kirkham v. Smith, 1 Ves. Sr. 258, p. 644.
Kirklin v. Atlas S. & L. Ass'n, (Tenn. Ch. App.) 60 S. W. 149, p. 1166.
Kirkman v. Bank of America, 2 Cold. 397, p. 2796.
Kirkman v. Bank of Greensboro, 77 N. C. 394, p. 2196.
Kirkman v. Miles, 13 Ves. 338, p. 615, 2333.
Kirkman v. Vunlier, 7 Ala. 217, p. 2799.
Kirkpatrick v. Bonsall, 72 Pa. St. 155, p. 1676.
Kirkpatrick v. Brown, 59 Ga. 450, p. 1434.
Kirkpatrick v. Caldwell's Adm'rs, 32 Ind. 299, p. 1145.
Kirkpatrick v. Chesnut, 5 S. C. 216, p. 2487, 2489.
Kirkpatrick v. Clark, 132 Ill. 342, 22 Am. St. Rep. 531, 24 N. E. 71, 8 L. R. A. 511, p. 664.
Kirkpatrick v. Kirkpatrick, 13 Ves. 476, p. 1545.
Kirkpatrick v. McDonald, 11 Pa. St. 387, 392, 393, p. 460, 560.
Kirkpatrick v. Peshine, 24 N. J. Eq. 206, p. 1200.
Kirksey v. Fike, 27 Ala. 383, 62 Am. Dec. 768, p. 2761, 2764, 2765.

Kirksey v. Means, 42 Ala. 426, p. 2470, 2474.
Kirksey v. Snedecor, 60 Ala. 192, p. 1803.
Kirkwood v. Koester, 11 Kan. 471, p. 1145.
Kirsch v. Tozier, 143 N. Y. 390, 38 N. E. 375, 42 Am. St. Rep. 729, p. 1017, 1095, 1128.
Kirschbaum v. Coon, (Va.) 25 S. E. 658, p. 352.
Kirtland v. Moore, 40 N. J. Eq. 106, 2 Atl. 269, p. 2561.
Kirwan v. Daniel, 5 Hare, 493, 499, p. 1855, 1904.
Kirwan v. Murphy, 189 U. S. 35, 23 Sup. Ct. 599, p. 380.
Kisch v. Cent. R'y of Venezuela, 3 De Gex, J. & S. 122, 135, L. R. 2 H. L. 99, 125, p. 1567, 1572, 1573, 1598, 2116.
Kiser v. Combs, 114 N. C. 640, 19 S. E. 664, p. 2351.
Kiser v. Heuston, 38 Ill. 252, p. 1112.
Kisler v. Kisler, 2 Watts, 323, 27 Am. Dec. 308, p. 2039.
Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644, p. 1769.
Kisterbock's Appeal, 51 Pa. St. 483, p. 1646.
Kitchell v. Jackson, 71 Ala. 556, p. 2041.
Kitchell v. Mudgett, 37 Mich. 81, p. 1264.
Kitchen v. Bedford, 13 Wall. 413, p. 1912.
Kitchen v. Rayburn, 86 U. S. (19 Wall.) 254, p. 664.
Kite v. Lumpkin, 40 Ga. 506, p. 1476.
Kitson v. Farwell, 132 Ill. 327, 23 N. E. 1024, p. 1621.
Kittell v. Missisquoi R. R. Co., 56 Vt. 96, p. 2528.
Kitteridge v. Chapman, 36 Iowa, 348, p. 1333, 1334, 1335.
Kittle v. Fremont, 1 Nebr. 329, 337, p. 369.
Kittle v. Kittle, 8 Daly, 72, p. 2703.
Kittle v. Pfeiffer, 22 Cal. 484, p. 2686.
Kittle v. Van Dyck, 1 Sand. Ch. 76, p. 1280.
Kittridge v. Breaud, 4 Rob. (La.) 79, 80, 39 Am. Dec. 512, p. 568, 588.
Kittridge v. Claremont Bank, 3 Story, 590, p. 283.
Kitzinger v. Beck, 4 Colo. App. 206, 35 Pac. 278, p. 1231.
Klabunde v. Byron-Reed Co., (Nebr.) 98 N. W. 182, p. 1771.
Klamp v. Klamp, 51 Nebr. 17, 70 N. W. 525, p. 1997, 2000.
Klapworth v. Dressler, 13 N. J. Eq. 62, 78 Am. Dec. 69, and note, p. 2405, 2705.
Kleeman v. Frisbie, 63 Ill. 482, p. 1226, 1227, 1230.
Kleeman v. Peltzer, 17 Nebr. 381, 22 N. W. 793, p. 673, 1718.
Kleimann v. Gieselmann, 114 Mo. 437, 35 Am. St. Rep. 761, 21 S. W. 796, p. 1482.
Klein v. Borchert, 89 Minn. 377, 95 N. W. 215, p. 1770.
Klein v. Class, 53 Tex. 37, p. 2383.
Klein v. Jewett, 26 N. J. Eq. 474, p. 2662.
Klein v. McNamara, 54 Miss. 90, p. 2380.
Klein v. New York Life Ins. Co., 104 U. S. 88, p. 753, 763.
Klenke v. Koeltze, 75 Mo. 239, p. 2195.
Klever v. Seawall, 65 Fed. 393, 22 U. S. App. 715, 12 C. C. A. 661, p. 501.
Klinck v. Price, 4 W. Va. 4, 6 Am. Rep. 268, p. 2373, 2376, 2377.
Kline v. Grannis, 61 N. J. Eq. 397, 48 Atl. 566, p. 982.
Kline v. Kline, 57 Pa. St. 120, 98 Am. Dec. 206, p. 1752.
Kline v. McGuckin, 24 N. J. Eq. 411, p. 2380.
Kline v. Ragland, 47 Ark. 111, 14 S. W. 474, p. 1993.
Klinger v. Lemler, 137 Ind. 77, 34 N. E. 698, p. 1346.
Klock v. Buell, 56 Barb. 398, p. 2306, 2315.
Klock v. Cronkhite, 1 Hill, 107, p. 2424.
Klock v. Walter, 70 Ill. 416, p. 2380.
Kloepping v. Stellmacher, 21 N. J. Eq. 328, p. 1671.
Klonne v. Bradstreet, 7 Ohio St. 322, 325, p. 587, 2722.
Klopenstein v. Mulcahy, 4 Nev. 296, p. 1588.
Klussman v. Copeland, 18 Ind. 306, p. 683, 2608.
Klyce v. Broyles, 37 Miss. 524, p. 2535, 2776, 2777.

Knabe v. Ternot, 16 La. Ann. 13, p. 1764.
Knaggs v. Mastin, 9 Kan. 532, p. 2192.
Knapp v. Bailey, 79 Me. 195, 201, 205, 1 Am. St. Rep. 295, 9 Atl. 122, p. 973, 977, 982, 1341, 2379.
Knapp v. Connecticut Mut. Life Ins. Co., 85 Fed. 329, 29 C. C. A. 171, 40 L. R. A. 861, p. 2414.
Knapp v. McGowan, 96 N. Y. 75, p. 1858.
Knapp v. Maltby, 13 Wend. 587, p. 742.
Knapp's Settlement, In re, [1895] 1 Ch. 91, p. 1864.
Knapp, Stout & Co. v. McCaffrey, 178 Ill. 107, 69 Am. St. Rep. 290, 52 N. E. 898, p. 122, 189, 202.
Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921, p. 2463, 2466.
Knatchbull v. Grueber, 1 Madd. 153, p. 649.
Knecht's Appeal, 71 Pa. St. 333, p. 2218.
Kneen v. Halin, 6 Ida. 621, 59 Pac. 14, p. 1280, 1281, 1282.
Knefler v. Shreve, 78 Ky. 297, p. 1844.
Knelcamp v. Hidding, 31 Wis. 503, p. 1725.
Knell v. Building Ass'n, 34 Md. 67, p. 1106, 1264, 1270.
Knickerbocker Ins. Co. v. Hill, 3 Hun, 577, p. 1894.
Knickerbocker Life Ins. Co. v. Dietz, 52 Md. 16, p. 753, 763.
Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 137, 150, p. 1706, 1707.
Knight v. Boughton, 11 Clark & F. 513, p. 1908.
Knight v. Bowyer, 2 De Gex & J. 421, 23 Beav. 609, 641, p. 182, 1040, 1047, 1702, 2555.
Knight v. Bunn, 7 Ired. Eq. 77, p. 1507.
Knight v. Cameron, 14 Ves. 389, p. 1683.
Knight v. Davis, 3 Mylne & K. 358, p. 2214.
Knight v. Dyer, 57 Me. 174, 99 Am. Dec. 765, p. 1373.
Knight v. Glasscock, 51 Ark. 390, 11 S. W. 580, p. 1490.
Knight v. Griffey, 161 Ill. 85, 43 N. E. 727, affirming 57 Ill. App. 583, p. 1207.
Knight v. Knight, L. R. 18 Eq. 487, p. 1922, 2168, 2173.
Knight v. Mahoney, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573, p. 1683.
Knight v. Marjoribanks, 2 Macn. & G. 10, p. 1753, 1758, 2085.
Knight v. Plymouth, 1 Dick. 720, p. 2058, 2065.
Knight v. Pocock, 24 Beav. 436, p. 1089.
Knight v. Ray, 75 Ala. 383, p. 2394, 2397.
Knight v. Waterford, 2 Younge & C. 39, p. 280.
Knight v. Watts, 26 W. Va. 175, 203, p. 1755.
Knight v. Weatherwax, 7 Paige, 182, p. 1894.
Knighton v. Curry, 62 Ala. 404, p. 2796.
Knighton v. Young, 22 Md. 359, p. 824.
Knights v. Wiffen, L. R. 5 Q. B. 660, p. 1422.
Knisley v. Williams, 3 Gratt. 265, 46 Am. Dec. 193, p. 2526.
Knobb v. Lindsay, 5 Ohio, 468, p. 1668.
Knobeloch v. Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962, p. 1175.
Knoblock v. Mueller, 123 Ill. 554, 17 N. E. 696, p. 1313, 1318, 1322, 1383.
Knopf v. First Nat. Bank, 173 Ill. 331, 50 N. E. 660, p. 406, 408, 410, 454.
Knott, Ex parte, 11 Ves. 609, 617, 619, p. 190, 1291, 1352, 1375, 2466.
Knott v. Cottee, 2 Phill. Ch. 192, p. 1925, 1929.
Knott v. Shepherdstown Mfg. Co., 30 W. Va. 790, 5 S. E. 266, p. 2471.
Knott v. Stephens, 5 Oreg. 235, p. 2778.
Knott v. Tidyman, 86 Wis. 164, 56 N. W. 632, p. 1155.
Knotts v. Bailey, 54 Miss. 235, 28 Am. Rep. 348, p. 2494.
Knotts v. Turver, 8 Ala. 743, p. 2799.
Knouff v. Thompson, 16 Pa. St. 357, 364, p. 1058, 1439.
Knowles v. Carpenter, 8 R. I. 548, p. 1402, 2409.

Knower v. Clothing Co., 57 Conn. 202, 221, 17 Atl. 580, p. 983.
Knowles v. Haughton, 11 Ves. 168, p. 1711.
Knowles v. Inches, 12 Cal. 212, p. 364, 385, 452.
Knowles v. Knowles, (R. I.) 56 Atl. 775, p. 2374.
Knowles v. Lawton, 18 Ga. 476, 63 Am. Dec. 290, p. 1403, 1406.
Knowles v. Lord, 4 Whart. 500, 34 Am. Dec. 525, p. 1332.
Knowles v. McCamly, 10 Paige, 342, p. 2152, 2196.
Knowles v. Rablin, 20 Iowa, 101, p. 1065, 1075, 2438.
Knowles v. Williams, 58 Kan. 221, 48 Pac. 856, p. 1051.
Knowles Loom Works v. Ryle, 97 Fed. 730, 38 C. C. A. 494, p. 2473.
Knowlton v. Cooley, 102 Mass. 233, p. 2584.
Knowlton v. Mickles, 29 Barb. 465, p. 1653.
Knowlton v. Walker, 13 Wis. 264, p. 2376.
Knox v. Armistead, 87 Ala. 511, 13 Am. St. Rep. 65, 6 South. 311, 5 L. R. A. 297, p. 1756.
Knox v. Childersburg Land Co., 86 Ala. 180, 5 South. 578, p. 2136, 2189.
Knox v. Easton, 38 Ala. 345, p. 2345.
Knox v. Eden Musée Americain Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700, p. 1239, 1242, 1249.
Knox v. Gye, L. R. 5 H. L. 656, 675, p. 182, 2009, 2011.
Knox v. Jones, 47 N. Y. 389, 396, p. 1918.
Knox v. Jordan, 5 Jones Eq. 175, p. 2196.
Knox v. Knox, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155, p. 1929, 1930.
Knox v. Lycoming F. Ins. Co., 50 Wis. 671, p. 2726.
Knox v. New York, 55 Barb. 404, p. 2683.
Knox v. Silloway, 10 Me. 201, 221, p. 1345.
Knox v. Singmaster, 75 Iowa, 64, 39 N. W. 183, p. 1778.
Knox v. Smith, 4 How. 298, 316, p. 514, 515.
Knox v. Symmonds, 1 Ves. 369, p. 1549.
Knox v. Thomson, 1 Litt. (Ky.) 350, 13 Am. Dec. 246, p. 1022.
Knox County v. Brown, 103 Mo. 223, 15 S. W. 382, p. 1058.
Knox Rock-Blasting Co. v. Grafton Stone Co., 60 Ohio St. 361, 60 N. E. 563, p. 736.
Knye v. Moore, Sim. & St. 61, p. 667, 669.
Koch v. Br'ggs, 14 Cal. 256, 73 Am. Dec. 651, p. 1860, 1861, 2434.
Koch v. West, 118 Iowa, 468, 92 N. W. 663, 96 Am. St. Rep. 394, p. 1100, 1114, 1119.
Kocher v. Cornell, 59 Nebr. 315, 80 N. W. 911, p. 2183.
Koeber v. Sturgis, 22 Beav. 588, p. 2171.
Kœster v. Burke, 81 Ill. 436, p. 2392.
Koefoed v. Thompson, (Nebr.) 102 N. W. 268, p. 2041.
Koehler v. Black R. etc. Co., 2 Black, 715, p. 182.
Koehler v. Dodge, 31 Nebr. 328, 47 N. W. 913, 28 Am. St. Rep. 518, p. 1177.
Koehler & Son Co., D. M., v. Flebbe, 47 N. Y. Supp. 369, 21 App. Div. 210, p. 1207.
Koen v. Martin, 110 La. 242, 34 South. 429, p. 651.
Koenig's Appeal, 57 Pa. St. 352, p. 1831.
Kohn v. Collison, 1 Marv. (Del.) 109, 27 Atl. 834, p. 2190.
Kohn v. Lapham, 13 S. Dak. 78, 82 N. W. 408, p. 1081, 1082, 1271.
Kohnweiler v. Anderson, 78 N. C. 133, p. 2570.
Konitsky v. Meyer, 49 N. Y. 571, p. 2793.
Konvalinka v. Schlegel, 104 N. Y. 125, 58 Am. Rep. 494, 9 N. E. 868, p. 832.
Koon v. Tramel, 71 Iowa, 137, 32 N. W. 243, p. 1284, 1328.
Koons v. Grooves, 20 Iowa, 373, p. 1100, 1373.
Koons v. Millett, 121 Ind. 591, 23 N. E. 95, 7 L. R. A. 231, p. 1268.
Koontz v. Northern Bank, 16 Wall. 196, p. 2662.
Koontz v. Owens, (Mo.) 18 S. W. 928, p. 1514, 1516.

Kopper v. Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742, p. 755, 1456, 1457, 1466.
Kostenbader v. Spotts, 80 Pa. St. 430, p. 2771.
Koster v. Hiller, 4 Ill. App. 21, p. 1801.
Kountz v. Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687, p. 1230.
Kountze v. Kennedey, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360, p. 1578.
Kowalke v. Milwaukee E. R. & L. Co., 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877, p. 1477, 1508, 1509.
Kraft v. Smith, 117 Pa. St. 183, 11 Atl. 86, p. 2039.
Kramer v. Arthurs, 7 Pa. St. 165, p. 1188, 1190, 1380.
Kramer v. Farmers' etc. Bank, 15 Ohio, 253, p. 2383, 2389.
Kramer v. Rebman, 9 Iowa, 114, p. 585.
Krankel's Ex'rs v. Krankel, 20 Ky. Law Rep. 901, 42 S. W. 1084, p. 1865.
Kransz v. Uedelhofen, 193 Ill. 477, 62 N. E. 239, p. 2347.
Krause v. Krause, (N. J. Eq.) 55 Atl. 1095, p. 1729, 1738.
Krauth v. Thiele, 45 N. J. Eq. 408, 18 Atl. 351, p. 1995.
Kreb's Estate, In re, 184 Pa. St. 222, 39 Atl. 66, p. 1850.
Krehl v. Burrell, L. R. 7 Ch. Div. 551, p. 2698.
Kreider v. Boyer, 10 Watts, 54, p. 908.
Kreiser's Appeal, 69 Pa. St. 194, p. 845, 848.
Kreling v. Kreling, 118 Cal. 413, 50 Pac. 546, p. 2408.
Krider v. Lafferty, 1 Whart. 303, p. 1037, 1041, 1107, 1148.
Kring v. Green's Ex'rs, 10 Mo. 195, p. 2648.
Kringle v. Rhomberg, 120 Iowa, 472, 94 N. W. 1115, p. 1994.
Kriz v. Peege, 119 Wis. 105, 95 N. W. 108, p. 2200.
Kroegher v. Calivada Colonization Co., 56 C. C. A. 257, 119 Fed. 641, p. 2079.
Kroll v. Coach, (Oreg.) 78 Pac. 397, p. 2033, 2034.
Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892, p. 1691.
Kronshage v. Varrell, (Wis.) 97 N. W. 928, p. 1944, 1957, 1970.
Krouse v. Woodward, (Cal.) 42 Pac. 1085, p. 1244.
Krouskop v. Shontz, 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241, p. 2200.
Krueger v. Armitage, 58 N. J. Eq. 357, 44 Atl. 167, p. 1636, 1637.
Kruse v. Steffens, 47 Ill. 112, p. 1780.
Krutz v. Fisher, 8 Kan. 90, p. 1760, 1763, 1764.
Krutz v. Robbins, 12 Wash. 7, 40 Pac. 415, 50 Am. St. Rep. 871, 28 L. R. A. 676, p. 734, 744.
Kuehne v. Union Trust Co., (Mich.) 95 N. W. 715, p. 1911.
Kuhl v. Gally Universal Press Co., 123 Ala. 452, 26 South. 535, 82 Am. St. Rep. 135, p. 1676, 1709, 1720.
Kuhl v. Lightle, 29 Wash. 137, 69 Pac. 630, p. 1039.
Kuhl v. Martin, 26 N. J. Eq. 60, p. 2659.
Kuhl v. Mayor etc., 23 N. J. Eq. 84, 85, p. 1429, 1440, 1444.
Kuhl v. Pierce County, 44 Nebr. 584, 62 N. W. 1066, p. 217, 252.
Kuhn v. Freeman, 15 Kan. 423, p. 2762.
Kuhn v. Meyers, 37 Iowa, 351, p. 733.
Kuhn v. Newman, 26 Pa. St. 227, p. 1831, 2161.
Kuhn v. Nixon, 15 Serg. & R. 118, 125, p. 559.
Kuhn v. Rumpp, 46 Cal. 299, p. 2381.
Kuhn v. Stansfield, 28 Md. 210, 92 Am. Dec. 681, p. 1801, 2193.
Kuhner v. Butler, 11 Iowa, 419, p. 649, 1704.
Kunkel v. Macgill, 56 Md. 120, p. 2207, 2216.
Kunkle v. Wherry, 189 Pa. St. 198 69 Am. St. Rep. 802, 42 Atl. 112, p. 730.
Kunkle v. Wolfersberger, 6 Watts, 126, p. 1334, 1336.
Kurry v. Keyser, 30 Md. 214, p. 1563.
Kurtz v. Sponable, 6 Kan. 395, p. 2418.

Kuteman v. Carroll, (Tex. Civ. App.) 80 S. W. 842, p. 1025.
Kyger v. Ryley, 2 Nebr. 20, 28, p. 2360.
Kyle v. Bellenger, 79 Ala. 516, p. 2498, 2513, 2523.
Kyle v. Fehley, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866, p. 1494.
Kyle v. Frost, 29 Ind. 382, p. 210.
Kyle v. Harvey, 25 W. Va. 716, 52 Am. Rep. 235, p. 1857.
Kyle v. Perdue, 95 Ala. 579, 10 South. 103, p. 1747, 1782, 1784.
Kyle v. Thompson, 11 Ohio St. 616, p. 1127, 1129, 1246.
Kyle v. Wills, 166 Ill. 501, 46 N. E. 1121, p. 1911.
Kyles v. Tait's Adm'r, 6 Gratt. 44, p. 2504.
Kyne v. Kyne, 48 Iowa, 21, 24, p. 852.

L.

Labaree v. Colby, 99 Mass. 559, p. 2193.
Labouchere v. Earl of Wharncliffe, L. R. 13 Ch. Div. 346, p. 2677.
Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659, p. 212, 1065, 1080.
Laccassaigne v. Abraham, 48 La. Ann. 1160, 20 South. 672, p. 1081.
Lacey, Ex parte, 6 Ves. 625, 627, p. 1753, 1757, 1758.
Lacey v. Ingle, 2 Phill. Ch. 413, p. 2519.
Lackay v. Curtiss, 6 Ired. Eq. 199, p. 1226.
Lackersteen v. Lackersteen, 6 Jur., N. S., 1111, p. 1515.
Lackland v. Garesche, 56 Mo. 267, 270, p. 569, 586, 2788.
Lackland v. Walker, 151 Mo. 210, 52 S. W. 414, p. 1944, 1946, 1968, 1975, 1980.
Laclede Bank v. Schuler, 120 U. S. 511, 7 Sup. Ct. 644, p. 1212.
Lacon, In re, [1891] 2 Ch. 482, p. 908.
Lacon v. Allen, 3 Drew. 579, 582, p. 2538.
Lacon v. Briggs, 3 Atk. 105, p. 697.
Lacon v. Lacon, [1891] 2 Ch. 482, p. 902.
Laconia Sav. Bank v. Vittum, 71 N. H. 465, 52 Atl. 848, 93 Am. St. Rep. 561, p. 1265.
La Crosse etc. Co. v. Reynolds, 12 Minn. 213, p. 2702.
Lacustrine etc. Co. v. Lake Guano etc. Co., 82 N. Y. 476, 477, p. 1095, 1355.
Lacy, In re, [1899] 2 Ch. 149, p. 1936.
Lacy v. Hale, 37 Pa. St. 360, p. 2028.
Lacy v. Wilson, 4 Munf. 313, p. 1346.
Ladd v. Anderson, 133 Mo. 625, 34 S. W. 872, p. 1102.
Ladd v. Harvey, 21 N. H. 514, p. 2653, 2654.
Ladd v. Rice, 57 N. H. 374, p. 1640.
Ladley v. Creighton, 70 Pa. St. 490, p. 1126.
Ladue v. Detroit etc. R. R., 13 Mich. 380, 87 Am. Dec. 759, p. 2387.
Lady Arundel v. Phipps, 10 Ves. 139, 140, p. 183, 2133, 2148, 2763.
Lady Bateman v. Faber, [1897] 2 Ch. 223, [1898] 1 Ch. 144, p. 2159.
Lady Beresford v. Driver, 14 Beav. 387, 16 Beav. 134, p. 287, 2763.
Lady Caven v. Pulteney, 2 Ves. 544, 560, p. 782, 846, 857.
Lady Elibank v. Montolieu, 5 Ves. 737, 1 Lead. Cas. Eq. 623, 639–669, 670–679, p. 639, 644, 645, 2167, 2168.
Lady Lanesborough v. Lord Kilmaine, 2 Molloy, 403, p. 1393.
Lady Ormond v. Hutchinson, 13 Ves. 47, p. 1767.
Lady Platt v. Sleap, Cro. Jac. 275, p. 1395.
Lady Shaftesbury v. Arrowsmith, 4 Ves. 71, p. 244.
Lady Shelburne v. Lord Inchiquin, 1 Brown Ch. 338, p. 1515.
Lady Stanley v. Earl of Shrewsbury, L. R. 19 Eq. 616, p. 2698.
Lady Thynne v. Earl of Glengall, 2 H. L. Cas. 131, 153, 154, 1 Keen, 769, p. 868, 873, 875, 903, 906, 917, 918, 922.
La Farge Fire Ins. Co. v. Bell, 22 Barb. 54, 61, p. 1164, 1358, 2247, 2452.
Lafayette v. Cox, 5 Ind. 38, p. 408.
Lafayette v. Fowler, 34 Ind. 140, p. 407.
Lafever v. Billmyer, 5 W. Va. 33, p. 321, 2799.
Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678, p. 2028.
Lafferty v. People's Savings Bank, 76 Mich. 35, 43 N. W. 34, p. 2494.

La Fitte v. Rups, 13 Colo. 207, 22 Pac. 309, p. 1994.
La Fleur v. Chace, 171 Mass. 59, 50 N. E. 456, p. 1347.
Lafone v. Falkland Islands Co., 4 Kay & J. 34, p. 277, 282.
Lagarde v. Anniston etc. Co., 126 Ala. 496, 28 South. 199, p. 2024, 2085.
Lagger v. Mutual Union L. & B. Ass'n, 146 Ill. 283, 33 N. E. 946, p. 1099, 1127, 2481.
Lagow v. Badollet, 1 Blackf. 416, 12 Am. Dec. 258, p. 2499.
La Grange B. T. Co. v. National Bank, 122 Mo. 154, 26 S. W. 710, 43 Am. St. Rep. 558, p. 2013.
Lagrave, Matter of, 45 How. Pr. 301, 305, p. 2614.
Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392, p. 1613, 2066.
Lahey v. Broderick, 72 N. H. 180, 55 Atl. 354, p. 1997.
Lahr's Appeal, 90 Pa. St. 507, p. 1148.
Laible v. Ferry, 32 N. J. Eq. 791, p. 2103, 2104.
Laidlaw v. Organ, 2 Wheat. 178, 195, p. 1581, 1588, 1615, 1617.
Laidley v. Aiken, 80 Iowa, 112, 20 Am. St. Rep. 408, 45 N. W. 384, p. 1282.
Laight v. Morgan, 1 Johns. Cas. 492, 2 Caines Cas. 344, p. 324.
Lain v. Morton, 23 Ky. Law Rep. 438, 63 S. W. 286, p. 1335.
Laing v. McCall, 50 Vt. 657, p. 1701, 1703.
Laing v. McKee, 13 Mich. 124, 87 Am. Dec. 738, p. 179, 2037.
Laing v. Zeden, L. R. 9 Ch. 736, p. 2649.
Laing's Settlement, In re, [1899] 1 Ch. 593, p. 2071.
Laird v. Allen, 82 Ill. 43, p. 2780.
Laird v. Bass, 50 Tex. 412, p. 1939, 1954, 1959, 1977.
Laird v. Dickerson, 40 Iowa, 665, 669, p. 567, 586.
Lake v. Brutton, 18 Beav. 34, 8 De Gex, M. & G. 440, p. 2796.
Lake v. Craddock, 3 P. Wms. 158, 1 Lead. Cas. Eq., 4th Am. ed., 264, 268, p. 191, 2480.
Lake v. De Lambert, 4 Ves. 593, 595, p. 1833.
Lake v. Doud, 10 Ohio, 415, p. 2475.
Lake v. Gibson, 1 Eq. Cas. Abr. 290, 294, pl. 3, 1 Lead. Cas. Eq., 4th Am. ed., 264, 268, p. 191, 679, 680, 2480.
Lake v. Hancock, 38 Fla. 53, 20 South. 811, 56 Am. St. Rep. 159, p. 1356.
Lake v. McDavitt, 13 Lea, 26, p. 2612.
Lake Bigler Road Co. v. Bedford, 3 Nev. 399, p. 2749.
Lake View M. & M. Co. v. Hannon, 93 Ala. 87, 9 South. 539, p. 715, 717, 2053, 2299.
Lakin v. Sierra B. G. M. Co., 25 Fed. 337, p. 1154, 1333, 1356.
Lallance v. Fisher, 29 W. Va. 512, 2 S. E. 775, p. 1667.
Lally v. Holland, 1 Swan, 396, p. 1119, 1124.
Lamar v. Hale, 79 Va. 147, p. 1333, 1356, 1357, 1391, 1392.
Lamar v. Micou, 112 U. S. 452, 465, 5 Sup. Ct. Rep. 221, 26 L. ed. 774, p. 2078.
Lamar v. Wright, 31 S. C. 60, 9 S. E. 736, p. 2039.
Lamar Co. v. Clements, 49 Tex. 347, p. 1434.
Lamare v. Dixon, L. R. 6 H. L. 414, 423, p. 662, 2767.
Lamar's Ex'r v. Hale, 79 Va. 147, p. 1007.
Lamaster v. Scofield, 5 Nebr. 148, p. 252.
Lamb v. Cannon, 38 N. J. L. 362, p. 1284.
Lamb v. Eames, L. R. 10 Eq. 267, p. 1923.
Lamb v. Farrell, 21 Fed. 5, 8, p. 505.
Lamb v. Harris, 8 Ga. 546, p. 1476.
Lamb v. Hinman, 46 Mich. 112, p. 2780.
Lamb v. Lamb, 18 App. Div. 250, 46 N. Y. Supp. 219, p. 1907.
Lamb v. Lamb, (N. J. Eq.) 23 Atl. 1009, p. 1328.
Lamb v. Lamb, 5 Week. Rep. 720, p. 802.
Lamb v. Montague, 112 Mass. 352, p. 2426, 2438.

Lamb v. Pierce, 113 Mass. 72, p. 978, 1142, 1146.
Lamb v. Starr, Deady, 350, Fed. Cas. No. 8,021, p. 498.
Lamb v. Tucker, 42 Iowa, 118, p. 2412.
Lambe v. Eames, L. R. 10 Eq. 267, 6 Ch. 597, p. 1921, 1925.
Lambert v. Lambert, 11 Ves. 607, p. 2209.
Lambert v. Nanny, 2 Munf. 196, p. 1358.
Lambert v. Newman, 56 Ala. 623, 625, 626, p. 977, 979, 982, 994, 1143.
Lamberton v. Van Voorhis, 15 Hun, 336, p. 2502, 2518.
Lamb Knit Goods Co. v. Lamb, 119 Mich. 568, 78 N. W. 646, p. 342.
Lamborn v. Covington Co., 2 Md. Ch. 409, p. 2687.
Lambton, Ex parte, L. R. 10 Ch. 405, p. 2478.
Lamlee v. Hanman, 2 Vern. 499, p. 1679.
Lammott v. Maulsby, 8 Md. 5, p. 1493.
Lamoille Co. Nat. Bank v. Bingham, 50 Vt. 105, 28 Am. Rep. 490, p. 1707.
Lamont v. Cheshire, 65 N. Y. 30, 37, 38, p. 1062, 1081, 1088.
Lamont v. Stimson, 5 Wis. 443, p. 980, 994.
L'Amoreux v. Huntley, 68 Wis. 24, 31 N. W. 331, p. 1020.
L'Amoreux v. Vandenbergh, 7 Paige, 316, p. 1295.
La Mothe etc. Co. v. Tube etc. Co., 15 Blatchf. 436, Fed. Cas. No. 8,033, p. 494.
Lamotte, In re, L. R. 4 Ch. Div. 325, p. 2109.
Lampet's Case, 10 Coke, 46b, 47, 48, 48a, p. 157, 2546.
Lampert v. Haydell, 20 Mo. App. 216, affirmed, 96 Mo. 439, 9 Am. St. Rep. 358, 9 S. W. 780, 2 L. R. A. 113, p. 1845.
Lamphier v. Desmond, 187 Ill. 370, 58 N. E. 343, affirming 86 Ill. App. 101, p. 1131.
Lampkin v. First Nat. Bank, 96 Ga. 487, 23 S. E. 390, p. 1263.
Lamplugh v. Lamplugh, 1 Dick. 411, p. 1734.
Lamplugh v. Lamplugh, 1 P. Wms. 111, 113, p. 2001.
Lamplugh v. Smith, 2 Vern. 77, p. 1744.
Lampman v. Cochran, 16 N. Y. 269, 275, 277, p. 733, 746.
Lampson v. Fletcher, 1 Vt. 168, 18 Am. Dec. 676, p. 1231.
Lamson v. Drake, 105 Mass. 564, 567, p. 1412, 2426 2427, 2432, 2441.
Lamson v. Pfaff, 1 Handy, 449, 452, p. 587.
Lanahan v. Sears, 102 U. S. 318, 26 L. ed. 180, p. 2373.
Lancaster v. Dolan, 1 Rawle, 231, 18 Am. Dec. 625, p. 1806, 2154.
Lancaster v. Evors, 1 Phill. Ch. 349, 352, p. 283, 1390.
Lance v. Gorman, 136 Pa. St. 200, 20 Atl. 792, 20 Am. St. Rep. 914, p. 1028, 1034, 1048, 1276.
Lance v. Norman, 2 Ch. Rep. 79, p. 2165.
Lancey v. Randlett, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169, p. 250, 321, 323, 1465.
Lancy v. Fairechild, 2 Vern. 101, p. 2305.
Land v. Devaynes, 4 Brown Ch. 537, p. 2213.
Landa v. Obert, 45 Tex. 539, p. 1735.
Landau v. Cottrill, 159 Mo. 308, 60 S. W. 64, p. 2404.
Land Credit Co. v. Lord Fermoy, L. R. 8 Eq. 7, 11, 13, 5 Ch. 763, p. 2080, 2090, 2094, 2122.
Lander v. Mercantile Nat. Bank, 118 Fed. 785, 791 (C. C. A.), p. 500.
Landers v. Bolton, 26 Cal. 393, p. 1095, 1354.
Landers v. George, 49 Ind. 309, p. 2462.
Landes v. Brandt, 10 How. 348, 375, p. 1019.
Landigan v. Mayer, 32 Oreg. 245, 67 Am. St. Rep. 521, 51 Pac. 649, p. 1347, 1373.
Landis v. Scott, 32 Pa. St. 495, p. 2052.
Land, Log & Lumber Co. v. McIntyre, 100 Wis. 245, 75 N. W. 964, 69 Am. St. Rep. 915, p. 2129.
Landon v. Morris, 5 Sim. 247, p. 1074.

Landrum v. Farmer, 7 Bush, 46, p. 2749.
Landrum v. Union Bank, 63 Mo. 48, p. 1862.
Lane, In re, L. R. 14 Ch. Div. 856, p. 2213.
Lane v. Collier, 46 Ga. 580, p. 1285.
Lane v. Davis, 14 Allen, 225, p. 2395.
Lane v. Debenham, 11 Hare, 188, p. 2046.
Lane v. De Bode, 29 Tex. Civ. App. 602, 69 S. W. 437, p. 1167, 1356.
Lane v. Dickerson, 10 Yerg. 373, p. 2373.
Lane v. Dighton, Amb. 409, 411, 413, p. 701, 2000, 2016, 2029.
Lane v. Doty, 4 Barb. 530, 534, p. 683, 2607.
Lane v. Eaton, 69 Minn. 141, 71 N. W. 1031, 65 Am. St. Rep. 559, 38 L. R. A. 669, p. 1968, 1970, 2334.
Lane v. Ewing, 31 Mo. 75, 77 Am. Dec. 632, p. 1868, 1873.
Lane v. Holmes, 55 Minn. 379, 57 N. W. 132, 43 Am. St. Rep. 508, p. 1482.
Lane v. Jackson, 20 Beav. 535, p. 1089, 1109, 1315.
Lane v. Lane, 8 Allen, 350, p. 1916.
Lane v. Lane, 80 Me. 570, 16 Atl. 323, p. 1997.
Lane v. Logan Grain Co., (Mo. App.) 79 S. W. 722, p. 1676.
Lane v. Logue, 80 Tenn. (12 Lea) 681, p. 1325, 1329.
Lane v. Ludlow, 2 Paine, 591, p. 2536.
Lane v. Ludlow, 6 Paige, 316, p. 192.
Lane v. Marshall, 1 Heisk. 30, 34, p. 228, 460, 465.
Lane v. Mason, 5 Leigh, 520, p. 1105.
Lane v. Newdigate, 10 Ves. 192, p. 2685, 2698.
Lane v. Page, Amb. 233, p. 1657.
Lane v. Schomp, 20 N. J. Eq. 82, 89, p. 408, 410.
Lane v. Stebbins, 9 Paige, 622, p. 255, 263.
Lanes v. Squyres, 45 Tex. 382, p. 1791.
Lanesborough, Lady, v. Lord Kilmaine, 2 Molloy, 403, p. 1393.
Lang v. Cadwell, 13 Mont. 458, 34 Pac. 957, p. 2402, 2438.
Lang v. Dietz, 191 Ill. 161, 60 N. E. 841, affirming 93 Ill. App. 148, p. 2411.
Lang v. Lang, 62 Md. 33, p. 1850.
Lang v. Lang, 8 Sim. 451, p. 956.
Lang v. Ropke, 5 Sand. 363, p. 1895.
Lang v. Thacher, 48 App. Div. 313, 62 N. Y. Supp. 956, p. 188, 234.
Langdale's Trust, In re, L. R. 10 Eq. 39, p. 2070.
Langdon v. Astor's Ex'rs, 3 Duer, 477, p. 2214.
Langdon v. Astor's Ex'rs, 16 N. Y. 9, reversing 3 Duer, 477, p. 896, 899, 901, 908, 909, 910, 935, 938, 945, 2212.
Langdon v. Buel, 9 Wend. 80, p. 2417, 2461.
Langdon v. Doud, 10 Allen, 433, 437, 6 Allen, 423, 83 Am. Dec. 641, p. 1436, 1562.
Langdon v. Goddard, 3 Story, 13, p. 270, 283.
Langdon v. Keith, 9 Vt. 299, p. 1515, 1541, 2417.
Langdon v. Templeton, 66 Vt. 173, 28 Atl. 866, p. 386, 660.
Lange v. Baranco, 32 La. Ann. 697, p. 2750.
Lange v. Werk, 2 Ohio St. 519, p. 749, 1690.
Langford v. Gowland, 3 Giff. 617, p. 1964.
Langridge v. Payne, 2 Johns. & H. 423, p. 726.
Langslow v. Langslow, 21 Beav. 552, p. 783, 792.
Langstaffe v. Fenwick, 10 Ves. 405, p. 1495, 2371, 2431.
Langston, Ex parte, 17 Ves. 227, p. 2538.
Langston v. Boylston, 2 Ves. 101, 103, 109, p. 2635, 2636, 2637, 2642, 2649.
Langstraat v. Nelson, 40 Fed. 783, p. 503.
Lang Syne Gold Mining Co. v. Ross, 20 Nev. 127, 19 Am. St. Rep. 337, 18 Pac. 358, p. 982, 988, 1011.
Langton v. Horton, 3 Beav. 464, 1 Hare, 547, 549, 560, 563, p. 268, 304, 1193, 1211, 1214, 1268, 2581, 2582, 2638.
Langton v. Horton, 5 Beav. 9, p. 2379.
Lanier v. Allison, 31 Fed. 100, 102, p. 500.
Lanier v. Griffin, 11 S. C. 565, p. 2130.
Lanier v. Hill, 25 Ala. 554, p. 1567.

Lanier v. Irvine, 24 Minn. 116, p. 2607.
Lanier v. McIntosh, 117 Mo. 508, 23 S. W. 787, 38 Am. St. Rep. 676, p. 2415.
Lanning v. Carpenter, 48 N. Y. 408, p. 1486, 1489.
Lanning v. Com. of Public Instruction, 63 N. J. Eq. 1, 51 Atl. 787, p. 1975, 2109.
Lanning v. Smith, 1 Pars. Cas. 16, p. 644, 650, 653, 2438.
Lanning v. Tompkins, 45 Barb. 308, 316, p. 2470.
Lannon v. Hackett, 49 Wis. 261, p. 2293.
Lannon v. Jordan, 56 Ill. 204, p. 2758.
Lanoy v. Duke of Athol, 2 Atk. 444, 446, p. 655, 2222, 2786.
Lanphier v. Desmond, 187 Ill. 370, 58 N. E. 343, aff. 86 Ill. App. 101, p. 1100.
Lansden v. McCarthy, 45 Mo. 106, p. 2554.
Lansdowne v. Lansdowne, 2 Jacob & W. 205, Mos. 364, 365, p. 1484, 1499.
Lansing v. Commercial Union Assur. Co., (Nebr.) 93 N. W. 756, p. 1489, 1490.
Lansing v. Goelet, 9 Cow. 372, p. 188, 2462.
Lansing v. Starr, 2 Johns. Ch. 150, p. 1647.
Lansing v. Woodworth, 1 Sand. Ch. 43, p. 2383, 2387, 2388.
Lant v. Manley, 71 Fed. 7, 12, p. 510.
Lant v. Manley, 75 Fed. 627, 634, 43 U. S. App. 623, p. 511.
Lant's Appeal, 95 Pa. St. 279, 40 Am. Rep. 646, p. 1491.
Lanzit v. Sefton Mfg. Co., 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171, p. 1689.
Lapeer Co. v. Hart, Harr. (Mich.) 157, p. 437.
Lapham v. Clapp, 10 R. I. 543, p. 2492, 2494.
La Pice v. Caddenhead, 21 Tex. Civ. App. 363, 53 S. W. 66, p. 1103.
Lappen v. Gill, 129 Mass. 349, p. 2408, 2414.
Lapping v. Duffy, 47 Ind. 51, p. 2563.
Laprad v. Sherwood, 79 Mich. 520, 44 N. W. 943, p. 1365.
Laraway v. Larue, 63 Iowa, 407, 19 N. W. 242, p. 1028, 1338.
Large v. Ditmars, 27 N. J. Eq. 283, p. 2679.
Larimer v. Kelley, 10 Kan. 298, p. 2192.
Larkin v. Mann, 2 Paige, 27, p. 2741.
Larking, Ex parte, L. R. 4 Ch. Div. 566, p. 1152, 1156.
Larkins v. Biddle, 21 Ala. 252, 256, p. 1489, 1501, 1515.
Larmon v. Knight, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116, p. 2037.
Larned v. Donovan, 155 N. Y. 341, 49 N. E. 942, p. 1302.
Larned v. Renshaw, 37 Mo. 458, p. 2740.
Larrabee v. Given, (Nebr.) 91 N. W. 504, p. 354.
Larrabee v. Hascall, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440, p. 2231, 2237, 2239, 2244.
Larrabee v. Larrabee, 34 Me. 477, p. 1742.
Larrabee v. Van Alstyne, 1 Johns. 307, 3 Am. Dec. 333, p. 820.
Larrowe v. Beam, 10 Ohio, 498, p. 1315, 1393, 2736.
Larsen v. Burke, 39 Iowa, 703, p. 2729.
Lart, In re, [1896] 2 Ch. 789, p. 1436.
Lash v. Lash, 209 Ill. 595, 70 N. E. 1049, p. 2312.
Lasher, In re, 2 Barb. Ch. 97, p. 2624.
Lasher v. Lasher, 13 Barb. 106, p. 820, 836.
Lasher v. McCreery, 66 Fed. 834, 843, p. 360, 421, 455.
Lashmar, In re, [1891] 1 Ch. 258, p. 2055.
Lashua v. Myhre, 117 Wis. 18, 93 N. W. 811, p. 2420, 2425.
La Société Française v. Dist. Court, 53 Cal. 495, p. 2653, 2660.
Lass v. Sternberg, 50 Mo. 124, p. 1861.
Lasselle v. Barnett, 1 Blackf. 150, 12 Am. Dec. 217, p. 1106.
Lassen v. Vance, 8 Cal. 271, 68 Am. Dec. 322, p. 1282, 1284.
Lassence v. Tierney, 1 Macn. & G. 551, 561, 562, p. 2216.
La Terriere v. Bulmer, 2 Sim. 18, p. 2321.
Latham v. Henderson, 47 Ill. 185, p. 1994.
Latham v. Inman, 88 Ga. 505, 15 S. E. 8, p. 1344.

Latham v. Staples, 46 Ala. 462, p. 2521.
Lathrop v. Am. Bd. of For. Miss., 67 Barb. 590, p. 1727.
Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141, p. 1897, 2030, 2043.
Lathrop v. Godfrey, 6 Thomp. & C. 96, p. 1234.
Lathrop v. Knapp, 37 Wis. 307, p. 2662.
Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 192, p. 2053, 2107.
Lathrop v. Tracy, 24 Colo. 382, 51 Pac. 486, 65 Am. St. Rep. 229, p. 1665, 1756.
Latimer v. Aylesbury etc. R'y, L. R. 9 Ch. Div. 385, p. 2659.
Latimer v. Latimer, 174 Ill. 418, 51 N. E. 548, p. 1739.
Latimer v. Latimer, 38 S. C. 379, 16 S. E. 995, p. 2407.
Latimer v. Neate, 11 Bligh, 112, 4 Clark & F. 470, 570, p. 273, 289.
La Touche v. La Touche, 3 Hurl. & C. 576, p. 183.
Latouche v. Lord Dunsany, 1 Schoales & L. 159, 160, p. 1093.
Latrobe v. Tiernan, 2 Md. Ch. 474, p. 2096.
Latrobe B. & L. Ass'n v. Fritz, 152 Pa. St. 224, 25 Atl. 558, 31 Wkly. Notes Cas. 330, p. 2197.
Lattimer v. Livermore, 72 N. Y. 174, p. 767, 1200.
Lattimore v. Simmons, 13 Serg. & R. 183, 186, p. 2552.
Lattin v. McCarty, 41 N. Y. 107, 109, 110, p. 94, 230, 355, 586, 1524.
Latymer's Charity, In re, L. R. 7 Eq. 353, p. 1945, 1963.
Laub v. Buckmiller, 17 N. Y. 620, 626, p. 94, 230, 355, 586, 1524.
Lauchner v. Rex, 20 Pa. St. 464, p. 1515.
Lauderdale v. Hallock, 7 Smedes & M. 622, p. 1515.
Lauer v. Dunn, 115 N. Y. 408, 22 N. E. 270, p. 2561.
Laufer v. Powell, 30 Tex. Civ. App. 604, 71 S. W. 549, p. 1103, 2143.
Laughlin v. Tips, 8 Tex. Civ. App. 649, 28 S. W. 551, p. 1103, 1124, 1125, 1342.
Laurence v. Nelson, 143 U. S. 224, 12 Sup. Ct. 440, 443, p. 508.
Laurent v. Lanning, 32 Oreg. 11, 51 Pac. 80, p. 1275, 1394.
Lavassar v. Washburne, 50 Wis. 200, 6 N. W. 516, p. 1641.
Lavender v. Abbott, 30 Ark. 172, p. 2498, 2511, 2512, 2519.
Laverty v. Moore, 33 N. Y. 658, p. 1436.
Laverty v. Sexton, 41 Iowa, 435, p. 2749.
Lavery v. Pursell, L. R. 39 Ch. Div. 518, p. 344.
Lavette v. Sage, 29 Conn. 577, p. 1729, 1733.
Law v. East I. Co., 4 Ves. 824, p. 2796.
Law v. Ford, 2 Paige, 310, p. 2656.
Law v. Grant, 37 Wis. 548, p. 1615, 1617.
Law v. Henry, 39 Ind. 414, p. 2762.
Law v. Law, 3 P. Wms. 391, Cas. t. Talb. 140, 142, p. 1678, 1697.
Lawe v. Hyde, 39 Wis. 345, p. 2715.
Lawery v. Steward, 25 N. Y. 239, 82 Am. Dec. 346, p. 2569.
Lawes, In re, L. R. 20 Ch. Div. 81, p. 880, 908, 919.
Lawes v. Bennett, 1 Cox, 167, p. 2311, 2314.
Lawl v. Hyde, 39 Wis. 353, p. 355, 588, 766.
Lawless v. Mansfield, 1 Dru. & War. 557, 631, p. 1771, 1772.
Lawley, In re, [1902] 2 Ch. 673, 799, p. 1468, 2223.
Lawrence, In re, 28 N. J. Eq. 331, p. 2624.
Lawrence v. Bank of Republic, 35 N. Y. 320, p. 2791.
Lawrence v. Bayard, 7 Paige, 70, 76, p. 2571.
Lawrence v. Bowle, 2 Phill. Ch. 140, p. 2090.
Lawrence v. Bowman, 1 McAll. 423, Fed. Cas. No. 8,134, p. 502.
Lawrence v. Brown, 5 N. Y. 394, 401, p. 1388, 1427.
Lawrence v. Campbell, 4 Drew. 485, p. 281.
Lawrence v. Clark, 36 N. Y. 128, p. 1323, 1330, 1791.
Lawrence v. Cooke, 104 N. Y. 632, 41 N. E. 144, p. 1929.
Lawrence v. Cornell, 4 Johns. Ch. 542, p. 2440.
Lawrence v. Dale, 3 Johns. Ch. 23, p. 1788.

Lawrence v. Elliott, 3 Redf. 235, p. 2306, 2309, 2310.
Lawrence v. Farmers' etc. Co., 13 N. Y. 200, p. 1861.
Lawrence v. Galsworthy, 3 Jur., N. S., 1049, p. 1754.
Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29, p. 1556, 1559, 1583.
Lawrence v. Hand, 23 Miss. 103, p. 1625.
Lawrence v. Kidder, 10 Barb. 641, 653, p. 1688.
Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918, p. 1835, 1989.
Lawrence v. Lawrence, 42 N. H. 109, p. 1463.
Lawrence v. Lawrence, 2 Vern. 365, 2 Freem. 234, 235, 3 Brown Parl. C. Tomlins's ed., 483, p. 827.
Lawrence v. Luhr, 65 Pa. St. 236, p. 1436.
Lawrence v. Miller, 1 Sand. 516, p. 2736.
Lawrence v. Nelson, 21 N. Y. 158, p. 1234.
Lawrence v. Rokes, 61 Me. 38, 42, p. 556.
Lawrence v. Staigg, 8 R. I. 256, p. 1513.
Lawrence v. Stratton, 6 Cush. 163, 166, 167, p. 1146, 1274.
Lawrence v. Times P't'g Co., 90 Fed. 24, p. 214.
Lawrence v. Timpleman, 37 Ark. 643, p. 2753, 2754.
Lawrence v. Tucker, 7 Me. (7 Greenl.) 195, p. 1101, 1166.
Lawrence v. Tucker, 23 How. 14, 16 L. ed. 474, p. 2383.
Lawrence Co. v. Stewart Bros., (Ark.) 81 S. W. 1059, p. 739.
Lawrence Co. Bank v. Arndt, 69 Ark. 406, 65 S. W. 1052, p. 1492.
Law's Estate, In re, 144 Pa. St. 499, 22 Atl. 831, 14 L. R. A. 103, p. 2058.
Lawson v. Copeland, 2 Br. Ch. Cas. 156, Ames' Cas. on Trusts, 492, p. 2057.
Lawson v. Davis, 7 Gill, 345, p. 215, 219.
Lawson v. Jordan, 19 Ark. 297, 70 Am. Dec. 596, p. 2648.
Lawson v. Lawson, 1 P. Wms. 441, p. 2232, 2233.
Lawson v. Shotwell, 27 Miss. 630, 633, p. 2176.
Lawson v. Stitch, 1 Atk. 507, p. 2208.
Lawson's Appeal, 23 Pa. St. 85, p. 935, 938.
Lawton v. Case, 73 Ind. 60, p. 2544.
Lawton v. Champion, 18 Beav. 87, p. 1501, 1508.
Lawton v. Estes, 167 Mass. 181, 45 N. E. 90, 57 Am. St. Rep. 450, p. 665.
Lawton v. Gordon, 37 Cal. 202, 205, 206, p. 982, 985, 997, 1096, 1142, 1144, 1356.
Layard v. Maud, L. R. 4 Eq. 397, 406, p. 1261, 2539.
Layman v. Vicknair, 47 La. Ann. 679, 17 South. 265, p. 1228.
Layman v. Willard, 7 Ill. App. 183, p. 2441, 2448, 2452.
Layton v. Layton, 1 Smale & G. 179, p. 2173.
Lea v. Fabbrie, 13 Jones & S. 36, p. 2509.
Lea v. Feamster, 21 W. Va. 108, 45 Am. Rep. 549, p. 1706.
Lea v. Polk Co. Copper Co., 21 How. 493, 498, p. 1019.
Leach v. Ansbacher, 55 Pa. St. 85, p. 1026, 1291, 1349.
Leach v. Beattie, 33 Vt. 195, p. 1127, 1129, 2742, 2800.
Leach v. Day, 27 Cal. 643, p. 2686.
Leach v. Leach, 4 Ind. 628, 58 Am. Dec. 642, p. 767.
Leach v. Leach, 18 Pick. 68, 76, p. 2028.
Leach v. Leach, 65 Wis. 291, 26 N. W. 754, p. 826.
Leadenham v. Nicholson, 1 Har. & G. 267, 277, p. 621.
Leader v. Moody, L. R. 20 Eq. 145, p. 2673, 2676.
League v. Buena Ventura Stock Co., 2 Tex. Civ. App. 448, 21 S. W. 307, p. 1039.
League v. Corbitt, 57 Ala. 529, p. 2255.
League v. Snyder, 5 Tex. Civ. App. 13, 23 S. W. 825, p. 1034, 1048.
Leahigh v. White, 8 Nev. 147, p. 2376.
Leaird v. Smith, 44 N. Y. 618, p. 2722, 2776.
Leake v. Leake, 10 Ves. 489, p. 921.
Leak. v. Sutherland, 25 Ark. 219, p. 176.

Leake v. Watson, 58 Conn. 332, 18 Am. St. Rep. 270, 20 Atl. 343, 8 L. R. A. 666, p. 981, 1057, 2018.
Leales v. Scott, 13 Cal. 76, p. 2791.
Learned v. Geer, 139 Mass. 31, 29 N. E. 215, p. 1667.
Learned v. Holmes, 49 Miss. 290, p. 1637.
Learned v. Tritch, 6 Colo. 432, p. 1372.
Learned v. Welton, 40 Cal. 349, p. 1895, 1897, 2045.
Learoyd v. Whiteley, 12 App. Cas. (H. L.) 727, affirming 33 Ch. Div. 347, p. 2066, 2073.
Leary v. King, 6 Del. Ch. 108, 33 Atl. 621, p. 2166.
Leary v. Laflin, 101 Mass. 334, p. 741, 742, 747.
Leather v. Simpson, L. R. 11 Eq. 398, p. 1633.
Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523, 4 De Gex, J. & S. 137, p. 1695, 2690.
Leather Cloth Co. v. Lorsent, L. R. 9 Eq. 345, p. 1690, 2690.
Leathes v. Leathes, L. R. 5 Ch. Div. 221, p. 2728.
Leavens v. Butler, 8 Port. 380, p. 2257.
Leavenson v. Lafontaine, 3 Kan. 523, 526, p. 1234.
Leavitt v. Beirne, 21 Conn. 1, 8, p. 1841, 2051.
Leavitt v. Burns, 21 Conn. 1, p. 1843.
Leavitt v. Reynolds, 79 Iowa, 348, 44 N. W. 567, 7 L. R. A. 365, p. 2392.
Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333, p. 1486, 1721.
Leaycraft v. Hedden, 4 N. J. Eq. 512, 551, p. 2153.
Lebanon Sav. Bank v. Hollenbeck, 29 Minn. 322, 13 N. W. 145, p. 1170, 1275.
Le Blanc, Re, 14 Hun, 8, p. 1915.
Lebreton v. Lemaire, (Tex. Civ. App.) 43 S. W. 31, p. 1276.
Lechmere v. Brotheridge, 32 Beav. 353, p. 2149.
Lechmere v. Earl of Carlisle, 3 P. Wms. 211, 215, 222, p. 185, 604, 620, 700, 949, 950, 953, 2306, 2316.
Lechmere v. Lavie, 2 Mylne & K. 197, p. 1909, 1929.
Lechmere v. Lechmere, Cas. t. Talb. 80, p. 700, 953.
Leddel's Ex'r v. Starr, 19 N. J. Eq. 163, p. 2658.
Leddel's Ex'r v. Starr, 20 N. J. Eq. 274, p. 2640.
Ledford v. Smith, 6 Bush, 129, p. 2500, 2523, 2525.
Le Doux v. Johnson, (Tex. Civ. App.) 23 S. W. 902, p. 1034, 1048.
Ledwich v. McKim, 53 N. Y. 307, p. 1239, 1241.
Ledyard v. Butler, 9 Paige, 132, 37 Am. Dec. 379, p. 1384.
Lee v. Angas, L. R. 7 Ch. 79, p. 1769, 1771.
Lee v. Baird, 132 N. C. 755, 44 S. E. 605, p. 2310.
Lee v. Browder, 51 Ala. 288, p. 1993, 1999.
Lee v. Carroll Normal School Co., (Nebr.) 96 N. W. 65, p. 741.
Lee v. Cato, 27 Ga. 637, 73 Am. Dec. 746, 748, p. 1104, 1145.
Lee v. Cole, 17 Oreg. 559, 21 Pac. 819, p. 2471.
Lee v. D'Aranda, 3 Atk. 419, p. 955.
Lee v. Egremont, 5 De Gex & S. 348, p. 785.
Lee v. Evans, 8 Cal. 424, p. 2370.
Lee v. Green, 6 De Gex, M. & G. 155, 168, p. 1089, 1090.
Lee v. Haley, L. R. 5 Ch. 155, 158, p. 1450, 1695, 2690.
Lee v. Horton, 104 N. Y. 538, 11 N. E. 51, p. 2017.
Lee v. Howell, 69 N. C. 200, p. 1774.
Lee v. Howlett, 2 Kay & J. 531, p. 992, 1215.
Lee v. Kennedy, 25 Misc. Rep. 140, 54 N. Y. Supp. 155, p. 1868.
Lee v. Kirby, 104 Mass. 420, 428, p. 1529, 1665, 1666, 1669, 2774.
Lee v. Kirkpatrick, 14 N. J. Eq. 264, p. 1194, 1453.
Lee v. Lee, 55 Ala. 590, p. 564.
Lee v. Lee, 67 Ala. 406, 423, p. 2018.
Lee v. Lee, 4 Ch. Div. 175, 179, p. 2141.
Lee v. Lee, 2 Duvall, 134, p. 1743.
Lee v. Lee, 27 L. J. Ch. 824, p. 2214.
Lee v. Lockart, 3 Mylne & C. 302, p. 1790.
Lee v. Muggeridge, 1 Ves. & B. 118, p. 2156.
Lee v. Munroe, 7 Cranch, 366, 368, p. 1194, 1294.
Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, p. 1096, 1114, 1144.

Lee v. Overstreet, 44 Ga. 507, p. 742, 746.
Lee v. Pain, 4 Hare, 201, 216, 218, 221, 223, 233, 236, 242, 243, 250, p. 886, 888, 889, 890, 931, 937, 939, 2228.
Lee v. Patillo, 4 Leigh, 436, p. 1653.
Lee v. Percival, 85 Iowa, 135, 52 N. W. 543, p. 1489.
Lee v. Price, 12 Md. 253, p. 2273.
Lee v. Prieaux, 3 Brown Ch. 381, 385, p. 2139, 2145.
Lee v. Read, 5 Beav. 381, p. 275.
Lee v. Robinson, 15 R. I. 369, 5 Atl. 290, p. 2561.
Lee v. Ruggles, 62 Ill. 427, p. 2756.
Lee v. Sankey, L. R. 15 Eq. 204, p. 2045.
Lee v. Stiger, 30 N. J. Eq. 610, p. 1706.
Lee v. Tannenbaum, 62 Ala. 501, p. 2189.
Lee v. Timken, 10 App. Div. 213, 41 N. Y. Supp. 979, p. 2004.
Lee v. Tower, 124 N. Y. 370, 26 N. E. 943, p. 857.
Lee v. Vacuum Oil Co., 126 N. Y. 579, 27 N. E. 1018, p. 1627.
Lee v. Vernon, 5 Brown Parl. C. 10, p. 2027.
Leech v. Bonsall, 9 Phila. 204, p. 1300.
Leech v. Schweder, L. R. 9 Ch. 463, 465, note, 468, note, p. 2673.
Lee County v. Rogers, 7 Wall. 181, p. 1069, 1071.
Leedham v. Chawner, 4 Kay & J. 458, p. 2103.
Leedon v. Lombaert, 80 Pa. St. 381, p. 2089.
Leeds v. Barnardiston, 4 Sim. 538, p. 2621.
Leeds v. Cameron, 3 Sum. 488, Fed. Cas. No. 8,206, p. 2383.
Leeds v. Shaw, 82 Ky. 80, p. 1979.
Leeds & Hanley Theatres of Varieties, Lim., [1902], In re, 2 Ch. 809, p. 1613, 1783.
Leeds Woolen Mills, In re, Fed. 922, p. 339.
Leeke v. Bennett, 1 Atk. 470, p. 2205.
Leeman v. Edison Electric Illum. Co., 53 N. Y. Supp. 302, p. 742.
Leeming, In re, 3 De Gex, F. & J. 43, p. 2622.
Leeming v. Lady Murray, L. R. 13 Ch. Div. 123, p. 2049.
Leeper v. Taylor, 111 Mo. 312, 19 S. W. 955, p. 1868.
Lees v. Nuttal, 2 Mylne & K. 819, p. 1761.
Lees v. Laforest, 14 Beav. 250, p. 2028.
Lee's Ex'r v. Boak, 11 Gratt. 182, p. 2237, 2238.
Leet v. Rider, 48 Cal. 623, p. 2748.
Lefever v. Lefever, 30 N. Y. 27, p. 1437.
Lefevre v. Lefevre, 59 N. Y. 435, p. 809, 820, 828.
Le Fevre v. Toole, 84 N. Y. 95, p. 2493.
Leffler v. Armstrong, 4 Iowa, 482, 68 Am. Dec. 672, p. 1863.
Lefforge v. West, 2 Ind. 514, 516, p. 632.
Legal v. Miller, 2 Ves. Sr. 299, p. 1525.
Legard v. Hodges, 1 Ves. 477, p. 1268, 2586.
Le Gendre v. Byrnes, 44 N. J. Eq. 372, 14 Atl. 621, p. 1762.
Leggett v. Bullock, Busb. 283, p. 1097.
Leggett v. Cole, 1 McCrary, 515, p. 2748, 2749.
Leggett v. Du Bois, 5 Paige 114, 28 Am. Dec. 413, p. 1834.
Leggett v. Hunter, 19 N. Y. 445, 459, p. 2046, 2060, 2108.
Leggett v. Leggett, 88 N. C. 108, p. 1899.
Leggett v. Mut. Life Ins. Co., 50 Barb. 616, p. 748.
Leggett v. Perkins, 2 N. Y. 297, p. 1895, 1918.
Leggett v. Postley, 2 Paige, 599, 601, p. 245, 258, 259, 324.
Leggott v. Barrett, L. R. 15 Ch. Div. 306, p. 1690.
Legnoski v. Crooker, 86 Tex. 324, 24 S. W. 278, p. 1117.
Le Grice v. Finch, 3 Mer. 50, p. 2207, 2209.
Legro v. Staples, 16 Me. 252, p. 2561.
Lehigh Valley R. R. Co. v. McFarlan, 30 N. J. Eq. 135, 2 Ames' Cas. Eq. Jur. 85, 31 N. J. Eq. 730, 754, 759–761, 1 Keener Cas. Eq. Jur. 133, p. 372, 378, 401.
Lehman v. Collins, 69 Ala. 127, p. 1132, 2540.
Lehman v. Feld, 37 Fed. 852, p. 1676.
Lehman v. Lewis, 62 Ala. 129, p. 1992, 2006.

Lehman v. Roberts, 86 N. Y. 232, p. 2679.
Lehman v. Robertson, 84 Ala. 489, 4 South. 728, p. 2056.
Lehnard v. Specht, 54 N. E. 208, 315, p. 2018.
Lehr v. Beaver, 8 Watts & S. 106, p. 559.
Leib v. Stribling, 51 Md. 285, p. 2787.
Leiby's Ex'rs v. Wolf, 10 Ohio, 80, 83, p. 1105, 1127, 1130, 1132.
Leigh v. Harrison, 69 Miss. 923, 11 South. 604, 18 L. R. A. 49, p. 1845.
Leigh v. Leigh, 17 Beav. 605, p. 2228.
Leigh v. Macauley, 1 Younge & C. 260, 265, 266, p. 2016.
Leigh v. Savidge, 14 N. J. Eq. 124, p. 2493.
Leigh's Estate, In re, L. R. 6 Ch. Div. 256, p. 270.
Leigh's Estate, In re, L. R. 6 Ch. 887, p. 2483.
Leighton v. Bowen, 75 Me. 504, p. 1837.
Leighton v. Leighton, 32 Me. 399, 402, p. 554, 555.
Leighton v. Leighton, 1 P. Wms. 671, p. 364, 385, 451.
Leighton v. Orr, 44 Iowa, 679, p. 1738, 1780, 1781.
Leighton v. Preston, 9 Gill, 201, p. 2348.
Leighton v. Sheldon, 16 Minn. 243, p. 2194.
Leighton v. Young, 52 Fed. 439, 3 C. C. A. 176, 10 U. S. App. 298, 18 L. R. A. 266, p. 337.
Leiman, Matter of, 32 Md. 225, 244, p. 997.
Leiman, Matter of, 32 Md. 225, 3 Am. Rep. 132, p. 1146.
Leiman's Estate, 32 Md. 225, 3 Am. Rep. 132, p. 1106.
Leinaweaver v. Stoever, 1 Watts & S. 160, p. 825.
Leininger v. Summit Branch R. Co., 180 Pa. St. 289, 36 Atl. 738, p. 212.
Leitch v. Abbott, L. R. 31 Ch. Div. 374, p. 275, 276.
Leitch v. Hollister, 4 N. Y. 211, p. 1858.
Leitch v. Wells, 48 Barb. 637, 48 N. Y. 585, 602, 609, p. 1064, 1897.
Leitensdorfer v. Delphy, 15 Mo. 160, 55 Am. Dec. 137, p. 1523.
Leiter v. Pike, 127 Ill. 287, 20 N. E. 23, p. 1051.
Leith v. Irvine, 1 Mylne & K. 277, p. 2371.
Leland v. Isenbeck, 1 Ida. 469, p. 1338.
Leman v. Sherman, 117 Ill. 657, 6 N. E. 872, p. 2109.
Leman v. Whitley, 4 Russ. 423, p. 1991, 2040.
Le Marchant v. Le Marchant, L. R. 18 Eq. 414, p. 1924.
Le May v. Baxter, 11 Wash. 649, 40 Pac. 122, p. 252.
Lembeck v. Jersey City, 30 N. J. Eq. 554, p. 2749.
Lembeck & Betz Eagle Brewing Co. v. Kelly, 63 N. J. Eq. 401, 51 Atl. 794, p. 1107.
Lemen v. McComas, 63 Md. 153, p. 2055.
Lemke v. Dietz, (Wis.) 98 N. W. 936, p. 669, 1695.
Lemmond v. Peoples, 6 Ired. Eq. 137, p. 1986.
Lemon v. Lemon, 8 Vin. Abr. 366, pl. 45, p. 827.
Lemon v. Phœnix etc. Ins. Co., 38 Conn. 294, p. 1550.
Lemon v. Sweeney, 6 Ill. App. 507, p. 2710.
Lemos v. Terhune, 40 N. J. Eq. 364, 2 Atl. 18, p. 1107.
Lemprière v. Lange, L. R. 12 Ch. Div. 675, p. 1634, 1725, 1833, 2671.
Lench v. Lench, 10 Ves. 511, 517, p. 958, 1999, 2016, 2024, 2029, 2517.
Lenders v. Thomas, 35 Fla. 518, 17 South. 633, 48 Am. St. Rep. 255, p. 1065.
Lenehan v. McCabe, 2 Ir. Eq. 342, p. 1168.
Le Neve v. Le Neve, Amb. 436, 2 Lead. Cas. Eq. 1–108, 109, and notes, 227, 2 Lead. Cas. Eq., 4th Am. ed., secs. 140–142, 3 Atk. 646, 1 Ves. Sr. 64, p. 266, 268, 695, 965, 1091, 1137, 1138, 1139, 1152, 1159, 1173, 1187, 1188, 1197, 1357.
Lengfelder v. Hill, 21 Wash. 371, 58 Pac. 250, p. 1371.
Lengley v. City of Hudson, 4 Thomp. & C. 353, p. 2757.
Lennig's Estate, 52 Pa. St. 135, 138, p. 2405.

Lennig's Estate, 182 Pa. St. 485, 38 Atl. 466, 61 Am. St. Rep. 725, 38 L. R. A. 378, p. 2574.
Lennon v. Mayor etc., 5 Daly, 347, p. 2756.
Lenow v. Fones, 48 Ark. 557, 4 S. W. 56, p. 2318.
Lenox v. Reed, 12 Kan. 223, 227, p. 1860.
Lenox v. Roberts, 2 Wheat. 373, 4 L. ed. 264, p. 469, 2557.
Lent v. Howard, 89 N. Y. 169, p. 1851, 2070, 2099, 2309, 2310, 2312.
Lentilhow v. Moffat, 1 Edw. Ch. 451, p. 1858.
Lenz v. Prescott, 144 Mass. 505, 11 N. E. 923, p. 2274.
Lenzberg, In re, L. R. 7 Ch. Div. 650, p. 1790.
Leon, In re, [1892] 1 Ch. 348, p. 1834.
Leonard v. Broughton, 120 Ind. 536, 22 N. E. 731, 16 Am. St. Rep. 347, p. 1268.
Leonard v. Countess of Sussex, 2 Vern. 526, p. 1884.
Leonard v. Haworth, 171 Mass. 496, 51 N. E. 7, p. 1835.
Leonard v. Lady Sussex, 2 Vern. 526, p. 1885, 1886.
Leonard v. Leonard, 2 Ball & B. 171, 176, 179, 180, p. 1501, 1508, 1609, 1613.
Leonard v. Logan, 20 Wis. 540, 542, 568, p. 231, 355, 588.
Leonard v. Marshall, 82 Fed. 396, p. 2562.
Leonard v. Poole, 114 N. Y. 371, 21 N. E. 707, 11 Am. St. Rep. 667, 4 L. R. A. 728, p. 1689, 1711.
Leonard v. Steele, 4 Barb. 20, p. 811, 820, 828, 852.
Leonard's Adm'r v. Leonard's Ex'r, 67 Vt. 318, 31 Atl. 783, p. 2291.
Leonard's Appeal, 95 Pa. St. 196, p. 2057.
Leonard's Lessee v. Diamond, 31 Md. 536, 541, p. 1850.
Leonis v. Lazzarovich, 55 Cal. 52, p. 2726.
Leopold v. Weeks, 96 Md. 280, 53 Atl. 937, p. 2472, 2560.
Lepage v. McNamara, 5 Iowa, 124, 146, p. 1974.
Lepard v. Vernon, 2 Ves. & B. 51, p. 195, 2561.
Lepper v. Nuttman, 35 Ind. 384, p. 1625.
Leppoc v. National Union Bank, 32 Md. 136, p. 1106.
Lerch's Appeal, 44 Pa. St. 140, p. 1108.
Lerma v. Stevenson, 40 Fed. 356, 359, p. 495.
Lerow v. Wilmarth, 9 Allen, 382, 386, 83 Am. Dec. 701, p. 1800.
Le Roy v. Rogers, 3 Paige, 234, p. 2788.
Le Roy v. Wright, 4 Saw. 530, p. 2085, 2681.
Leschen v. Guy, 149 Ind. 17, 48 N. E. 344, p. 2192.
Lesesne v. Witte, 5 S. C. 450, p. 1926.
Lesley v. Johnson, 41 Barb. 359, p. 1194.
Leslie v. Baillie, 2 Younge & C. Ch. 91, p. 1478, 1506.
Leslie v. Duke of Devonshire, 2 Brown Ch. 187, p. 1986.
Leslie v. Guthrie, 1 Bing. N. C. 697, 708, p. 2582.
Leslie v. Tompson, 9 Hare, 268, p. 1518, 1520.
Leslie's Trusts, In re, L. R. 2 Ch. Div. 185, p. 2103.
Lessee of Findlay v. Riddle, 3 Binn. 139, 152, 5 Am. Dec. 355, p. 1886.
Lessee of Love v. Truman, 10 Ohio St. 45, 55, p. 570.
Lessee of Smith v. McCann, 24 How. 398, 403, p. 494.
Lester v. Buel, 49 Ohio St. 240, 34 Am. St. Rep. 556, 30 N. E. 821, p. 1708.
Lester v. Foscroft, Colles, 108, 2 Vern. 456, 1 Lead. Cas. Eq., 4th Am. ed., 1027, 1038, 1042, p. 2780.
Lester v. Hardesty, 29 Md. 50, p. 1106.
Lester v. Pike, 127 Ill. 287, 20 N. E. 23, p. 1055.
Lestrade v. Barth, 19 Cal. 660, 675, p. 1517, 2726.
Letcher v. Reese, 24 Tex. Civ. App. 537, 60 S. W. 256, p. 1074.
Le Texier v. Margrave of Anspach, 5 Ves. 322, 15 Ves. 159, p. 276.
Lethbridge v. Thurlow, 15 Beav. 334, p. 920.
Le Touche v. Earl of Lucan, 7 Clark & F. 772, p. 1855.

Lett v. Morris, 4 Sim. 607, p. 193, 195, 2561, 2563, 2566.
Lett v. Randall, 2 De Gex, F. & J. 388, p. 2219.
Letterstedt v. Boers, 9 App. Cas. (Priv. Coun.) 371, p. 2107.
Letton v. Goodden, L. R. 2 Eq. 123, 130, p. 383, 451.
Leupold v. Krause, 95 Ill. 440, p. 1644.
Leuppie v. Osborn's Ex'rs, 52 N. J. Eq. 637, 29 Atl. 433, p. 2603.
Leuty v. Hillas, 2 De Gex & J. 110, 120, 121, p. 1476, 1509, 1528, 1529.
Leutz v. Earnhart, 12 Heisk. 711, p. 1559, 1566.
Levaroni v. Miller, 34 Cal. 231, 91 Am. Dec. 692, p. 2685, 2686.
Le Vasseur v. Scratton, 14 Sim. 116, p. 2172.
Leverton v. Waters, 7 Cold. 20, p. 2741.
Levi v. Blackwell, 35 S. C. 511, 15 S. E. 243, p. 650.
Levi v. Earl, 30 Ohio St. 147, p. 2186, 2197.
Levi v. Gardner, 53 S. C. 24, 30 S. E. 617, p. 1105.
Levick v. Brotherline, 74 Pa. St. 149, 157, p. 1588.
Levis v. Kengla, 169 U. S. 234, 18 Sup. Ct. Rep. 309, 42 L. ed. 728, p. 1911.
Levy v. Brush, 45 N. Y. 589, p. 2040.
Levy v. Levy, 33 N. Y. 97, 102, 112–118, p. 177, 1936, 1962, 1968.
Levy v. Hart, 54 Barb. 248, p. 2755, 2756.
Levy v. Martin, 48 Wis. 198, 4 N. W. 35, p. 2424.
Levy v. Rudolph, 22 Ky. Law Rep. 258, 56 S. W. 988, p. 2394.
Levy & Cohn Mule Co. v. Kauffman, 114 Fed. 170, 52 C. C. A. 126, p. 1176.
Lewellin v. Cobbold, 1 Smale & G. 376, p. 2165.
Lewers v. Earl of Shaftesbury, L. R. 2 Eq. 270, p. 345.
Lewin v. Lewin, 2 Ves. Sr. 415, p. 2225, 2226.
Lewin's Trust, In re, 20 Beav. 378, p. 2172, 2173.
Lewis, In re, [1904] 2 Ch. 656, p. 1436, 1444.
Lewis, In re, 81 N. Y. 421, p. 1857, 2048.
Lewis, In re, 152 Pa. St. 477, 25 Atl. 878, 31 Wkly. Notes Cas. 460, p. 1977.
Lewis v. Adams, 6 Leigh, 320, p. 2144.
Lewis v. Allenby, L. R. 10 Eq. 668, p. 1933, 1943, 1950.
Lewis v. Allred, 57 Ala. 628, p. 2130.
Lewis v. Arbuckle, 85 Iowa, 335, 52 N. W. 237, 16 L. R. A. 677, p. 1727.
Lewis v. Atherton, 5 Okl. 90, 47 Pac. 1070, p. 1273.
Lewis v. Baca, 5 N. M. 289, 21 Pac. 343, p. 215.
Lewis v. Baird, 3 McLean, 56, 83, p. 644, 1113, 1120.
Lewis v. Barnhart, 145 U. S. 56, 12 Sup. Ct. 772, 43 Fed. 854, p. 1100, 1113, 1114, 1131.
Lewis v. Berry, 64 Barb. 593, p. 2561.
Lewis v. Bond, 18 Beav. 85, p. 1025, 1047, 1053.
Lewis v. Boskins, 27 Ark. 61, p. 1341, 1380, 2477, 2533.
Lewis v. Bradford, 10 Watts, 67, p. 1108.
Lewis v. Caperton's Ex'r, 8 Gratt. 148, p. 2518.
Lewis v. Christian, 40 Ga. 187, p. 2682.
Lewis v. City of Buffalo, 29 How. Pr. 335, p. 2756.
Lewis v. Cocks, 23 Wall. 466, 469, 470, 23 L. ed. 70, p. 212, 514, 516, 540.
Lewis v. Cole, 60 Tex. 341, p. 1355.
Lewis v. Darling, 16 How. 1, p. 2494.
Lewis v. Dudley, 70 N. H. 594, 49 Atl. 572, p. 974.
Lewis v. Elrod, 38 Ala. 17, p. 2146.
Lewis v. Ford, 67 Ala. 143, p. 2494.
Lewis v. Hawkins, 23 Wall. 119, p. 2533.
Lewis v. Henderson, 22 Oreg. 548, 30 Pac. 324, p. 1372.
Lewis v. Hillman, 3 H. L. Cas. 607, 630, p. 1753, 1760, 1763, 1777.
Lewis v. Holdrege, 56 Nebr. 379, 76 N. W. 890, p. 657, 1226.
Lewis v. King, 2 Brown Ch. 600, p. 782, 857.
Lewis v. Kirk, 28 Kan. 497, 42 Am. Rep. 173, p. 1227, 1300.

Lewis v. Lewis, 1 Cox, 162, p. 1836.
Lewis v. Lewis, 5 Oreg. 169, p. 1510.
Lewis v. Lewis, 13 Pa. St. 79, 82, 53 Am. Dec. 443, p. 782, 857.
Lewis v. Lord Lechmere, 10 Mod. 503, p. 1671.
Lewis v. Madisons, 1 Munf. 303, p. 1072.
Lewis v. Madocks, 17 Ves. 48, 51, 56, 58, p. 2016, 2029, 2473.
Lewis v. Marsh, 8 Hare, 97, p. 285.
Lewis v. Mathews, L. R. 2 Eq. 177, p. 2146.
Lewis v. Nangle, 2 Ves. Sr. 431, p. 2436.
Lewis v. Nobbs, L. R. 8 Ch. Div. 591, 594, p. 2070, 2095.
Lewis v. Palmer, 28 N. Y. 271, p. 2796.
Lewis v. Pead, 1 Ves. 19, p. 1728, 1732.
Lewis v. Powell, [1897] 1 Ch. 679, p. 287.
Lewis v. Providence, 10 R. I. 97, p. 2678.
Lewis v. Pusey, 8 Bush, 615, p. 2526.
Lewis v. Reed, 11 Ind. 239, p. 2060.
Lewis v. Rees, 3 Kay & J. 132, p. 1806.
Lewis v. Small, 71 Me. 552, p. 2475.
Lewis v. Smith, 1 Macn. & G. 417, p. 2670.
Lewis v. Smith, 9 N. Y. 502, 504, 510, 511, 61 Am. Dec. 706, p. 621, 809, 811, 820, 821, 828, 829, 830, 832, 852.
Lewis v. Soule, 52 Iowa, 11, 13, p. 2749, 2752.
Lewis v. Stanley, 148 Ind. 351, 45 N. E. 693, 47 N. E. 677, p. 1993.
Lewis v. Starke, 10 Smedes & M. 120, p. 2417.
Lewis v. Stein, 16 Ala. 214, 50 Am. Dec. 177, p. 2686, 2687.
Lewis v. Taylor, 96 Ky. 556, 29 S. W. 444, p. 1278.
Lewis v. Tobias, 10 Cal. 574, p. 2729.
Lewis v. Town of North Kingstown, 16 R. I. 15, 26 Am. St. Rep. 724, 11 Atl. 173, p. 343.
Lewis v. Wells, 85 Fed. 896, p. 1994, 2354, 2379.
Lewis v. Yale, 4 Fla. 418, p. 2153, 2191.
Lewis' Estate, In re, 152 Pa. St. 477, 25 Atl. 878, 31 Wkly. Notes Cas. 460, p. 1944.
Lewis's Adm'r v. Glenn, 84 Va. 947, p. 1863.
Lewis's Appeal, 67 Pa. St. 166, p. 659.
Lewiston Falls Mfg. Co. v. Franklin Co., 54 Me. 402, p. 555.
Leyland v. Illingworth, 2 De Gex, F. & J. 248, 252, 254, p. 1569, 1585, 1590, 1607.
Leyson v. Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429, p. 2231, 2237.
Libbett v. Maultsby, 71 N. C. 345, p. 2052.
Libby v. Frost, (Me.) 56 Atl. 906, p. 1904.
Libby v. Norris, 142 Mass. 246, 7 N. E. 919, p. 416.
Libby v. Rosekrans, 55 Barb. 202, p. 2653.
Libby v. Tufts, 121 N. Y. 172, 24 N. E. 12, p. 2455, 2456.
Lichfield v. Bond, 6 Beav. 88, p. 274.
Lick v. Ray, 43 Cal. 83, p. 2754, 2756.
Liddard v. Liddard, 28 Beav. 266, p. 1917, 1929.
Liddell v. Norton, 23 L. J. Ch. 169, p. 284, 287.
Liddel's Ex'r v. Starr, 20 N. J. Eq. 274, p. 1779.
Lidderdale's Ex'rs v. Executor of Robinson, 12 Wheat. 594, p. 2796.
Liddiard, In re, L. R. 14 Ch. Div. 310, p. 2109.
Liebe v. Battman, 33 Oreg. 241, 54 Pac. 179, 72 Am. St. Rep. 705, p. 2241.
Life Ass'n of Am. v. Boogher, 3 Mo. App. 173, p. 2667, 2680, 2696.
Life Ass'n of Am. v. Cook, 20 Kan. 19, p. 2358.
Life Ass'n of Scotland v. Siddal, 3 De Gex, F. & J. 58, 61, 74, 271, p. 1788, 2045, 2087, 2096, 2097, 2168, 2169.
Life Ins. Co. v. Bangs, 103 U. S. 780, p. 2730.
Light v. Jacobs, 183 Mass. 206, 66 N. E. 799, p. 1594.
Light v. Light, 25 Beav. 248, p. 2626.
Light v. Light, 21 Pa. St. 407, 412, p. 850, 1487, 1494, 1501.
Lightbody v. Smith, 125 Mass. 51, p. 2567.
Lightfoot v. Heron, 3 Younge & C. 586, p. 1731, 1732, 1733.
Lightfoot v. Lightfoot's Ex'r, 27 Ala. 351, p. 2224.

Lightfoot v. Tenant, 1 Bos. & P. 551, p. 1720.
Light, Heat & Water Co. v. City of Jackson, 73 Miss. 598, 19 South. 771, p. 741.
Lighthouse v. Third Nat. Bank, 162 N. Y. 336, 56 N. E. 738, p. 2471.
Lightner v. Menzel, 35 Cal. 452, p. 748, 1690.
Lightner v. Mooney, 10 Watts, 407, 412, p. 1107, 1108, 1132, 1148.
Lightner's Appeal, 82 Pa. St. 301, p. 2561.
Lignoski v. Bruce, 8 Fla. 269, p. 2190.
Lignoski v. Crooker, 86 Tex. 324, 24 S. W. 278, 788, p. 1103.
Ligon v. Ligon, 105 Ala. 460, 17 South. 89, p. 2255.
Ligon v. Rogers, 12 Ga. 281, 292, p. 1383.
Liles v. Terry, [1895] 2 Q. B. 679, p. 1767.
Liley v. Hey, 1 Hare, 580, p. 1942.
Lill v. Brant, 6 Ill. App. 366, p. 1801.
Lillard v. Oil, Paint & Drug Co., (N. J. Eq.) 56 Atl. 254, p. 2128.
Lillard v. Ruckers, 9 Yerg. 64, p. 1275.
Lillard v. Turner, 16 B. Mon. 374, p. 2153, 2194.
Lillibridge v. Allen, 100 Iowa, 582, 69 N. W. 1031, p. 1329.
Lillie v. Legh, 3 De Gex & J. 204, p. 345.
Lilly v. Curry's Ex'r, 6 Bush, 590, p. 2208.
Lilly v. Palmer, 51 Ill. 331, p. 1400, 1403, 1410, 2407.
Lilly v. The Fifty Associates, 101 Mass. 432, p. 756.
Lilly v. Tobbein, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887, p. 2279, 2303.
Lime Rock Nat. Bank v. Mowry, 66 N. H. 598, 22 Atl. 555, 13 L. R. A. 294, p. 1406.
Lincoln v. Little Rock Granite Co., 56 Ark. 405, 19 S. W. 1056, p. 739, 740.
Lincoln v. Rowe, 15 Mo. 571, p. 2194.
Lincoln v. Rutland etc. R. R., 24 Vt. 639, p. 2635, 2642.
Lincoln Sav. Bank v. Ewing, 12 Lea, 598, p.
Lincoln v. Windsor, 9 Hare, 158, p. 2098.
Lincoln v. Wright, 4 De Gex & J. 16, 22, p. 1658, 1659, 1715.
Lincoln B. & S. Ass'n v. Hass, 10 Nebr. 583, 7 N. W. 327, p. 1102.
Lincoln Rapid Transit Co. v. Rundle, 34 Nebr. 559, 52 N. W. 563, p. 1066, 1068.
Lindauer v. Cummings, 57 Ill. 195, 200, p. 2381.
Lindemeier v. Monohan, 64 Iowa, 24, 19 N. W. 839, p. 1622.
Linden v. Hepburn, 3 Sand. 668, 671, p. 355, 644.
Lindley, Ex parte, 32 Ind. 367, p. 1961, 1974.
Lindley v. Cross, 31 Ind. 106, 99 Am. Dec. 610, p. 2191.
Lindley v. Martindale, 78 Iowa, 379, 43 N. W. 233, p. 1037.
Lindley v. Nunn, 17 Tex. Civ. App. 70, 42 S. W. 310, p. 1051.
Lindsay v. Cooper, 94 Ala. 170, 11 South. 325, 33 Am. St. Rep. 105, 16 L. R. A. 813, p. 1436, 1451.
Lindsay v. First Nat. Bank, 156 U. S. 485, 493, 15 Sup. Ct. 472, 475, p. 500, 501.
Lindsay v. Freeman, 83 Tex. 259, 18 S. W. 727, p. 1333.
Lindsay v. Gibbs, 22 Beav. 522, p. 193, 2547, 2581.
Lindsay v. Harrison, 8 Ark. 302, 311, p. 2159, 2161.
Lindsay v. Matthews, 17 Fla. 575, p. 2373, 2376.
Lindsay v. Pleasants, 4 Ired Eq. 320, 321, 326, p. 615, 2325, 2326.
Lindsay v. Price, 33 Tex. 280, p. 2564.
Lindsay v. Smith, 78 N. C. 328, 24 Am. Rep. 463, p. 1701, 1703.
Lindsay v. Williams's Ex'rs, 2 Duvall, 475, p. 2005.
Lindsay v. Wilson, 2 Dev. & B. Eq. 85, p. 1254.
Lindsell v. Thacker, 12 Sim. 178, p. 2145.
Lindsey v. Bates, 42 Miss. 397, p. 2417, 2501, 2520.
Lindsey v. Eokles, 99 Va. 668, 40 S. E. 23, p. 1848.
Lindsey v. Lindsey, 50 Ill. 79, 99 Am. Dec. 489, p. 2729.
Lindsey v. Lindsey, 34 Miss. 432, p. 1603.
Lindsey v. Rankin, 4 Bibb, 482, p. 1346.

Lindsey v. Veasy, 62 Ala. 421, p. 1144.
Lindsley v. Ferguson, 49 N. Y. 623, 625, p. 1645.
Lindsley v. James, 3 Cold. 477, p. 264, 273.
Lines v. Darden, 5 Fla. 51, p. 1467, 1926.
Lines v. Lines, 142 Pa. St. 149, 24 Am. St. Rep. 487, 21 Atl. 809, p. 1864.
Lingard v. Bromley, 1 Ves. & B. 114, 117, p. 2091.
Lingan v. Henderson, 1 Bland, 236, p. 2533.
Lingen v. Sowray, 1 Eq. Cas. Abr. 175, 1 P. Wms. 172, p. 2305, 2333.
Lingenfelter v. Ritchey, 58 Pa. St. 485, 98 Am. Dec. 308, p. 1900.
Lingke v. Wilkinson, 57 N. Y. 445, p. 2086.
Lingood v. Croucher, 2 Atk. 395, p. 264, 1653.
Lingwood v. Stowmarket Co., L. R. 1 Eq. 77, 336, p. 2685.
Linhart v. Foreman's Admr., 77 Va. 540, p. 1588, 1591.
Link v. Caldwell, 59 S. W. 502, 22 Ky. L. Rep. 1041, p. 233.
Linker v. Linker, 32 N. J. Eq. 174, p. 2142.
Linker v. Smith, 4 Wash. 224, p. 2166.
Linn v. Le Compte, 47 Tex. 442, p. 1356.
Linn County Abstract Co. v. Beechley, (Iowa) 99 N. W. 702, p. 1691, 2552.
Linnell v. Lyford, 72 Me. 280, p. 2372.
Linoleum Mfg. Co. v. Nairn, L. R. 7 Ch. Div. 834, p. 2690.
Linscott v. Buck, 33 Me. 530, 534, p. 551, 553.
Linsenbigler v. Gourley, 56 Pa. St. 166, 172, 94 Am. Dec. 51, p. 573, 2286.
Linsey v. Platt, 9 Fla. 150, p. 904, 906.
Linsley v. Sinclair, 24 Mich. 380, p. 2004.
Linthicum v. Tapscott, 28 Ark. 267, p. 2498, 2511.
Linville v. Savage, 58 Mo. 248, p. 2513.
Linzee v. Mixer, 101 Mass. 512, p. 767.
Lipp v. Hunt, 25 Nebr. 91, 41 N. W. 143, p. 1024.
Lipp v. Land Syndicate, 24 Nebr. 692, 40 N. W. 129, p. 1024.
Lippencott v. Stokes, 6 N. J. Eq. 122, p. 961, 1467.
Lippincott v. Evans, 35 N. J. Eq. 553, p. 1845.
Lippincott v. Leeds, 77 Pa. St. 420, p. 2197.
Lippincott v. Mitchell, 94 U. S. 767, 24 L. ed. 315, p. 2144.
Lippincott v. Ridgway, 10 N. J. Eq. 164, p. 1657.
Lippmins v. McCranie, 30 La. Ann., pt. 2, 1251, p. 1434.
Liquidation Estates Purchase Co. v. Willoughby, [1898] App. Cas. 321, 67 Law J. Ch. 251, 78 Law T., N. S., 329, reversing [1896] 1 Ch. 726, p. 1407.
Liquidators of the Western Bank v. Douglas, 11 Ses. Cas. S., 3d series, 112, p. 2063.
Liskey v. Snyder, (W. Va.) 49 S. E. 515, p. 1781, 2372.
Lisle v. Liddle, 3 Anstr. 649, p. 2728.
Lisle v. Reeves, [1902] 1 Ch. 53, p. 2371.
Lissa v. Posey, 64 Miss. 352, 1 South. 500, p. 1269, 2501, 2518.
Lister v. Hodgson, L. R. 4 Eq. 30, p. 1872, 1906, 2727, 2729.
Lister v. Lister, 35 N. J. Eq. 49, p. 2001.
Lister v. Pickford, 34 Beav. 576, p. 1548.
Litchfield v. Bond, 6 Beav. 88, p. 257.
Litchfield v. White, 7 N. Y. 438, 57 Am. Dec. 534, p. 1858.
Litchfield v. White, 3 Sandf. 545, p. 2063, 2066.
Litchfield Bank v. Peck, 29 Conn. 384, p. 1625.
Litka v. Wilcox, 39 Mich. 94, p. 2682.
Littauer v. Houck, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572, p. 1155, 1275.
Little v. Banks, 85 N. Y. 259, p. 729, 748.
Little v. Birdwell, 21 Tex. 597, 73 Am. Dec. 242, p. 1684, 2289, 2302.
Little v. Brown, 2 Leigh, 353, p. 2513.
Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570, p. 2088.
Little v. Cooper, 10 N. J. Eq. 273, 275, p. 224, 319, 333.
Little v. Kingswood Coll. Co., L. R. 20 Ch. Div. 733, p. 2670.
Little v. Price, 1 Md. Ch. 182, p. 697, 1450, 1788.
Little v. Thorne, 93 N. C. 69, p. 2302.

Little v. Thurston, 58 Me. 86, p. 2772.
Little v. Willford, 31 Minn. 173, 17 N. W. 282, p. 1970.
Littlefield v. Cole, 33 Me. 552, p. 2051.
Littlefield v. Littlefield, 51 Wis. 23, p. 2780.
Littlefield v. Nichols, 42 Cal. 372, p. 1261.
Littlefield v. Smith, 17 Me. 327, p. 1212.
Littlejohn v. Gordon, 32 Miss. 235, p. 2501.
Little Rock v. Barton, 33 Ark. 436, p. 407.
Little Rock v. Prather, 46 Ark. 471, p. 407.
Little Rock etc. R. R. Co. v. Perry, 37 Ark. 164, p. 353.
Littleton v. Giddings, 47 Tex. 109, p. 991, 993, 1007, 1009, 1010, 1018, 1148.
Littlewood v. Pattison, 10 Jur., N. S., 875, p. 2322.
Littlewort v. Davis, 50 Miss. 403, p. 2380.
Livermore v. Boutelle, 11 Gray, 217, 71 Am. Dec. 708, p. 1803.
Livermore v. Maxwell, 87 Iowa, 705, 55 N. W. 37, p. 1300, 2048.
Livermore v. Peru, 55 Me. 469, p. 1503.
Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 160, 167, p. 356, 360, 390, 416, 445, 660.
Liverpool Wharf. v. Prescott, 7 Allen, 494, 4 Allen, 22, p. 1437.
Livesey v. Jones, 35 Atl. 1064, 55 N. J. Eq. 204, p. 1952, 1975.
Livesey v. Livesey, 3 Russ. 287, p. 2067.
Livezey's Appeal, 106 Pa. St. 201, p. 1831.
Livingston v. Curtis, 12 Hun, 121, 54 How. Pr. 370, p. 293.
Livingston v. Dean, 2 Johns. Ch. 478, 479, p. 1257, 1382.
Livingston v. Hubbs, 2 Johns. Ch. 512, p. 1645, 1650.
Livingston v. Livingston, 2 Johns. Ch. 537, p. 1833.
Livingston v. Livingston, 6 Johns. Ch. 497, 499, 500, 4 Johns. Ch. 287, 290, 291, 294, 8 Am. Dec. 562, 10 Am. Dec. 353, p. 222, 226, 239, 308, 382, 450, 1463, 2693.
Livingston v. Murray, (Mass.) 72 N. E. 1012, p. 1495.
Livingston v. Peru Iron Co., 2 Paige, 390, p. 1609, 1615.
Livingston v. Reynolds, 26 Wend. 115, p. 2681.
Livingston v. Sickles, 8 Paige, 398, 7 Hill, 253, p. 767.
Livingston v. Story, 9 Pet. 632, p. 494, 497, 498.
Livingston v. Superior Court, 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175, p. 2177.
Livingston v. Tompkins, 4 Johns. Ch. 415, 431, 8 Am. Dec. 598, p. 632, 766.
Livingston v. Van Ingen, 1 Paine, 45, p. 497, 512.
Livingston v. Wells, 8 S. C. 347, p. 2082, 2089.
Livingstone v. Murphy, (Mass.) 72 N. E. 1012, p. 1499, 2403.
Llewellyn v. Badely, 1 Hare, 527, p. 270.
Llewellyn v. Mackworth, Barn. Ch. 445, p. 783, 786.
Lloyd, In re, 12 Ch. Div. 447, p. 2661.
Lloyd v. Attwood, 3 De Gex & J. 614, 657, p. 1166, 1195, 1296, 1757, 1758, 1785, 1796, 2056, 2068, 2079, 2083, 2097.
Lloyd v. Banks, L. R. 3 Ch. 488, 490, p. 969, 996, 997, 1211.
Lloyd v. Banks, L. R. 4 Eq. 222, p. 1211.
Lloyd v. Branton, 3 Mer. 108, 117, 119, p. 1681, 1682, 1683.
Lloyd v. Brewster, 4 Paige, 537, 27 Am. Dec. 88, p. 1789.
Lloyd v. Cocker, 19 Beav. 140, p. 1516.
Lloyd v. Collett, 4 Brown Ch. 469, 4 Ves. 690, p. 2775, 2779.
Lloyd v. Colston, 5 Bush, 587, p. 1760.
Lloyd v. Gurden, 2 Swanst. 180, p. 2669.
Lloyd v. Harvey, 2 Russ. & M. 310, 316, p. 930, 931, 933.
Lloyd v. Jones, 12 Sim. 491, p. 2432.
Lloyd v. Kirkwood, 112 Ill. 329, p. 2612.
Lloyd v. Lloyd, L. R. 7 Eq. 458, p. 1988.
Lloyd v. Lloyd, 2 Sim., N. S., 255, p. 1683.
Lloyd v. Loaring, 6 Ves. 773, p. 2671, 2763.
Lloyd v. London etc. R'y, 2 De Gex, J. & S. 568, p. 2673, 2676, 2695.

Lloyd v. Lynch, 28 Pa. St. 417, p. 1356.
Lloyd v. Pughe, L. R. 14 Eq. 241, L. R. 8 Ch. 88, p. 2142.
Lloyd v. Simons, (Minn.) 95 N. W. 903, p. 1354.
Lloyd v. Spillet, 2 Atk. 148, 149, 150, p. 175, 1836, 1988.
Lloyd v. Wait, 1 Phill. Ch. 61, p. 2436.
Lloyd v. Williams, 1 Madd. 450, p. 2174.
Lloyd's Bank Co. v. Jones, L. R. 29, Ch. Div. 221, 227, p. 1196, 1296.
Loader v. Clarke, 2 Macn. & G. 382, 387, p. 1613, 1788, 2165.
Loan & Exchange Bank v. Peterkin, 52 S. C. 236, 68 Am. St. Rep. 900, 29 S. E. 546, p. 213.
Lobdell v. Baker, 3 Met. 469, p. 1562.
Lobley v. Stocks, 19 Beav. 392, p. 890.
Loch v. Bagley, L. R. 4 Eq. 122, p. 1886.
Lochenour v. Lochenour, 61 Ind. 595, p. 1997, 2005.
Lock v. Fulford, 52 Ill. 166, 169, p. 2447.
Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199, p. 2408.
Locke v. Moulton, 96 Cal. 21, 30 Pac. 957, p. 2354.
Locke's Ex'r v. Palmer, 26 Ala. 312, 323, p. 2372, 2373.
Lockett v. Hurt, 57 Ala. 198, p. 2754, 2756.
Lockett v. Robinson, 31 Fla. 134, 12 South. 649, 20 L. R. A. 67, p. 1331.
Lockhard v. Beckley, 10 W. Va. 87, p. 1801, 1803.
Lockhart v. Cameron, 29 Ala. 355, p. 2172.
Lockhart v. Leeds, (N. M.) 76 Pac. 312, p. 1482.
Lockhart v. Leeds, (U. S.) 25 Sup. Ct. 76, p. 2034.
Lockhart v. Reilly, 1 De Gex & J. 464, p. 2068, 2088, 2090.
Lockrow v. Cline, 4 Kan. App. 716, 46 Pac. 720, p. 1224.
Lockwood v. Bates, 1 Del. Ch. 435, 12 Am. Dec. 121, p. 1065.
Lockwood v. Bostwick, 2 Daly, 521, p. 2691.
Lockwood v. City of St. Louis, 24 Mo. 20, p. 2753, 2757.
Lockwood v. Marsh, 3 Nev. 138, p. 2424.
Lockwood v. Noble, 113 Mich. 418, 71 N. W. 856, p. 1087.
Lockwood v. Sturdevant, 6 Conn. 373, p. 1402.
Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81, p. 2052.
Lockwood County v. Lawrence, 77 Me. 297, 309, 52 Am. Rep. 763, p. 423, 446, 456.
Loder v. Hatfield, 4 Hun, 36, p. 2486.
Loder v. Loder, 34 Nebr. 824, 52 N. W. 814, p. 1729, 1738.
Lodge v. Lyseley, 4 Sim. 70, p. 1193, 1268.
Lodor v. McGovern, 48 N. J. Eq. 275, 27 Am. St. Rep. 446, 22 Atl. 199, p. 332.
Loeschigk v. Hatfield, 5 Robt. (N. Y.) 26, p. 1801.
Loewen v. Forsee, (Mo.) 35 S. W. 1138, p. 1285.
Loffus v. Maw, 3 Giff. 592, p. 2592.
Loften v. Witboard, 92 Ill. 461, p. 1993.
Loftis v. Glass, 15 Ark. 680, p. 2315.
Lofton v. Sterrett, 23 Fla. 565, 2 South. 837, p. 2000.
Loftus v. Heriot, [1895] 2 Q. B. 212, p. 2159.
Loftus-Otwey, In re, [1895] 2 Ch. 235, p. 1843.
Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90, p. 2686.
Logan v. Fairlee, Jacob, 193, p. 2614.
Logan v. Gigley, 11 Ga. 243, p. 1712.
Logan v. Goodall, 42 Ga. 95, p. 1893.
Logan v. Logan, 2 B. Mon. 142, p. 2177.
Logan v. Miller, 106 Iowa, 511, 76 N. W. 1005, p. 2412.
Logan v. Shrift, 20 Ohio St. 62, p. 2197.
Logan v. Simmons, 3 Ired. Eq. 487, 494, p. 2166.
Logan v. Wienholt, 1 Clark & F. 611, 7 Bligh, N. S., 1, 49, 50, p. 731, 749.
Logansport v Justice, 74 Ind. 378, 39 Am. Rep. 79, p. 1159.
Lohler v. Lohler, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282, p. 2034.
Lohmeyer v. Durbin, 206 Ill. 574, 69 N. E. 523, p. 1280, 2474.
Lohman v. Crouch, 19 Gratt. 331, p 653.

Lohrer v. Russell, 207 Pa. St. 105, 56 Atl. 333, p. 2381.
Lomax v. Pickering, 165 Ill. 431, 46 N. E. 238, p. 1099, 1113.
Lombard v. Cowham, 34 Wis. 486, 492, p. 93, 2715.
Lombard v. La Dow, 126 Fed. 119, p. 1127.
Lombard v. Morse, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273, p. 105, 1725.
London v. London, 1 Humph. 1, p. 2736.
London v. Mullins, 52 Ill. App. 410, p. 1076, 1077.
London & Birmingham R'y v. Winter, Craig & P. 57, 61, p. 1520, 1521, 2601.
London & Canadian L. & A. Co., Limited v. Duggan, [1893] A. C. 506, p. 2018.
London & County Banking Co. v. Ratcliffe, 6 App. Cas., H. L., 722, p. 2385.
London & Mediterranean Bank, In re, L. R. 7 Ch. 55, p. 1573.
London & Mediterranean Bank, In re, L. R. 12 Eq. 331, p. 1574.
London & N. W. R'y v. Lancashire etc. R'y, L. R. 4 Eq. 174, 178, p. 2684, 2693, 2695.
London & Provincial Ins. Co. v. Seymour, L. R. 17 Eq. 85, p. 1634, 2707.
London & S. F. Bank, Lt. v. Dexter, Horton & Co., (C. C. A.) 126 Fed. 593, p. 1278.
London & S. W. R'y v. Gomm, L. R. 20 Ch. Div. 562, 582, 583, 586, 587, p. 2597.
London, Brighton & S. C. R'y v. London & S. W. R'y, 4 De Gex & J. 362, p. 2677.
London Chartered Bank of Australia v. Lemprière, L. R. 4 P. C. 572, 597, p. 2155, 2182, 2184.
London Guarantee & Accident Co. v. Doyle, 130 Fed. 719, p. 252.
Loney v. Bailey, 43 Md. 10, p. 1791.
Loney v. Courtnay, 24 Nebr. 580, 39 N. W. 616, p. 651.
Long v. Barker, 85 Ill. 431, p. 214.
Long v. Cochrane, 9 Phila. 267, p. 217, 2799.
Long v. Crews, 113 N. C. 256, 18 S. E. 499, p. 1097, 1115.
Long v. Dennis, 4 Burr. 2052, 2055, p. 1681, 1682.
Long v. Dollarhide, 24 Cal. 218, 453, p. 1095, 1132, 1354.
Long v. Duncan, 10 Kan. 294, p. 2769.
Long v. Fields, (Tex. Civ. App.) 71 S. W. 774, p. 1348.
Long v. Hagerstown Agricultural Co., 30 Gratt. 665, p. 1269.
Long v. Hewitt, 44 Iowa, 363, p. 960, 1469.
Long v. Long, 9 Md. 348, p. 1728.
Long v. Long, 62 Md. 33, p. 2046.
Long v. Long, 5 Ves. 445, p. 856.
Long v. King, 117 Ala. 423, 23 South. 534, p. 1995.
Long v. Mitchell, 63 Ga. 769, p. 2266.
Long v. Neville, 29 Cal. 132, 135, p. 1086.
Long v. Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281, p. 1065, 2431.
Long v. Ricketts, 2 Sim. & St. 179, p. 1682.
Long v. Short, 1 P. Wms. 403, p. 2209, 2222, 2224.
Long v. Towl, 42 Mo. 545, 548, 97 Am. Dec. 355, p. 744, 748, 1688.
Long v. Warren, 68 N. Y. 426, p. 1588.
Long v. Weller's Ex'rs, 29 Gratt. 347, p. 1050, 1149.
Long v. Woodman, 58 Me. 49, p. 1561.
Long v. Wortham, 4 Tex. 381, p. 2288.
Long Branch etc. R. R., In re, 24 N. J. Eq. 398, p. 2660.
Longdon v. Crouse, (Pa.) 1 Atl. 600, p. 1900.
Longenecker v. Zion Evangelical Lutheran Church, 200 Pa. St. 567, 50 Atl. 244, p. 1780.
Longfellow v. Barnard, 58 Nebr. 612, 76 Am. St. Rep. 117, 79 N. W. 255, p. 1328.
Longheed v. Dykeman's Baptist Church, 129 N. Y. 211, 29 N. E. 249, 14 L. R. A. 410, p. 1960, 1969.
Longley v. City of Hudson, 4 Thomp. & C. 353, p. 2754.
Longley v. Longley, L. R. 13 Eq. 133, 1985, 1988.
Longmate v. Ledger, 2 Giff. 157, 163, 164, 1671, 1728, 1730.
Longmore v. Elcum, 2 Younge & C. Ch. 363, 369, 370, p. 1919, 1921.
Long's Adm'r v. White's Adm'rs, 5 J. J. Marsh. 226, p. 2139.

Longstaff v. Hurd, 66 Conn. 350, 34 Atl. 91, p. 1086.
Longwell v. Bentley, 23 Pa. St. 99, p. 2741.
Longwood etc. R. R. v. Baker, 27 N. J. Eq. 166, p. 2698.
Longworth v. Taylor, 1 McLean, 395, 17 Pet. 172, p. 2771, 2775, 2778.
Lonsdale v. Brown, 4 Wash. C. C. 148, 151, Fed. Cas. No. 8,494, p. 1330.
Lonsdale v. Curwen, 3 Bligh, 168, p. 285.
Lonsdale v. Littledale, 2 Ves. 451, p. 264, 1653.
Lonsdale Co. v. Woonsocket, 21 R. I. 498, 44 Atl. 929, p. 397, 453.
Lonsdale's Estate, 29 Pa. St. 407, p. 1872.
Loomer v. Wheelwright, 3 Sand. Ch. 135, 157, p. 1402, 1404.
Loomis v. Brush, 36 Mich. 40, p. 2139, 2142.
Loomis v. D. & St. P. R. R. Co., 17 Fed. 301, 3 McCrary, 301, p. 2514.
Loomis v. Eagle Bank, 10 Ohio St. 327, p. 1234.
Loomis v. Freer, 4 Ill. App. 547, p. 2727.
Loomis v. Loomis, 26 Vt. 198, 204, p. 1212, 1224, 1229.
Loomis v. Riley, 24 Ill. 307, p. 1065.
Loomis v. Ruck, 56 N. Y. 462, p. 2201.
Loomis v. Tifft, 16 Barb. 541, 543, p. 2041.
Loosemore v. Smith, 12 Nebr. 343, p. 2279.
Lord v. Bishop, 101 Ind. 334, p. 2005, 2006.
Lord v. Bunn, 2 Y. & C. C. C. 98, p. 1842.
Lord v. Co. of Copper Miners, 2 Phill. Ch. 740, p. 2121.
Lord v. Horr, 30 Wash. 477, 71 Pac. 23, p. 1541, 1542.
Lord v. Jeffkins, 35 Beav. 7, p. 1743.
Lord v. Lord, 23 Conn. 327, 331, p. 820, 851.
Lord v. Morris, 18 Cal. 487, 488, p. 2357.
Lord v. Sutcliffe, 2 Sim. 273, p. 886.
Lord v. Underdunck, 1 Sand. Ch. 46, p. 2601.
Lord v. Wightwick, 4 De Gex, M. & G. 803, p. 2046, 2048, 2087, 2310.
Lord and Fullerton's Contract, In re, [1896] 1 Ch. 228, p. 1905, 2045.
Lord & Polk Chemical Co., In re, 7 Del. Ch. 248, 44 Atl. 775, p. 685.
Lord Ashburton v. Lady Ashburton, 6 Ves. 6, p. 2619.
Lord Auckland v. Westminster Board, L. R. 7 Ch. 597, p. 2677, 2695.
Lord Bandon v. Becher, 3 Clark & F. 419, 510, p. 1651.
Lord Brook v. Lord Hertford, 2 P. Wms. 518, p. 2740.
Lord Brooke v. Earl of Warwick, 2 De Gex & S. 425, p. 2213.
Lord Brooke v. Rounthwaite, 5 Hare, 298, 306, p. 1587, 1590, 1591.
Lord Camoys v. Blundell, 1 H. L. Cas. 778, p. 1548.
Lord Caven v. Pulteney, 2 Ves. 544, 560, p. 794.
Lord Cawdor v. Lewis, 1 Younge & C. 427, p. 2482.
Lord Chedworth v. Edwards, 8 Ves. 46, p. 2052, 2669, 2670.
Lord Chesham, In re, L. R. 31 Ch. Div. 466, p. 782, 846.
Lord Chichester v. Coventry, L. R. 2 H. L. 71, 82, 86, 90, 91, 95, p. 863, 867, 869, 877, 895, 921.
Lord Compton v. Oxenden, 2 Ves. 261, 264, p. 1400.
Lord Clifford's Estate, In re, [1900] 2 Ch. 707, p. 2065.
Lord Crewe v. Edleston, 1 De Gex & J. 93, p. 2658.
Lord Deerhurst v. Duke of St. Albans, 5 Madd. 232, 260, p. 1886, 1887.
Lord Dorchester v. Earl of Effingham, Coop. 319, 419, p. 819, 827.
Lord Durham v. Wharton, 3 Clark & F. 146, 10 Bligh, N. S., 526, 3 Mylne & K. 472, 5 Sim. 297, p. 867, 868, 902.
Lord Glengall v. Barnard, 1 Keen, 769, p. 930.
Lord Glenorchy v. Bosville, Cas. t. Talb. 3, 1 Lead. Cas. Eq., 4th Am. ed., 1, 13, 36, p. 175, 1850, 1881, 1885, 1886.
Lord Gordon v. Marquis of Hertford, 2 Madd. 106, p. 1517.
Lord Grey de Wilton v. Saxon, 6 Ves. 106, p. 2673.
Lord Hinchinbroke v. Seymour, 1 Brown Ch. 395, p. 1657.
Lord Hotham's Trusts, In re, L. R. 12 Eq. 76, p. 2049.

Lord Irnham v. Child, 1 Brown Ch. 92, p. 1487, 1506.
Lord Kensington v. Mansell, 13 Ves. 240, p. 262.
Lord Lonsdale v. Littledale, 2 Ves. 451, 453, p. 264, 1653.
Lord Manners v. Johnson, L. R. 1 Ch. Div. 673, p. 2673, 2698.
Lord Midleton v. Eliot, 15 Sim. 531, 536, p. 2429.
Lord Perceval v. Phipps, 2 Ves. & B. 19, 24, p. 2689.
Lord Portarlington v. Soulby, 3 Mylne & K. 104, p. 1709, 2761.
Lord Portmore v. Morris, 2 Brown Ch. 219, p. 1506.
Lord Rancliffe v. Parkyns, 6 Dow. 149, 179, 185, p. 782, 788, 794, 809, 857, 1390.
Lord Raymond's Case, Cas. t. Talb. 58, p. 2621.
Lord St. John v. Lady St. John, 11 Ves. 526, p. 2728.
Lord Say and Seal v. Jones, 3 Brown Parl. C. 113, p. 1397.
Lord Scarsdale v. Curzon, 1 Johns. & H. 40, p. 1887.
Lord Selsey v. Rhoades, 1 Bligh, N. S., 1, 2 Sim. & St. 41, p. 1763.
Lord Tenham v. Herbert, 2 Atk. 483, p. 362, 363, 393, 455.
Lord Townshend v. Windham, 2 Ves. Sr. 1, 7, p. 1800, 2163.
Lord Tredegar v. Windus, L. R. 19 Eq. 607, p. 2704.
Lord Trimleston v. Hamill, 1 Ball & B. 377, 385, p. 2430.
Lord Walpole v. Lord Orford, 3 Ves. 402, p. 2593.
Lord Walsingham v. Goodricke, 3 Hare, 122, p. 280.
Lords Stratheden and Campbell, In re, [1894] 3 Ch. 265, p. 1948.
Lorentz v. Lorentz, 14 W. Va. 809, p. 1997.
Lorenzana v. Camarillo, 45 Cal. 125, p. 2434.
Lorillard v. Coster, 5 Paige, 172, 173, 218, p. 185, 621, 1854, 2305.
Lorillard's Case, 14 Wend. 265, p. 1895.
Lorimer v. Lorimer, 5 Madd. 363, p. 2742.
Loring v. Brodie, 134 Mass. 453, p. 2049.
Loring v. Davis, 32 Ch. Div. 634, p. 2101.
Loring v. Downer, 1 McAll. 360, 362-365, p. 494, 516.
Loring v. Eliot, 16 Gray, 568, p. 1989.
Loring v. Groomer, 110 Mo. 632, 19 S. W. 950, p. 1051.
Loring v. Hildreth, 170 Mass. 328, 64 Am. St. Rep. 301, 49 N. E. 652, 40 L. R. A. 127, p. 1905, 1911.
Loring v. Loring, 100 Mass. 340, p. 1844.
Loring v. Marsh, 2 Cliff. 469, 493, p. 512.
Loring v. Palmer, 118 U. S. 321, 6 Sup. Ct. Rep. 1073, 24 L. ed. 165, p. 1903.
Loring v. Salisbury Mills, 125 Mass. 138, p. 543, 1253, 1382.
Loring v. Woodward, 41 N. H. 391, 394, 395, p. 2207, 2208, 2210.
Lorins v. Abbott, 49 Nebr. 214, 68 N. W. 486, p. 738.
Lorman v. Clark, 2 McLean, 568, p. 494, 497, 516.
Loscombe v. Wintringham, 13 Beav. 87, 89, p. 1933, 1942, 1962, 1963.
Losey v. Simpson, 11 N. J. Eq. 246, p. 1111, 1132, 1134, 1147, 1159, 1257, 1333, 1337, 1348, 1363.
Loss v. Obry, 22 N. J. Eq. 52, p. 1550.
Lothian v. Wood, 55 Cal. 159, p. 1163.
Lothrop v. Duffield, (Mich.) 96 N. W. 577, p. 1470.
Lothrop v. King, 8 Cush. 382, p. 1790.
Louchevin Brothers' Appeal, 67 Pa. St. 49, p. 1791.
Loud v. Charlestown, 99 Mass. 208, p. 544.
Loud v. Hamilton, (Tenn.) 51 S. W. 140, 45 L. R. A. 400, p. 1735.
Loud v. Lane, 8 Met. 517, 518, 519, p. 1402, 1403, 1407, 1412.
Loud v. Winchester, 52 Mich. 174, 17 N. W. 784, p. 2052, 2099.
Loud v. Winchester, 64 Mich. 23, 30 N. W. 896, p. 2066.
Louden v. Blythe, 16 Pa. St. 532, 55 Am. Dec. 527, p. 1734.
Louden v. Tiffany, 5 Watts & S. 367, p. 1224, 1229.
Loudenslager v. Woodbury Heights Land Co., (N. J. Eq.) 45 Atl. 784, p. 2402.
Loudon v. Warfield, 5 J. J. Marsh. 196, p. 2682.

Loudon v. Youmans, 31 S. C. 150, 9 S. E. 775, 17 Am. St. Rep. 17, p. 1344, 1345.
Loudon & County Banking Co. v. Goddard, [1897] 1 Ch. 642, p. 1834.
Loughridge v. Bowland, 52 Miss. 546, 553, 554, 555, p. 977, 979, 982, 994, 1007, 1011, 1019, 1023, 1146, 1273.
Louisiana Nat. Bank v. Knapp, 61 Miss. 485, p. 2501, 2509, 2520, 2521.
Louisville & N. R. Co. v. Boykin, 76 Ala. 560, p. 1350, 1351.
Louisville & N. R. Co. v. Smith, (C. C. A.) 128 Fed. 1, 6, p. 359, 424.
Louisville, N. A. & C. R. Co. v. Ohio Val. I. & C. Co., 57 Fed. 42, 45, p. 311, 357, 420, 446, 456, 1628.
Louisville Tr. Co. v. Louisville. N., A. & C. R. Co., 75 Fed. 433, 22 C. C. A. 378, p. 1165, 1176.
Lounsbury v. Norton, 59 Conn. 170, 22 Atl. 153, p. 2369, 2375, 2376.
Lounsbury v. Purdy, 18 N. Y. 515, p. 2004, 2757.
Louthain v. Miller, 85 Ind. 161, p. 1328.
Lovat v. Lord Ranelagh, 3 Ves. & B. 24, p. 759.
Love v. Anchor Raisin Vineyard Co., (Cal.) 45 Pac. 1044, p. 1156.
Love v. Ardmore Stock Exch., (Ind. Ty.) 82 S. W. 721, p. 2569.
Love v. Breedlove, 75 Tex. 652, 13 S. W. 222, p. 1030.
Love v. Keowne, 58 Tex. 191, p. 2289.
Love v. Lea, 2 Ired. Eq. 627, p. 1773.
Love v. Sierra Nevada Co., 32 Cal. 639, 652, 653, 654, 91 Am. Dec. 602, p. 191, 630, 1468, 2470, 2476.
Love v. Taylor, 26 Miss. 567, p. 1329.
Love v. Truman, 10 Ohio St. 45, 55, p. 570.
Love v. Teeter, 24 W. Va. 741, p. 1561.
Loveaux, In re, [1895] 2 Ch. 501, p. 1937.
Lovejoy v. Chapman, 23 Oreg. 571, 32 Pac. 687, p. 2477.
Lovejoy v. Raymond, 58 Vt. 509, 2 Atl. 156, p. 1052, 1098, 1127, 2486.
Lovelace v. Webb, 62 Ala. 271, p. 2387, 2389.
Lovell v. Cragin, 136 U. S. 147, 10 Sup. Ct. 1024, 34 L. ed. 372, p. 2393.
Lovell v. Galloway, 17 Beav. 1, p. 248, 259.
Lovell v. Hicks, 2 Younge & C. 46, p. 1560, 1789.
Lovell v. Minot, 20 Pick. 116, 32 Am. Dec. 206, p. 2077.
Loveridge, In re, [1902] 2 Ch. 859, p. 2339.
Loveridge v. Cooper, 3 Russ. 30, 31; affirmed on appeal, 3 Russ. 48–60, p. 690, 692, 1210.
Lovesy v. Smith, L. R. 15 Ch. Div. 655, p. 1613, 2727.
Lovett v. Lovett, 3 Kay & J. 1, p. 2303.
Lovett v. Prentice, 44 Fed. 459, p. 360, 413.
Lovett v. Thomas, 81 Va. 245, p. 2057.
Loving v. Pairo, 10 Iowa, 282, 77 Am. Dec. 108, p. 2789.
Low, Estate of, In re, Myrick's Prob. Rep. 148, p. 844.
Low v. Bouverie, [1891] 3 Ch. 82, 113, p. 1206, 1387, 1424, 1434, 1444, 1578, 1632.
Low v. Carter, 1 Beav. 426, p. 1997.
Low v. Harmony, 72 N. Y. 408, p. 1896, 1911.
Low v. Holmes, 17 N. J. Eq. 148, p. 2740.
Low v. Innes, 4 De Gex, J. & S. 286, p. 2698.
Low v. Low, 77 Me. 171, p. 1929.
Low v. Low, 177 Mass. 306, 59 N. E. 57, 77 Me. 37, 38, p. 895, 929, 1155.
Low v. Nolte, 16 Ill. 478, p. 727.
Low v. Pratt, 53 Ill. 438, p. 1072.
Low v. Staples, 2 Nev. 209, 212, p. 2749, 2752, 2754.
Lowe v. Allen, 68 Ga. 225, p. 1268, 1272, 1383.
Lowe v. Loomis, 53 Ark. 454, 14 S. W. 674, p. 648.
Lowe v. Matson, 140 Ill. 108, 29 N. E. 1036, p. 1268.
Lowe v. Peers, 4 Burr. 2225, p. 727, 1678.
Lowe v. Williams, 2 Sim. & St. 574, p. 284.
Lowell v. Boston etc. R. R., 23 Pick. 24, 32, 34 Am. Dec. 33, p. 671, 1719, 1721.
Lowell v. Daniels, 2 Gray, 161, 61 Am. Dec. 448, p. 1447, 1448.
Lowenstein v. Abramsohn, 76 Miss. 890, 25 South. 498, p. 419, 455.

Lower Latham Ditch Co. v. Louden Irrigating Canal Co., 27 Colo. 267, 83 Am. St. Rep. 80, 60 Pac. 629, p. 1434, 1449.
Lowery v. Peterson, 75 Ala. 109, p. 2530, 2534.
Lowery v. Stewart, 25 N. Y. 239, 82 Am. Dec. 346, p. 2561.
Lowes v. Lowes, 5 Hare, 501, p. 819, 837.
Lowman v. Lowman, 118 Ill. 582, 9 N. E. 245, p. 1403.
Lowndes v. Chisholm, 2 McCord Eq. 455, 16 Am. Dec. 667, p. 1493, 2430.
Lowndes v. Cornford, 18 Ves. 299, p. 2637.
Lowndes v. Davies, 6 Sim. 468, p. 270, 273.
Lowndes v. Lane, 2 Cox, 363, p. 1560, 1590, 1595.
Lowndes v. Wicks, 69 Conn. 15, 36 Atl. 1072, p. 1786.
Lowry v. Buffington, 6 W. Va. 249, 253, p. 2767, 2780.
Lowry v. Fisher, 2 Bush, 70, 92 Am. Dec. 475, p. 1801, 1803.
Lowry v. Hurd, 7 Minn. 356, 363, p. 2719.
Lowry v. McKinney, 68 Pa. St. 294, p. 1265.
Lowry v. Muldrow, 8 Rich. Eq. 241, p. 2764.
Lowry v. Read, 3 Brewst. 452, p. 2677.
Lowry v. Smith, 97 Ind. 466, p. 2499, 2521.
Lowry v. Spear, 7 Bush, 451, p. 1743.
Lowson v. Copeland, 2 Brown Ch. Cas. 156, Ames' Cas. on Trust, 493, p. 2065.
Lowther v. Carlton, 2 Atk. 242, p. 994, 1166, 1293, 1346.
Lowther v. Lowther, 13 Ves. 95, 103, p. 1666, 1760, 1763, 1771, 2763.
Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 664, 1020, 1022, 1191.
Loxley v. Heath, 27 Beav. 523, 1 De Gex, F. & J. 489, p. 1561, 2592.
Loyd v. Read, 1 P. Wms. 607, p. 1992, 1996, 1998.
Loyd v. Phillips, (Wis.) 101 N. W. 1092, p. 1510.
Lozear v. Shields, 23 N. J. Eq. 509, p. 1728.
Lozier v. Hill, (N. J. Eq.) 59 Atl. 234, p. 1449.
Lozier's Ex'rs v. Van Saun's Adm'rs, 3 N. J. Eq. 325, p. 2637, 2640, 2642, 2648.
Lucas v. Brandreth, 28 Beav. 273, p. 2309, 2321.
Lucas v. Burgess, Reg. Lib. 1573, A, fol. 7, p. 1635.
Lucas v. Commerford, 3 Brown Ch. 166, p. 2765.
Lucas v. Evans, 3 Atk. 260, p. 275.
Lucas v. Harris, 20 Ill. 165, p. 2415.
Lucas v. James, 7 Hare, 410, p. 1609, 1619.
Lucas v. Lockhart, 10 Smedes & M. 466, 48 Am. Dec. 766, p. 1926.
Lucas v. Lucas, 1 Atk. 270, p. 2139, 2164.
Lucas v. Waul, 12 Smedes & M. 157, p. 229, 461, 465.
Lucas v. Norswick, 1 Moody & R. 293, p. 1477.
Luch's Appeal, 44 Pa. St. 140, 519, p. 1116, 2542.
Lucht v. Behrens, 28 Ohio St. 231, 22 Am. Rep. 378, p. 2104.
Lucich v. Medim, 3 Nev. 93, 93 Am. Dec. 376, p. 2280.
Luckhart v. Luckhart, 120 Iowa, 248, 94 N. W. 461, p. 1900, 1989, 1991.
Lucy, Ex parte, 4 De Gex, M. & G. 356, p. 1501, 1502.
Luddington v. Gabbert, 5 W. Va. 330, p. 2526.
Luddy's Trustee v. Peard, 33 Ch. D. 500, 519, 520, p. 1765, 1769, 1771,
Luders v. Austey, 4 Ves. 501, 5 Ves. 213, p. 1561, 2591.
Ludington v. City of Elizabeth, 32 N. J. Eq. 159, 34 N. J. Eq. 357, p. 2749.
Ludington v. Patton, 111 Wis. 208, 86 N. W. 571, p. 1495, 1757, 1758.
Ludlam's Estate, 1 Pars. Cas. 116, 13 Pa. St. 188, 3 Pa. L. J. Rep. 332, p. 2208, 2211, 2213.
Ludlow v. Gill, N. Chipman (Vt.) 33, 1 Am. Dec. 695, p. 1098.
Ludlow v. Kidd, 3 Ohio, 541, p. 1071.
Ludlow v. Simond, 2 Cai. Cas. 1, 2 Am. Dec. 291, p. 462.
Ludlow v. Van Ness, 8 Bosw. 178, p. 1109.
Ludlow's Heirs v. Johnson, 3 Ohio 353, 561, 17 Am. Dec. 609, p. 570.

Ludlow's Heirs v. Kidd's Ex'rs, 3 Ohio, 541, p. 1069.
Ludlum v. Buckingham, 35 N. J. Eq. 71, p. 2775, 2779.
Ludlum v. Rothschild, 41 Minn. 219, 43 N. W. 137, p. 2576.
Ludwig v. Highley, 5 Pa. St. 132, 140, p. 1361.
Luff v. Lord, 11 Jur., N. S., 50, p. 1758.
Luff v. Pope, 5 Hill, 413, 7 Hill, 577, p. 2561, 2568.
Lufkin v. Nunn, 11 Ves. 170, p. 1204.
Luigart v. Ripley, 19 Ohio St. 24, p. 825.
Luigi v. Luchesi, 12 Nev. 306, p. 2049, 2066.
Luker v. Dennis, L. R. 7 Ch. Div. 227, p. 1200.
Lulay v. Barnes, 172 Pa. St. 331, 34 Atl. 52, 37 Wkly. Notes Cas. 409, p. 1108.
Lull v. Matthews, 19 Vt. 322, p. 2353.
Lumb v. Milnes, 5 Ves. 517, p. 2145, 2146.
Lumbard v. Abbey, 73 Ill. 177, p. 1145.
Lumberman's Mut. Ins. Co. v. Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140, p. 1158.
Lumley v. Wagner, 1 De Gex, M. & G. 604, p. 2674.
Lumpkins v. Adams, 74 Tex. 97, 11 S. W. 1070, p. 1342.
Lund v. Lund, 1 N. H. 39, 8 Am. Dec. 29, p. 2367, 2376.
Lund v. Seamen's Bank, 37 Barb. 129, p. 2645.
Lund v. Wheaton Roller-Mill Co., 50 Minn. 36, 52 N. W. 268, 36 Am. St. Rep. 623, p. 1222.
Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933, p. 755, 758.
Lundy v. Seymour, 55 N. J. Eq. 1, 35 Atl. 893, p. 1668.
Lunn v. Thornton, 1 Com. B. 379, p. 2576.
Lunt v. Bank of North America, 49 Barb. 221, p. 2563.
Lupo v. True, 16 S. C. 580, p. 1390.
Lupton v. Lupton, 2 Johns. Ch. 614, 623, p. 2491, 2493.
Lupton v. White, 15 Ves. 432, 440, p. 2052, 2070, 2082.
Lurton v. Rodgers, 139 Ill. 214, 29 N. E. 866, 32 Am. St. Rep. 214, p. 1672.
Luscombe v. Grigsby, 11 S. Dak. 408, 78 N. W. 357, p. 2008, 2039.
Luse v. Deitz, 46 Iowa, 205, p. 2771.
Luse v. Rankin, 57 Nebr. 632, 78 N. W. 258, p. 2018.
Lush's Trusts, In re, L. R. 4 Ch. 591, p. 1386, 1613, 1724, 2168, 2173.
Lusk v. Hopper, 3 Bush, 179, p. 2526.
Lusk v. Reel, 36 Fla. 418, 18 South. 582, 51 Am. St. Rep. 32, p. 1273, 1279.
Lutheran Church v. Maschop, 10 N. J. Eq. 57, p. 2694.
Luton v. Sharp, 94 Mich. 202, 53 N. W. 1054, p. 1276.
Lutrell v. Olmius, 11 Ves. 638, 14 Ves. 290, 1 Jacob & W. 96, p. 1654.
Lutz v. Linthicum, 8 Pet. 165, 178, p. 1653.
Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, p. 1438.
Lycett v. Stafford etc. R'y, L. R. 13 Eq. 261, p. 2529.
Lyday v. Douple, 17 Md. 188, p. 2702.
Lyddon v. Ellison, 19 Beav. 565, 572, p. 900.
Lyddon v. Moss, 4 De Gex & J. 104, p. 1769.
Lyde v. Mynn, 1 Mylne & K. 683, 4 Sim. 505, p. 191, 2473, 2601.
Lydick v. Holland, 83 Mo. 703, p. 344.
Lydings v. Pitcher, 82 Mo. 379, p. 1051.
Lyell v. Kennedy, L. R. 23 Ch. Div. 382, affirmed in L. R. 9 App. Cas. 81, L. R. 27 Ch. Div. 1, L. R. 8 App. Cas. 217, 233, 20 Ch. Div. 484, p. 258, 271, 277, 278.
Lyle v. Burke, 40 Mich. 499, p. 1896, 1904, 1912.
Lyle v. Rollins, 25 Cal. 437, p. 2748.
Lyles v. Kirkpatrick, 9 S. C. 265, p. 2771, 2775.
Lyman v. Babcock, 40 Wis. 503, p. 743, 746.
Lyman v. Bonney, 101 Mass. 562, p. 2011.
Lyman v. Cessford, 15 Iowa, 229, p. 1804.
Lyman v. Gaar, 75 Minn. 207, 77 N. W. 828, 74 Am. St. Rep. 452, p. 1274.
Lyman v. Gedney, 114 Ill. 388, 55 Am. Rep. 871, 29 N. E. 282, p. 750.
Lyman v. Little, 15 Vt. 576, p. 1516.

Lyman v. Lyman, 2 Paine, 11, 13, p. 520, 2632.
Lyman v. Lyman, 32 Vt. 79, 76 Am. Dec. 151, p. 2447, 2454.
Lyman v. Smith, 21 Wis. 674, p. 2393.
Lyman v. U. Ins. Co., 2 Johns. Ch. 630, 17 Johns. 373, p. 1516, 1523:
Lyme v. Allen, 51 N. H. 242, p. 527, 529, 1647.
Lynch v. Andrews, 25 W. Va. 751, p. 1066.
Lynch v. Clements, 24 N. J. Eq. 431, p. 1901, 1902.
Lynch v. Jennings, 43 Ind. 276, 286, p. 2776.
Lynch v. Mayor etc., 76 N. Y. 60, 32 Am. Rep. 271, p. 2687.
Lynch v. Metropolitan El. R'y Co., 129 N. Y. 274, 15 L. R. A. 287, 26 Am. St. Rep. 523, 29 N. E. 315, p. 224, 340.
Lynch v. Moser, 72 Conn. 714, 46 Atl. 153, p. 603, 662.
Lynch v. Murphy, 161 U. S. 247, 16 Sup. Ct. 523, p. 1114, 1372.
Lynch v. Rotan, 39 Ill. 14, p. 2612.
Lynch v. Spicer, 53 W. Va. 426, 44 S. E. 255, p. 2312.
Lynch v. Utica Ins. Co., 18 Wend. 236, 253, p. 1188, 2474.
Lynchburg P. B. & L. Co. v. Fellers, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851, p. 1105, 1130, 2452, 2454.
Lynde v. Thompson, 2 Allen, 456, 459, 460, p. 729, 732, 735, 742.
Lyndonville Nat. Bank v. Folsom, 7 N. M. 611, 38 Pac. 253, p. 1221.
Lyne v. Lyne, 8 De Gex, M. & G. 553, 21 Beav. 318, p. 1390.
Lynes v. Hayden, 119 Mass. 482, p. 2769.
Lyne's Estate, L. R. 8 Eq. 482, p. 2222.
Lyne's Ex'r v. Crouse, 1 Pa. St. 111, p. 2154.
Lynn v. Gephart, 27 Md. 547, 563, p. 824, 2306.
Lynn v. Sims, (Tex. Civ. App.) 43 S. W. 554, p. 1373.
Lynn v. Lynn, 135 Ill. 19, 25 N. E. 634, p. 1864, 1886.
Lynn's Appeal, 31 Pa. St. 44, 72 Am. Dec. 721, p. 2681.
Lyon, Estate of, 70 Iowa, 375, 378, 30 N. W. 642, 5 L. R. A. 71, p. 907, 908, 925.
Lyon v. Baker, 5 De Gex & S. 622, p. 2098.
Lyon v. Clark, (Mich.) 94 N. W. 4, p. 2501, 2511, 2516.
Lyon v. Colville, 1 Coll. 449, p. 885.
Lyon v. Horne, L. R. 6 Eq. 655, p. 1738, 1751, 1780.
Lyon v. Hunt, 11 Ala. 295, 305, 46 Am. Dec. 216, p. 2682, 2694, 2756.
Lyon v. Lyon, 65 N. Y. 339, p. 1920.
Lyon v. McIlvaine, 24 Iowa, 9, p. 1403.
Lyon v. McLaughlin, 32 Vt. 423, 425, 426, p. 382, 451.
Lyon v. Richmond, 2 Johns. Ch. 51, 60, p. 1482.
Lyon v. Robbins, 45 Conn. 513, p. 2440, 2441, 2443.
Lyon v. Sanders, 23 Miss. 530, p. 1483.
Lyons v. Bass, 108 Ga. 573, 34 S. E. 721, p. 2049.
Lyons v. Bodenhamer, 7 Kan. 455, p. 1145, 2005.
Lyons v. Field, 17 B. Mon. 543, 549, p. 1861.
Lyons v. Miller, 6 Gratt. 427, 438, 439, 52 Am. Dec. 129, p. 290, 321, 324, 326.
Lyons v. Van Riper, 26 N. J. Eq. 337, p. 1731, 1738, 2729.
Lyon's Appeal, 61 Pa. St. 15, p. 2426.
Lysaght v. Edwards, L. R. 2 Ch. Div. 499, 506, 507, p. 2531.
Lysaght v. Royce, 2 Schoales & L. 151, 153, p. 2622, 2623.
Lyse v. Kingdon, 1 Coll. C. C. 184, 188, p. 2090.
Lysney v. Selby, 2 Ld. Raym. 1118, 1120, p. 1594.
Lytle v. Black, 107 Ga. 386, 33 S. E. 414, p. 1104, 1271.
Lyttle v. Cozad, 21 W. Va. 183, p. 1463.

M.

Maas v. Goodman, 2 Hilt. 275, p. 1228, 1234.
Maas v. Tacquard's Ex'rs, (Tex. Civ. App.) 75 S. W. 350, p. 1264.
Mabie v. Bailey, 95 N. Y. 206, p. 1912.
Mabry v. Brown, 12 Heisk. 597, p. 2663.
McAbee v. Cribbs, 194 Pa. St. 94, 44 Atl. 1066, p. 2408.
McAdams, In re, 19 Hun, 292, p. 2624.
McAdow v. Black, 6 Mont. 601, 13 Pac. 377, p. 1278, 1338.

McAdow v. Boten, 67 Kan. 136, 72 Pac. 529, p. 2270.
McAdow v. Wachob, (Fla.) 33 South. 702, p. 1024, 1193, 1274.
McAfee v. Ferguson, 9 B. Mon. 475, p. 2166.
McAleer v. Horsey, 35 Md. 439, p. 1560, 1565, 1567.
McAlister v. Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158, p. 1940, 1956, 1979.
McAlister v. Butterfield, 31 Ind. 25, p. 1544.
McAllister v. Hurman, (Va.) 42 S. E. 920, p. 344.
McAllister v. Purcell, 124 N. C. 262, 32 S. E. 715, p. 1097, 1147.
McAlpine v. Burnett, 23 Tex. 649, p. 1355, 2502.
McArthur v. Franklin, 16 Ohio St. 193, p. 2437.
McArthur v. Martin, 23 Minn. 74, p. 2787, 2796.
McArthur v. Montclair R. R., 27 N. J. Eq. 77, p. 2663.
Macartney v. Graham, 2 Sim. 285, p. 1464.
McAteer v. McMullen, 2 Pa. St. 32, p. 1054.
Macaulay v. Philips, 4 Ves. 15, 19, p. 646, 2167, 2170.
Macaulay v. Porter, 71 N. Y. 173, p. 2372, 2376.
Macaulay v. Smith, 132 N. Y. 524, 30 N. E. 997, p. 1335.
Macauley v. Shackell, 1 Bligh, N. S., 96, 120, p. 258, 263.
McAuley v. Wilson, 1 Dev. Eq. 276, 18 Am. Dec. 587, p. 1954, 1971.
McAuley's Estate, In re, 184 Pa. St. 124, 39 Atl. 31, p. 1910.
McAuliffe v. Reuter, 166 Ill. 491, 46 N. E. 1087, p. 1227.
McAvoy's Estate, 12 Phila. 83, p. 2306, 2318.
McBean v. Fox, 1 Ill. App. 177, p. 1577, 1588.
McBee, Ex parte, 63 N. C. 332, p. 2306, 2316.
McBee v. Loftus, 1 Strob. Eq. 90, p. 1336.
McBee v. Myers, 4 Bush, 356, p. 1743.
McBeth v. Trauhe, 69 Mo. 642, p. 1446, 1448.
McBlair v. Gibbes, 17 How. 232, 237, p. 673, 1713.
McBratney v. Chandler, 22 Kan. 692, 31 Am. Rep. 213, p. 1699.
McBride v. Moore, (Tex. Civ. App.) 37 S. W. 450, p. 1060.
McBurnie, Ex parte, 1 De Gex, M. & G. 441, p. 1799.
McCan v. Woolf, 42 Ala. 389, p. 604, 1446.
McCabe v. Bellows, 7 Gray, 148, 66 Am. Dec. 467, p. 1412, 2441.
McCabe v. Grey, 20 Cal. 509, p. 1095, 1111, 1127, 1234.
MacCabe v. Hussey, 5 Bligh, N. S., 715, p. 1773.
McCabe v. Raney, 32 Ind. 309, p. 1429, 1441, 1444.
McCabe v. Swap, 14 Allen, 188, 191, p. 1405, 1412, 2407.
McCaffrey v. Hickey, 66 Barb. 489, p. 2788.
McCaleb v. Crichfield, 5 Heisk. 288, p. 2169, 2171, 2174.
McCall v. Davis, 56 Pa. St. 431, 94 Am. Dec. 92, p. 1560, 1605.
McCall v. Hampton, 98 Ky. 166, 56 Am. St. Rep. 335, 32 S. W. 406, 33 L. R. A. 266, p. 1742, 2548, 2574.
McCall v. McCall, Dru. 283, p. 802, 805.
McCall v. Mash, 89 Ala. 489, 18 Am. St. Rep. 147, 7 South. 770, p. 1756.
McCalla v. Beadleston, 17 R. I. 20, 20 Atl. 11, p. 220.
McCall's Appeal, 56 Pa. St. 363, p. 2743.
McCamant v. Nuckolls, 85 Va. 331, 12 S. E. 160, p. 1909.
McCampbell v. Fountain Head R. Co., (Tenn.) 77 S. W. 1070, p. 2118.
McCampbell v. McCampbell, 2 Lea, 661, 31 Am. Rep. 623, p. 2143.
McCandless v. Engle, 51 Pa. St. 309, p. 1734.
McCandless v. Inland Acid Co., 108 Ga. 618, 34 S. E. 618, p. 1276.
McCandless v. Warner, 26 W. Va. 754, p. 1903.
McCann v. Letcher, 8 B. Mon. 320, p. 1515.
McCants v. Bee, 1 McCord Eq. 383, 16 Am. Dec. 610, p. 1754.
McCarger v. Rood, 47 Cal. 138, p. 2782.
McCarogher v. Whieldon, L. R. 3 Eq. 236, p. 917, 920.

McCarron v. Cassidy, 18 Ark. 34, p. 2430.
McCartee v. Orphan Asylum Soc., 9 Cow. 437, 474–482, p. 1967.
McCarthy v. Decaix, 2 Russ. & M. 614, p. 1477, 1494, 1499.
McCarthy v. Goold, 1 Ball & B. 387, p. 2554.
McCarthy v. McCarthy, 74 Ala. 546, p. 2052.
McCarthy v. Mt. Tecarte etc. Water Co., 110 Cal. 687, 43 Pac. 391, p. 1231.
McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418, p. 1036.
McCartin v. Traphagen, 43 N. J. Eq. 340, 11 Atl. 156, p. 2066.
McCartney v. Bostwick, 32 N. Y. 53, 31 Barb. 390, p. 2004.
McCartney v. Garnhart, 45 Mo. 593, 100 Am. Dec. 397, p. 2690.
McCartney v. Ridgway, 160 Ill. 129, 43 N. E. 826, 32 L. R. A. 555, p. 1865.
McCarty v. Chalfant, 14 W. Va. 531, p. 2383, 2388.
McCarty v. Deming, 4 Lans. 440, 442, 443, p. 2325, 2326.
McCarty v. Kearnan, 86 Ill. 291, p. 2232, 2238.
McCarty v. Kyle, 4 Cold. 348, p. 1670.
McCarty v. Pruett, 4 Ind. 226, p. 2499.
McCarty v. Williams, 69 Ala. 174, p. 2498.
McCaskill v. Connecticut Savings Bank, 60 Conn. 300, 25 Am. St. Rep. 323, 22 Atl. 568, 13 L. R. A. 737, p. 1436.
McCaslin v. Advance Mfg. Co., 155 Ind. 298, 58 N. E. 67, p. 1285.
McCaslin v. State, 44 Ind. 151, p. 2526, 2530, 2534, 2535.
McCaughey v. McDuffie, (Cal.) 74 Pac. 751, p. 2382.
McChesney v. Brown's Heirs, 25 Gratt. 393, p. 2153.
McClain v. McClain, 57 Iowa, 167, 10 N. W. 333, p. 2040.
McClanahan v. Chambers, 1 Mon. 43, p. 2397.
McClane v. McClane, 207 Pa. St. 465, 56 Atl. 996, p. 2287.
McClane v. White, 5 Minn. 178, 190, p. 93, 2715, 2722.
McClare v. Lockard, 121 N. Y. 308, 24 N. E. 453, p. 1436.
McClartey v. Gokey, 31 Iowa, 505, p. 761, 2778.
McClary v. Ricks, 11 N. Dak. 38, 88 N. W. 1042, p. 2361.
McClaskey v. Barr, 48 Fed. 130, p. 1067, 1075, 1084, 1089.
McClaskey v. Mayor etc., 64 Barb. 310, p. 2762.
McClellan v. Clark, 50 L. T., N. S., 616, p. 2208.
McClellan v. Coffin, 93 Ind. 456, p. 765, 2499, 2513.
McClellan v. McClellan, 65 Me. 500, p. 1901, 1903.
McClellan v. Scott, 24 Wis. 81, p. 1567.
McClelland v. McClelland, (Tex. Civ. App.) 37 S. W. 350, p. 1847.
McClelland v. Saul, 113 Iowa, 208, 84 N. W. 1034, 86 Am. St. Rep. 370, p. 1169.
McClenahan v. Stevenson, 118 Iowa, 106, 91 N. W. 925, p. 1900, 1990.
Macclesfield v. Davis, 3 Ves. & B. 16, p. 257, 284.
McClintic v. Wise's Adm'rs, 25 Gratt. 448, 18 Am. Rep. 694, p. 2391.
McClintock v. Central Bank, 120 Mo. 127, 24 S. W. 1052, p. 1222.
McClintock v. Cummins, 3 McLean, 158, p. 1736.
McClintock v. Laing, 22 Mich. 212, p. 2761, 2769.
McClintock v. Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816, p. 664, 1997, 2001.
McCloskey v. Gleason, 56 Vt. 264, 38 Am. Rep. 770, p. 2089.
McCloskey v. McCloskey, 205 Pa. St. 491, 55 Atl. 180, p. 2040.
McCloskey v. McCormick, 44 Ill. 336, p. 1515.
McClung v. Colwell, 107 Tenn. 592, 89 Am. St. Rep. 961, 64 S. W. 890, p. 1996.
McClung v. Hohl, 10 Kan. App. 93, 61 Pac. 507, p. 1070.
McClung v. Livesay, 7 W. Va. 329, p. 407, 409, 454.
McClung v. Sneed, 3 Head, 218, 223, p. 825.
McClure v. Bryant, 18 Tex. Civ. App. 141, 44 S. W. 3, p. 1994.
McClure v. Burris, 16 Iowa, 591, p. 1300.
McClure v. Doak, 6 Baxt. 364, p. 2006.

McClure v. Evans, 29 Beav. 422, 425, p. 904.
McClure v. Harris, 12 B. Mon. 261, p. 2514.
McClure v. Lewis, 4 Mo. App. 554, p. 1739.
McClure v. McDearmon, 26 Ark. 66, p. 2473, 2585.
McClure v. Miller, Bail. Eq. 107, 108, 21 Am. Dec. 522, p. 2166, 2702.
McClure v. Raben, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 558, p. 1741, 1742, 2574.
McClure v. Roman, 52 Pa. St. 458, p. 2389.
McClure v. Thistle's Ex'rs, 2 Gratt. 182, p. 1105, 1149, 1272.
McClure's Appeal, 72 Pa. St. 414, p. 2306, 2309, 2312, 2315.
McClurg v. Phillips, 49 Mo. 315, 57 Mo. 214, p. 2475.
McClurg v. Terry, 21 N. J. Eq. 225, p. 1678.
McClurg's Appeal, 58 Pa. St. 51, p. 1690, 2615.
McClurkan v. Thompson, 69 Pa. St. 305, p. 2373.
McCluskey v. Provident Inst., 103 Mass. 300, p. 2193.
McColl v. Fraser, 40 Hun, 111, p. 2017.
McCollister v. Willey, 52 Ind. 382, p. 1985, 1989, 2005.
McCollum v. Eager, 2 How. 61, p. 494.
McCollum v. Prewitt, 37 Ala. 573, p. 261, 263.
McComas v. Easley, 21 Gratt. 23, 29, p. 1520, 2767, 2775.
McComb, Matter of, 117 N. Y. 378, 22 N. E. 1070, p. 2309.
McComb v. Title Guarantee & Trust Co., 36 Misc. Rep. 370, 73 N. Y. Supp. 554, p. 1836.
McCombs v. Merryhew, 40 Mich. 721, p. 2662.
McCone v. Courser, 64 N. H. 506, 15 Atl. 129, p. 1197.
McConehay v. Wright, 121 U. S. 20, p. 513.
McConihe v. Exchange Bank, 49 How. Pr. 422, 424, p. 570.
McConihe v. Sawyer, 12 N. H. 396, 403, p. 1803.
McConkey v. Cockey, 69 Md. 286, 14 Atl. 465, p. 1775.
McConnaughy v. Pennoyer, 43 Fed. 342, p. 357.
McConnell v. Combination Min. & Mill Co., (Mont.) 76 Pac. 194, p. 2127.
MacConnell v. Lindsay, 131 Pa. St. 476, 19 Atl. 306, p. 2154.
McConnell v. Reed, 4 Scam. 117, p. 1050.
McConnell v. Sherwood, 84 N. Y. 522, 38 Am. Rep. 537, p. 1858.
McConnell v. Wenrich, 16 Pa. St. 365, p. 1257.
McCook v. Harp, 81 Ga. 229, 7 South. 174, p. 2057.
McCook v. Pond, 72 Ga. 150, p. 2264, 2266.
McCord v. Ochiltree, 8 Blackf. 15, 17–20, 22, p. 567, 1958, 1962, 1966, 1967, 1974, 2612.
McCorkle v. Brown, 9 Smedes & M. 167, p. 1603, 1607, 2600, 2766.
McCormack v. Garnett, 5 De Gex, M. & G. 278, p. 1478, 1506.
McCormack Harvesting Mach. Co. v. Griffin, 116 Iowa, 397, 90 N. W. 84, p. 1989.
McCormick v. Garnett, 5 De Gex, M. & G. 278, p. 2172.
McCormick v. Grogan, L. R. 4 H. L. 82, 91, 97, p. 712, 1513, 1533, 1653, 1654, 2035, 2781.
McCormick v. Hartley, 107 Ind. 248, 6 N. E. 357, p. 132, 188, 2462.
McCormick v. Herndon, 78 Wis. 661, 47 N. W. 939, p. 2362.
McCormick v. Joseph, 83 Ala. 401, 3 South. 796, p. 1166.
McCormick v. Knox, 105 U. S. 126, 26 L. ed. 940, p. 2423.
McCormick v. Lawton, 3 Nebr. 449, p. 2195.
McCormick v. Leonard, 38 Iowa, 272, p. 1354, 1357.
McCormick v. McClure, 6 Blackf. (Ind.) 466, p. 1071.
McCormick v. Malin, 5 Blackf. 509, p. 1668, 1672, 1752, 1785.
McCormick v. Rossi, 70 Cal. 474, 15 Pac. 35, p. 765.
McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388, p. 1163, 1166, 1174, 1179.

McCormick Harvesting Mach. Co. v. Yankton Sav. Bank, 15 S. Dak. 196, 87 N. W. 974, p. 1155.
McCorn v. McCorn, 100 N. Y. 511, 3 N. E. 480, p. 2493.
McCornack v. Sage, 87 Ill. 484, p. 2769.
McCown v. Schrimpf, 21 Tex. 22, 73 Am. Dec. 221, p. 2413.
McCoy v. Cunningham, 27 Tex. Civ. App. 476, 65 S. W. 1084, p. 1051.
McCoy v. Harwitz, 62 Md. 183, p. 2078.
McCoy v. Poor, 56 Md. 197, p. 2097.
McCoy v. Rhodes, 52 U. S. (11 How.) 131, p. 1273.
McCrae v. Hollis, 4 Desaus. Eq. 122, p. 1550.
McCravey v. Remson, 19 Ala. 430, 54 Am. Dec. 194, p. 1445.
McCready v. Phillips, 56 Nebr. 446, 76 N. W. 885, p. 1561.
McCready v. Rumsey, 6 Duer, 574, p. 1219.
McCreary v. Casey, 50 Cal. 349, p. 1995, 1999.
McCreary v. First Nat. Bank, 109 Tenn. 128, 70 S. W. 821, p. 764.
McCreary v. Gewinner, 103 Ga. 528, 29 S. E. 960, p. 1911.
McCreary v. Reliance Lumber Co., 16 Tex. Civ. App. 45, 41 S. W. 485, p. 1133.
McCreedy v. Mier, 64 Ill. 495, p. 2268.
McCreery v. Bay Circuit Judge, 93 Mich. 463, 53 N. W. 613, p. 252.
McCreery v. Day, 119 N. Y. 1, 23 N. E. 198, 16 Am. St. Rep. 793, 6 L. R. A. 506, p. 634.
McCreight v. Foster, L. R. 5 Ch. 604, 610, 611, p. 1215, 2530.
McCrellis v. Cole, (R. I.) 55 Atl. 196, p. 2530.
McCrocklin v. McCrocklin, 2 B. Mon. 370, p. 1679, 2765.
McCrory v. Parks, 18 Ohio St. 1, p. 587.
Maccubbin v. Cromwell's Ex'rs, 7 Gill & J. 157, 164, p. 1902, 1904, 2061, 2096.
McCue v. Stumpf, (Mo.) 79 S. W. 661, p. 1639.
McCulloch v. Chatfield, 67 Fed. 877, 15 C. C. A. 48, 32 U. S. App. 323, p. 1853.
McCulloch v. Cowher, 5 Watts & S. 427, 430, p. 2039.
McCulloch v. Tomkins, 62 N. J. Eq. 262, 49 Atl. 474, p. 2052.
McCullough v. Colby, 5 Bosw. 477, p. 2789.
McCullough v. Ford, 96 Ill. 439, p. 1993, 2191.
McCullough v. Irvine, 13 Pa. St. 438, p. 2681.
McCullough v. Kervin, 49 S. C. 445, 27 S. E. 456, p. 215.
McCullough v. McCullough, 44 N. J. Eq. 313, 14 Atl. 123, p. 2056, 2076.
McCullough v. Merch. Loan etc. Co., 29 N. J. Eq. 217, p. 2660.
McCullough v. Walker, 20 Ala. 389, 391, p. 48, 214.
McCullough v. Wilson, 21 Pa. St. 436, p. 1447.
McCullough's Appeal, 12 Pa. St. 197, p. 1684.
McCullum v. Turpie, 32 Ind. 146, p. 2447.
McCully v. McCully, 78 Va. 159, p. 2024.
McCune v. Belt, 45 Mo. 174, p. 2796.
McCurdy v. Otto, 140 Cal. 48, 73 Pac. 748, p. 1895.
McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806, p. 730, 737.
McCutchen v. Miller, 31 Miss. 65, p. 1076, 1079.
McCutcheon v. Merz Capsule Co., 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415, p. 1715.
McDaniel v. Harley, (Tex. Civ. App.) 42 S. W. 323, p. 1060.
McDaniel v. Maxwell, 21 Oreg. 202, 27 Pac. 952, 28 Am. St. Rep. 740, p. 2560, 2562.
McDaniel v. Pattison, (Cal.) 27 Pac. 651, p. 2260, 2263, 2303.
McDaniel v. Stroud, 106 Fed. 486, 45 C. C. A. 446, p. 1407.
McDaniels v. Bank of Rutland, 29 Vt. 230, 238, 70 Am. Dec. 406, p. 1477.
McDaniels v. Colvin, 16 Vt. 300, 42 Am. Dec. 512, p. 2383, 2387.
McDaniels v. Flower Brook etc. M. Co., 22 Vt. 274, p. 981.
McDavid v. Adams, 77 Ill. 155, p. 2191.
McDearman v. Hodnett, 83 Va. 281, p. 907.
McDermid v. McGregor, 21 Minn. 111, p. 2779.

McDermith v. Voorhees, 16 Colo. 402, 27 Pac. 250, 25 Am. St. Rep. 286, p. 1985.
McDermutt v. Strong, 4 Johns. Ch. 687, p. 1079.
McDevitt v. Frantz, 85 Va. 740, 8 S. E. 642, p. 1995.
McDiarmid v. McDiarmid, 3 Bligh, N. S., 374, p. 1671.
McDole v. Purdy, 23 Iowa, 277, p. 2500, 2509.
McDonald v. Allen, 37 Wis. 108, 19 Am. Rep. 754, p. 2648.
McDonald v. Am. Nat. Bank, 25 Mont. 456, 65 Pac. 896, p. 1865.
McDonald v. Aten, 1 Ohio St. 293, p. 2285.
McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. 892, p. 1339, 1392.
McDonald v. Elyton Land Co., 78 Ala. 382, p. 2498, 2508.
McDonald v. Fire Ass'n of Philadel phia, 93 Wis. 348, 67 N. W. 719, p. 1170.
Macdonald v. Irvine, 8 Ch. Div. 101, 124, p. 2212, 2216, 2322.
McDonald v. Kellogg, 30 Kan. 170, 2 Pac. 507, p. 1859.
McDonald v. Kneeland, 5 Minn. 352, 365, p. 158, 590.
McDonald v. Lund, 13 Wash. 412, 43 Pac. 348, p. 674.
McDonald v. McDonald, 24 Ind. 68, p. 2005.
McDonald v. McDonald, 5 Jones Eq 211, 75 Am. Dec. 434, p. 2574.
McDonald v. Mass. Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529, p. 1943, 1978.
McDonald v. Neilson, 2 Cow. 139, 14 Am. Dec. 431, p. 643.
McDonald v. O'Hara, 144 N. Y. 566, 39 N. E. 642, p. 2055.
MacDonald v. Wagner, 5 Mo. App. 56, p. 1771.
McDonald v. Yungbluth, 46 Fed. 836, p. 1529, 1534.
McDonigal v. Plummer, 30 Md. 422, p. 2514.
McDonnell v. De Soto Sav. & Bldg. Ass'n, 175 Mo. 250, 97 Am. St. Rep. 592, 75 S. W. 439, p. 1665.
McDonnell v. White, 11 H. L. Cas. 570, p. 2052.
McDonough v. O'Niel, 113 Mass. 92, p. 2030.
MacDougal v. Gardiner, L. R. 1 Ch. Div. 13, p. 2118, 2121, 2125.
McDougal v. Lame, 39 Oreg. 212, 64 Pac. 864, p. 982, 987.
McDougal v. People's Savings Bank, 62 Miss. 663, p. 2194.
McDougald v. Dougherty, 14 Ga. 674, p. 2796.
McDougald v. Maddox, 17 Ga. 52, p. 263.
McDougall v. Dixon, 19 App. Div. 420, 46 N. Y. Supp. 280, p. 1839.
McDowall v. Peyton, 2 Desaus. Eq. 313, p. 1635.
McDowell v. Goldsmith, 2 Md. Ch. 370, p. 1647.
McDowell v. Lucas, 97 Ill. 489, p. 2780.
McDowell v. Melroy, 69 Ill. 498, p. 1771.
McDuff, In re, [1896] 2 Ch. 451, p. 1950.
McDuffie v. Montgomery, 128 Fed. 105, p. 1922, 1929.
McElderry v. Shipley, 2 Md. 25, 56 Am. Dec. 703, p. 1487.
McElfresh v. Schley, 2 Gill, 181, 182, 201, p. 785, 789, 800, 803, 804, 807.
McElhaney v. Shoemaker, 76 Iowa, 416, 41 N. W. 58, p. 1404.
McElhenny's Appeal, 61 Pa. St. 188, p. 2129.
McElroy v. McElroy, 113 Mass. 509, p. 1908.
McElroy v. McElroy, 110 Tenn. 137, 73 S. W. 105, p. 2318.
McElwain v. Willis, 9 Wend. 548, 562, 565, 568, 569, p. 2789.
McEwen v. Brewster, 17 Hun, 223, p. 2566.
McFadden v. Hefley, 28 S. C. 317, 5 S. E. 812, 13 Am. St. Rep. 675, p. 2208, 2223, 2316.
McFadden v. Jenkyns, 1 Phill. Ch. 153, 157, p. 1879, 1905.
McFadden v. Robison, 35 Ind. 24, p. 1565.
McFadden v. Rogers, 70 Mo. 421, p. 2725.
McFadden v. Worthington, 45 Ill. 362, p. 1272, 1279.
McFall v. Sherrard, Harp. 295, p. 1105.
McFarlan v. Rolt, L. R. 14 Eq. 580, p. 277, 281.

Macfarland v. Heim, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629, p. 2194.
McFarland v. Lyon, 4 Tex. Civ. App. 586, 23 S. W. 554, p. 1229.
McFarland v. McFarland, 64 Miss. 449, 1 South. 508, p. 2177.
McFarlane v. Louden, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883, p. 2379.
Macfarlane v. Southern Lumber & Supply Co., (Fla.) 36 South. 1029, p. 2191.
McFerran v. Taylor, 3 Cranch, 269, p. 1509, 1605.
McGahee v. Sneed, 1 Dev. & B. Eq. 333, p. 2504.
McGarrah v. Prather, 1 Blackf. 299, p. 2649.
McGarvey v. Hall, 23 Cal. 140, p. 2761.
McGaughey v. Brown, 46 Ark. 25, p. 1755.
McGee v. McGee, 10 Ga. 477, 482, p. 2176.
McGee v. Wells, 52 S. C. 472, 30 S. E. 602, p. 1995.
McGehee v. Gindrat, 20 Ala. 95, p. 982, 992, 1011.
McGhee v. Bell, 170 Mo. 121, 70 S. W. 493, 59 L. R. A. 761, p. 1591, 1639.
McGhee v. Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567, p. 1105, 1148.
Macgill v. Hyatt, 80 Md. 253, 30 Atl. 710, p. 2273.
McGinity v. McGinity, 63 Pa. St. 38, 45, p. 2380.
McGinn v. Shaeffer, 7 Watts, 412, p. 1754.
McGinn v. Tobey, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848, p. 1371.
McGinnis v. McGinnis, 1 Ga. 496, 503, p. 787.
McGiven v. Wheelock, 7 Barb. 22, p. 1402, 1407, 2424.
McGlaughlin v. McGlaughlin, 24 Pa. St. 20, p. 2494.
McGoon v. Shirk, 54 Ill. 408, p. 650.
McGough v. Insurance Bank, 2 Ga. 151, 153, 154, 46 Am. Dec. 382, p. 229, 465.
McGough v. Sweetser, 97 Ala. 361, 12 South. 162, 19 L. R. A. 470, p. 2435.
McGovern v. Knox, 21 Ohio St. 547, 551, 8 Am. Rep. 80, p. 1994.
McGowan v. Lufborrow, 82 Ga. 523, 14 Am. St. Rep. 178, 9 S. E. 427, p. 2264, 2612.
McGowan v. Smith, 44 Barb. 232, p. 1280.
McGowan v. Smith, 26 L. J., N. S., (Ch.) 8, p. 2561.
McGowin v. Remington, 12 Pa. St. 56, 51 Am. Dec. 584, p. 349, 2763.
McGrath, In re, [1892] 2 Ch. 496, [1893] 1 Ch. 143, 147, p. 2613, 2618.
McGrath v. McGrath, 38 Ala. 246, p. 823.
McGrath v. Reynolds, 116 Mass. 566, p. 2233, 2234, 2241, 2247.
McGregor v. Chase, 37 Vt. 225, p. 1858.
McGregor v. Hall, 3 Stew. 397, p. 1118.
McGregor v. McGregor, 20 Grant (Can.) C. Rep. 450, p. 837.
McGregor v. McGregor, 22 Iowa, 441, p. 1065.
McGregor v. McGregor, 130 Mich. 505, 90 N. W. 284, 97 Am. St. Rep. 492, p. 2555.
MacGregor v. Thompson, 7 Tex. Civ. App. 32, 26 S. W. 649, p. 1184, 1185, 1308.
McGrew v. City Produce Exchange, 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771, p. 1676.
McGuigan v. Gaines, (Ark.) 77 S. W. 52, p. 1514, 1516.
McGuire v. Bowman, 6 Bush, 550, p. 2729.
McGuire v. Brown, 41 Iowa, 650, p. 852.
McGuire v. Evans, 5 Ired. Eq. 269, p. 2208.
McGuire v. Hartford Fire Ins. Co., 40 N. Y. Supp. 300, p. 1158.
McGuirk v. Metropolitan Life Ins. Co., 56 Conn. 528, 32 L. R. A. 530, 16 Atl. 263, p. 1158.
McGunn v. Huntin, 29 Mich. 477, p. 149.
McGuire v. Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670, p. 212, 380.
McGuire v. Stevens, 42 Miss. 724, 2 Am. Rep. 649, p. 2769.
McGuire v. Van Pelt, 55 Ala. 344, p. 1706.

McGurren v. Garrity, 68 Cal. 566, 9 Pac. 839, p. 2354.
McHarry v. Irvin, 85 Ky. 322, 3 S. W. 374, 4 S. W. 800, p. 1508.
Machem v. Machem, 28 Ala. 374, p. 1544, 2172.
McHendry v. Reilly, 13 Cal. 75, p. 2515.
McHenry, In re, [1899] 3 Ch. 365, p. 1790.
McHenry v. Davies, L. R. 10 Eq. 88, p. 183, 1724, 2133, 2185.
McHenry v. Hazard, 45 Barb. 657, 45 N. Y. 580, 587, 588, p. 162, 226, 331, 456, 2643, 2648.
McHenry v. Jewett, 90 N. Y. 58, p. 2667.
Macher v. Foundling Hospital, 1 Ves. & B. 187, p. 759.
Machinists' National Bank v. Field, 126 Mass. 345, p. 543, 1253, 1382.
McHose v. Dutton, 55 Iowa, 728, 8 N. W. 667, p. 1915.
McHugh v. County of Schuylkill, 67 Pa. St. 391, 396, 5 Am. Rep. 445, p. 1645, 1650.
McHugh v. McCole, 97 Wis. 162, 72 N. W. 631, 65 Am. St. Rep. 106, 40 L. R. A. 724, p. 1970, 2325.
McHugh v. Wells, 39 Mich. 175, p. 2775, 2777.
McIlhenny v. Todd, 71 Tex. 400, 10 Am. St. Rep. 753, 9 S. W. 445, p. 1856.
McIlrath v. Snure, 22 Minn. 391, p. 2662.
McIlvain v. Hockaday, (Tex. Civ. App.) 81 S. W. 54, p. 1934.
McIlvaine v. Gethen, 3 Whart. 575, p. 1683, 1684.
McIlvaine v. Smith, 42 Mo. 45, 97 Am. Dec. 295, p. 1841, 1845.
McIlwrath v. Hollander, 73 Mo. 105, 39 Am. Rep. 484, p. 1076.
McIntier v. Shaw, 6 Allen, 83, p. 2369, 2375.
McIntire's School v. Zanesville, 9 Ohio, 203, p. 1976.
McIntosh v. Great West. R'y, 1 Hare, 328, p. 297.
McIntosh v. Great West. R'y, 2 Macn. & G. 74, p. 1633.
McIntosh v. Johnson, 8 Utah, 359, 31 Pac. 450, p. 728.
McIntosh v. Saunders, 68 Ill. 128, p. 2725.
Macintosh v. Thurston, 25 N. J. Eq. 242, p. 1284.
McIntyre v. Zanesville, 17 Ohio St. 352, p. 1961.
Machir v. Burroughs, 14 Ohio St. 519, p. 2155, 2197.
McJilton v. Love, 13 Ill. (3 Peck) 486, 54 Am. Dec. 449, p. 1226.
Mack v. Campeau, 69 Vt. 558, 38 Atl. 149, 60 Am. St. Rep. 948, p. 1703.
Mack v. Hill, 28 Mont. 99, 72 Pac. 307, p. 637, 650.
Mack v. Latta, (N. Y.) 71 N. E. 97, p. 222, 401, 1639.
Mack v. McIntosh, 181 Ill. 633, 54 N. E. 1019, p. 1038, 1100, 1126.
Mack v. Mulcahy, 47 Ind. 68, p. 1684.
Mack v. Village of Frankfort, 123 Mich. 421, 82 N. W. 209, p. 1631.
Mack v. Wetzlar, 39 Cal. 247, p. 2354.
Mackall v. Mackall, 135 U. S. 167, 171, 172, 173, 10 Sup. Ct. 705, p. 1738, 1779.
McKamey v. Thorp, 61 Tex. 648, p. 1269, 1278, 1280.
Mackason's Appeal, 42 Pa. St. 330, 82 Am. Dec. 517, p. 1841, 1846.
McKay v. Carrington, 1 McLean, 50, p. 2778.
Mackay v. Commercial Bank, L. R. 5 P. C. 394, p. 1625.
Mackay v. Douglas, L. R. 14 Eq. 106, 118–121, p. 1609, 1613, 1802.
Mackay v. Gabel, 117 Fed. 873, p. 1324.
McKay v. Gilliam, 65 N. C. 130, p. 2504.
McKay v. Ward, 20 Utah, 149, 57 Pac. 1024, 46 L. R. A. 623, p. 2413.
Mackdowell v. Halfpenny, 2 Vern. 484, p. 880.
McKean & Elk Land Imp. Co. v. Mitchell, 35 Pa. St. (11 Casey) 269, 78 Am. Dec. 335, p. 1108, 1114.
McKechnie v. McKechnie, 39 N. Y. Suppl. 402, 3 App. Div. 91, p. 696.
McKechnie v. Sterling, 48 Barb. 330, 335, p. 1460.
McKechnie v. Vaughan, L. R. 15 Eq. 289, p. 1544.
McKecknie v. Hoskins, 23 Me. 230, p. 1026.
McKee v. Chautauqua Assembly, 124 Fed. 808, p. 2119, 2125.
McKee v. McKinley, 33 Pa. St. 92, p 2161, 1831.

McKee v. Perchment, 69 Pa. St. 342, p. 1050.
McKee v. Rapp, 35 N. Y. Supp. 175, p. 739.
McKeecknie v. Hoskins, 23 Me. 230, p. 1032.
McKeegan v. O'Neill, 22 S. C. 454, 460, 468, p. 2591.
McKeen v. Delancey's Lessee, 9 U. S. (5 Cranch) 22, p. 1108.
McKelvey v. Truby, 4 Watts & S. 323, p. 1194, 1388.
McKelway v. Armour, 10 N. J. Eq. 115, 64 Am. Dec. 445, p. 1388.
McKenna v. Kirkwood, 50 Mich. 544, 15 N. W. 898, p. 1234, 1297.
McKennan v. Phillips, 6 Whart. 571, 37 Am. Dec. 438, p. 2139.
Mackensie v. Mackensie, 2 Russ. 262, 273, p. 886, 888.
McKenzie v. Baldridge, 49 Ala. 564, p. 2535.
Mackenzie v. Coulson, L. R. 8 Eq. 368, p. 1541, 2726.
McKenzie v. Downing, 25 Ga. 669, p. 2238.
McKenzie v. Hesket, L. R. 7 Ch. Div. 675, p. 1539.
Mackenzie v. Johnston, 4 Madd. 373, p. 224, 316, 317, 331, 2800.
Mackenzie v. Mackenzie, 16 Ves. 372, p. 1790.
McKeon v. Hagan, 18 Hun, 65, p. 2201.
McKeown v. Collins, 38 Fla. 276, 21 South. 103, p. 1099, 1114, 2499, 2513.
McKesson v. Stanton, 50 Wis. 297, 36 Am. Rep. 850, 6 N. W. 881, p. 2200.
Mackett v. Mackett, L. R. 14 Eq. 49, p. 1925.
Mackey v. Bowles, 98 Ga. 730, 25 S. E. 834, p. 1335.
Mackey v. Cole, 79 Wis. 426, 48 N. W. 520, 920, 24 Am. St. Rep. 728, p. 1098, 1133.
McKillip v. McKillip, 8 Barb. 552, p. 2509.
McKim v. Hibbard, 142 Mass. 422, 8 N. E. 152, p. 2089.
McKim v. Mason, 3 Md. Ch. 186, p. 2348.
McKim v. Odom, 12 Me. 94, p. 554.
McKim v. Whitehall Co., 2 Md. Ch. 510, p. 632, 766.
McKinley v. Irvine, 13 Ala. 681, p. 1764.
McKinley v. Williams, 74 Fed. 94, 20 C. C. A. 312, 36 U. S. App. 749, p. 1764.
McKinnell v. Robinson, 3 Mees. & W. 434, p. 1720.
McKinney v. Brights, 16 Pa. St. 399, 55 Am. Dec. 512, p. 998.
McKinney v. Burns, 31 Ga. 295, p. 2005.
McKinney v. Miller, 19 Mich. 142, p. 2374, 2447.
McKinney v. Pinckard, 2 Leigh, 149, 21 Am. Dec. 601, p. 1072, 1742.
McKinney v. Rhoads, 5 Watts, 343, p. 1856.
McKinnie v. Rutherford, 1 Dev. & B. Eq. 14, p. 1226.
Mackinnon v. Peach, 2 Keen, 555, p. 886.
McKinstry v. Conly, 12 Ala. 678, p. 2371, 2373, 2377.
McKinzie v. Perrill, 15 Ohio St. 162, p. 1019, 1148.
McKinzie v. Steele, 18 Ohio St. 38, 41, p. 1432, 1435, 1444.
McKissick v. Pickle, 16 Pa. St. 140, p. 2006.
Mackinnon v. Stewart, 1 Sim., N. S., 76, 88, p. 1855.
Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 350, p. 1071.
Mack Mfg. Co. v. Wm. A. Smoot & Co., 102 Va. 724, 47 S. E. 859, p. 2561, 2567.
Macknet v. Macknet, 29 N. J. Eq. 54, p. 848, 849.
McKnight v. Brady, 2 Mo. 110, p. 2501.
McKnight v. Gordon, 13 Rich. Eq. 222, 94 Am. Dec. 164, p. 1280.
McKnight v. Robbins, 5 N. J. Eq. 229, 642, p. 2765.
McKnight v. Walsh, 24 N. J. Eq. 498, p. 2090.
McKnight v. Wimer, 38 Mo. 132, p. 1861, 1862.
Mackreth v. Symmons, 15 Ves. 329, 336, 349, 354, 1 Lead. Cas. Eq. 289, p. 192, 615, 692, 1138, 1198, 1261, 1292, 2497, 2505, 2510, 2513, 2515.
Mack's Appeal, 71 Conn. 122, 41 Atl. 242, p. 1940, 1955, 1958, 1973.

McLachlan v. McLachlan, 9 Paige, 534, p. 2488.
McLain v. School Directors, 51 Pa. St. 196, p. 1977.
McLain v. Thompson, 52 Miss. 418, p. 2501, 2509, 2516.
McLanahan v. Reeside, 9 Watts, 508, 36 Am. Dec. 136, p. 1116.
McLane v. Johnson, 43 Vt. 48, p. 179, 1803, 2008.
McLane v. Paschal, 47 Tex. 365, p. 1860.
McLarren v. Brewer, 51 Me. 402, 407, p. 548, 553, 701, 958, 2024.
McLaughlin v. Acorn, 58 Kan. 514, 50 Pac. 441, p. 2400.
McLaughlin v. Barnum, 31 Md. 425, p. 191, 2481.
McLaughlin v. Estate of Curts, 27 Wis. 644, p. 2440.
McLaughlin v. Kelly, 22 Cal. 212, p. 2686.
McLaughlin v. McLaughlin, 20 N. J. Eq. 190, p. 652.
McLaughlin v. Piatti, 27 Cal. 151, p. 2762.
McLaughlin v. Shepherd, 32 Me. 143, 52 Am. Dec. 646, p. 1044.
McLaurie v. Barnes, 72 Ill. 73, p. 2779.
McLaurie v. Partlow, 53 Ill. 340, p. 1904.
McLaurie v. Thomas, 39 Ill. 291, p. 2499, 2515.
McLaurin v. Wright, 2 Ired. Eq. 94, p. 2372.
MacLaury v. Hart, 121 N. Y. 636, 24 N. E. 1013, p. 467.
Maclay v. Love, 25 Cal. 367, p. 2190.
McLean v. Baldwin, 136 Cal. 565, 69 Pac. 259, p. 1072.
McLean v. Lafayette Bank, 3 McLean, 415, 419, Fed. Cas. No. 8,886, p. 424, 456.
McLean v. Lafayette Bank, 3 McLean, 587, Fed. Cas. No. 8,888, p. 2453.
McLean v. Longlands, 5 Ves. 71, p. 2142.
McLean v. Robertson, 126 Mass. 537, p. 2225, 2226, 2227.
McLean v. Tompkins, 18 Abb. Pr. 24, p. 2426.
McLean v. Wade, 41 Pa. St. 266, p. 1976.
McLean v. Walker, 10 Johns. 471, p. 2460.
McLean's Appeal, 103 Pa. St. 255, p. 2393.
McLearn v. Wallace, 10 Pet. 625, 640, 9 L. ed. 559, p. 2504.
McLellan v. Nelson, 27 Me. 129, p. 2193.
McLellan v. Osborne, 51 Me. 118, p. 2800.
McLellan v. Walker, 26 Me. 114, p. 2561.
McLellen v. Longfellow, 32 Me. 494, 54 Am. Dec. 599, p. 281.
McLenan v. Sullivan, 13 Iowa, 521, p. 1994.
McLeod v. Evans, 66 Wis. 410, 57 Am. Rep. 287, 28 N. W. 173, 214, p. 1913, 1914, 2023.
McLeod v. First Nat. Bank, 42 Miss. 99, 112, p. 982, 1146, 1324, 1326.
McLeod v. Griffis, 51 Ark. 1, 8 S. W. 837, p. 2258.
McLeod v. Venable, 163 Mo. 536, 63 S. W. 847, p. 1996.
McLeran v. McNamara, 55 Cal. 508, p. 2709.
McLin v. Marshall, 1 Heisk. 678, p. 1734.
McLin v. McNamara, 2 Dev. & B. Eq. 82, p. 2798.
McLure v. Lancaster, 24 S. C. 273, 58 Am. Rep. 259, p. 2147.
McLure v. Ripley, 2 Macn. & G. 274, p. 1613, 1782.
McMahan v. Kimball, 3 Blackf. 1, p. 2735.
McMahan v. Smith, 6 Heisk. 167, p. 1769.
McMahon v. Burchell, 2 Phill. Ch. 127, p. 290.
McMahon v. McGraw, 26 Wis. 614, p. 1762, 1764.
McMahon v. Williams, 79 Ala. 288, p. 2596.
McMairy v. Eastland, 10 Yerg. 310, p. 2790.
McMaken v. Niles, (Iowa) 60 N. W. 199, p. 1157.
McMannus v. Smith, 53 Ind. 211, p. 2722.
McMannus v. State, 2 Head, 213, p. 281.
McManus v. Chollar, (C. C. A.) 128 Fed. 902, p. 495.
McMasters v. Edgar, 22 W. Va. 673, p. 983.

McMasters v. Wilhelm, 85 Pa. St. 218, p. 1230.
McMechan v. Griffing, 3 Pick. 149, 154, 15 Am. Dec. 189, 198, p. 1027, 1037, 1142.
McMichael v. Kilmer, 76 N. Y. 36, 44, p. 1603, 1609.
McMichael v. Webster, 57 N. J. Eq. 295, 41 Atl. 714, 73 Am. St. Rep. 630, p. 1586, 1591, 2429.
McMickle v. Hardin, 25 Tex. Civ. App. 222, 61 S. W. 322, p. 407.
McMillan v. Bissell, 63 Mich. 66, 29 N. W. 737, p. 2379.
McMillan v. Boyles, 14 Iowa, 107, p. 406.
McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 78 Am. St. Rep. 93, 48 L. R. A. 345, p. 1693.
McMillan v. Jewett, 85 Ala. 476, 5 South. 145, p. 2371.
McMillan v. Peacock, 57 Ala. 127, p. 2139, 2142, 2153.
McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655, p. 2354.
McMillan v. Wiley, (Fla.) 33 South. 992, p. 340.
McMillen v. Rose, 54 Iowa, 522, p. 2534.
McMinn v. O'Connor, 27 Cal. 238, p. 1095.
McMinn v. Whelan, 27 Cal. 300, p. 2791.
McMonagle v. McGlinn, 85 Fed. 88, p. 1905, 1908, 1927, 2007.
McMullen v. Beatty, 56 Pa. St. 389, p. 2154.
McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, p. 1692.
McMullen v. Vanzant, 73 Ill. 190, p. 2765.
McMullen v. Wenner, 16 Serg. & R. 18, 16 Am. Dec. 543, p. 1229, 1232.
McMullin's Adm'r v. Sanders, 79 Va. 356, 365, p. 162, 359, 365, 1580, 1582, 1583, 1585, 1586, 1605, 1607.
McMurphy v. Adams, 67 N. H. 440, 39 Atl. 333, p. 1058.
McMurphy v. Minot, 4 N. H. 251, 255, p. 2350.
McMurray v. Spicer, L. R. 5 Eq. 527, 537, p. 2775, 2778, 2779.
McMurray v. St. Louis etc. Co., 33 Mo. 377, p. 1483.
McMurtrie v. Riddell, 9 Colo. 497, 13 Pac. 181, p. 1277.
Macnab v. Whitbread, 17 Beav. 299, p. 1924.
McNab v. Young, 81 Ill. 11, 14, p. 1384, 1828.
McNair v. Pope, 100 N. C. 404, 6 S. E. 234, p. 2039.
McNamara v. Culver, 22 Kan. 661, p. 2374, 2377.
Macnamara v. Jones, 2 Dick. 587, p. 2101.
McNamara v. McDonald, 69 Conn. 484, 61 Am. St. Rep. 48, 38 Atl. 54, p. 1868.
McName v. Wiethers, 37 Md. 171, p. 2762.
McNary v. Southworth, 58 Ill. 473, p. 1343.
McNaughton v. Burke, 63 Nebr. 704, 89 N. W. 274, p. 2403.
McNaughton v. Partridge, 11 Ohio, 223, 38 Am. Dec. 731, p. 1487, 1489, 1788.
McNeady v. Hyde, 47 Cal. 481, 483, p. 94, 231, 355.
McNeal v. McNeal, 161 Pa. St. 109, 28 Atl. 997, 34 Wkly. Notes Cas. 259, p. 2197.
McNeeley v. South Penn. Oil Co., (W. Va.) 44 S. E. 508, p. 1447.
McNees v. Swaney, 50 Mo. 388, 391, p. 2370.
McNeil v. Ames, 120 Mass. 481, p. 543, 545.
McNeil v. Baird, 6 Munf. 316, p. 1609, 1618.
McNeil v. Cahill, 2 Bligh, 228, p. 1679, 1716, 1732, 1791.
McNeil v. Congregational Soc., 66 Cal. 105, 4 Pac. 1096, p. 1372.
McNeil v. Jordan, 28 Kan. 7, 16, p. 1030.
McNeil v. Magee, 5 Mason, 244, 270, p. 266, 695, 2764, 2770, 2775.
McNeil v. Miller, 29 W. Va. 480, 2 S. E. 335, p. 2504.
McNeil v. Polk, 57 Cal. 323, p. 1028, 1096, 1144.
McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341, reversing 55 Barb. 59, p. 1222, 1223, 1236, 1238, 1239, 1241, 1243, 1245, 1247, 1248, 1249, 1443.
McNeill v. Arnold, 17 Ark. 154, p. 2172.
McNeill v. Cahill, 2 Bligh, 228, p. 672.
McNeill v. Edie, 24 Kan. 108, p. 2709.

McNeill v. Hodges, 83 N. C. 504, p. 2130.
McNeill v. Norsworthy, 39 Ala. 156, p. 2373.
McNeillie v. Acton, 4 De Gex, M. & G. 744, p. 2103.
McNeill's Adm'r v. McNeill's Creditors, 36 Ala. 109, 76 Am. Dec. 320, p. 2255.
McNiell's Case, L. R. 10 Eq. 503, p. 1573.
McNulty v. Cooper, 3 Gill & J. 214, p. 1872.
McNutt v. McEwen, 10 Phila. 112, p. 2675.
Macomb v. Wilkinson, 83 Mich. 486, 47 N. W. 336, p. 1155.
Macomber v. Doane, 2 Allen, 541, p. 2567.
Macomber v. Jaffray, 4 Gray, 82, p. 2750.
Macon v. Huff, 60 Ga. 221, p. 1699, 1783.
Macon v. Sheppard, 2 Humph. 335, p. 1044.
Macon & Augusta R. R. v. Georgia etc. R. R., 63 Ga. 103, p. 2050.
Macon & B. R. Co. v. Gibson, 85 Ga. 1. 11 S. E. 442, 21 Am. St. Rep. 134, 135, p. 368, 390, 409, 445.
Macoupin Co. v. People, 58 Ill. 191, p. 1668.
McPherson v. Cox, 96 U. S. 404, 24 L. ed. 746, p. 2106, 2107.
McPherson v. Hayward, 81 Me. 329, 17 Atl. 164, p. 2381.
McPherson v. Housel, 13 N. J. Eq. 299, p. 1064.
Macpherson v. Macpherson, 1 Macq. 243, p. 2321.
McPherson v. Rollins, 107 N. Y. 316, 322, 14 N. E. 411, 1 Am. St. Rep. 826, p. 1095, 1128.
McPherson v. Watt, 3 App. Cas. 254, 266, 270, p. 1771.
McPike v. Pen, 51 Mo. 63, p. 2757.
McQueen v. Chouteau's Heirs, 20 Mo. 222, 64 Am Dec. 178, p. 343, 345, 2782.
McQueen v. Farquhar, 11 Ves. 467, 477, p. 1346, 2775.
McQueen v. McQueen, 2 Jones Eq. 16, 62 Am. Dec. 205, p. 845, 847.
McQueen v. Whetstone, 127 Ala. 417, 30 South. 548, p. 2423, 2426, 2432, 2435.
McQuie v. Peay, 58 Mo. 56, p. 2475.
Macrae v. Goodbar, 80 Miss. 315, 31 South. 812, p. 1207.
McRea v. Walker, 4 How. 455, p. 2277.
McRee's Adm'rs v. Means, 34 Ala. 349, p. 1926.
McRoberts v. Washburne, 10 Minn. 23, 30, p. 383, 451.
McShane v. Hazlehurst, 50 Md. 107, p. 1560, 1588, 1590, 1603.
McShane Mfg. Co., Henry v. Kolb, 59 N. J. Eq. 146, 45 Atl. 533, p. 1282.
McShirley v. Birt, 44 Ind. 382, p. 1346.
McSorley v. Larissa, 100 Mass. 270, p. 2431.
Mactier v. Osborn, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323, p. 755.
McTwiggan v. Hunter, 18 R. I. 776, 30 Atl. 962, 2 Ames' Cas. Eq. Jur. 71, p. 407, 454.
McVay v. McVay, 43 N. J. Eq. 47, 10 Atl. 178, p. 1904.
McVey v. Brendel, 144 Pa. St. 235, 22 Atl. 912, 29 Wkly. Notes Cas. 1, 27 Am. St. Rep. 625, 13 L. R. A. 377, p. 669, 1696.
McVey v. McQuality, 97 Ill. 93, p. 1145, 1644, 2017.
McVickar v. Greenleaf, 1 Abb. Pr., N. S., 452, 7 Rob. (N. Y.) 657, p. 292.
McWaid v. Blair State Bk., 58 Nebr. 618, 79 N. W. 620, p. 2018.
McWilliams v. Gough, 116 Wis. 576, 93 N. W. 550, p. 2332.
McWilliams v. Nisly, 2 Serg. & R. 507, 7 Am. Dec. 654, p. 2574.
McWilliams v. Webb, 32 Iowa, 577, p. 1212, 2562.
Macy v. Nantucket, 121 Mass. 351, p. 544.
Macy v. Southern etc. Ass'n, 102 Ga. 812, 30 S. E. 430, p. 1756.
Maddeford v. Austwick, 2 Mylne & K. 279, 1 Sim. 89, p. 1619, 1782.
Madden v. Barnes, 45 Wis. 135, 30 Am. Rep. 703, p. 2503, 2511.
Madden v. Louisville, N. C. & T. R'y Co., 66 Miss. 258, 6 South. 181, p. 854.

Maddison v. Alderson, 8 App. Cas. (H. L.) 467, 473, p. 1436.
Maddison v. Chapman, 1 Johns. & H. 470, p. 788, 809.
Maddock, In re, [1902] 2 Ch. 220, p. 2037.
Maddox v. Arp, 114 N. C. 585, 19 S. E. 665, p. 1097, 1147.
Maddox v. Dent, 4 Md. Ch. 543, p. 2315.
Maddox v. Maddox, 11 Gratt. 804, p. 1681, 1683.
Maddox v. Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734, p. 1737, 1738.
Maddox v. Simmons, 31 Ga. 512, p. 1072, 1729.
Madigan v. Mead, 31 Minn. 94, 16 N. W. 539, p. 2382.
Madison v. Madison, 206 Ill. 534, 69 N. E. 625, p. 1993.
Madison Co. v. People, 58 Ill. 456, p. 1668.
Madrid Bank, In re, L. R. 2 Eq. 216, p. 1613.
Maffitt's Adm'r v. Rynd, 69 Pa. St. 380, p. 1906.
Magdalena St. Nav. Co., In re, Johns. 690, p. 1713, 2605.
Magdalena etc Co., In re, 6 Jur., N. S., 975, p. 1453.
Magee v. Carpenter, 4 Ala. 469, p. 1861.
Magee v. Magee, 51 Ill. 500, 99 Am. Dec. 571, p. 1284.
Magee v. Verity, 97 Mo. App. 486, 71 S. W. 472, p. 1594.
Magers v. Edwards's Adm'r, 13 W. Va. 822, p. 2300.
Magie v. Reynolds, 51 N. J. Eq. 113, 26 Atl. 150, p. 1297, 2403, 2410.
Magin v. Lamb, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216, p. 1230.
Magistrates of Dundee v. Morris, 3 Macq. 134, 157, p. 1942, 1945, 1950.
Magner v. Crooks, 139 Cal. 640, 73 Pac. 585, p. 1843.
Magnusson v. Johnson, 73 Ill. 156, p. 2380.
Magnusson v. Williams, 111 Ill. 450, p. 725.
Magrane v. Archbold, 1 Dow. 107, p. 750.
Magrath v. Morehead, L. R. 12 Eq. 491, p. 1886.
Magruder v. Admire, 4 Mo. App. 133, p. 2794, 2795.
Magruder v. Peter, 11 Gill & J. 217, p. 2500, 2516, 2526.
Maguire, In re, L. R. 9 Eq. 632, 634, p. 1939, 1959, 1963.
Maguire v. Dodd, 9 Ir. Ch. 452–459, p. 2243.
Maguire v. Maguire, 7 Dana, 181, p. 1212, 2194, 2613, 2614.
Maguire v. Pingree, 30 Me. 508, p. 554.
Maguire v. Smock, 42 Ind. 1, p. 1688.
Maguire v. Tyler, 47 Mo. 115, 128, p. 564, 569, 586.
Maguire v. Vice, 20 Mo. 429, p. 586.
Magwood v. Johnston, 1 Hill Eq. 228, p. 2154, 2188, 2198.
Mahagan v. Mead, 63 N. H. 570, 3 Atl. 919, p. 2446.
Mahar v. O'Hara, 4 Gilm. 424, p. 2266, 2268.
Maher v. Aldrich, 205 Ill. 242, 68 N. E. 811, p. 1906.
Maher v. O'Hara, 4 Gilm. 424, 427, p. 567.
Maher v. Lanfrom, 86 Ill. 513, p. 2402.
Mahler v. Phœnix Ins. Co., 9 Heisk. 399, p. 1701, 1704.
Mahon v. Crothers, 28 N. J. Eq. 567, p. 2659.
Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175, p. 638, 642, 2379.
Mahoney v. Flanagan, (Tex. Civ. App.) 78 S. W. 245, p. 1052, 1060.
Mahoney v. Holt, 19 R. I. 660, 36 Atl. 1, p. 2208.
Mahoney v. Middleton, 41 Cal. 41, 50, p. 1095, 1135, 1303, 1357, 1359, 1361.
Maiben v. Bobe, 6 Fla. 381, p. 2191.
Maine Baptist Miss. Con. v. Portland, 65 Me. 92, p. 1940, 1974.
Major v. Lansley, 2 Russ. & M. 355, 357, p. 2139, 2149.
Mainwarring v. Templeman, 51 Tex. 205, 213, p. 1034, 1048, 1148, 1272.
Mair v. Himalaya Tea Co., L. R. 1 Eq. 411, p. 2677, 2772.
Maitland v. Backhouse, 16 Sim. 58, p. 1774.
Maitland v. Irving, 15 Sim. 437, p. 1622, 1775.
Maitland v. Wilson, 3 Atk. 814, p. 1333.
Major v. Bukley, 51 Mo. 227, 231, p. 1007, 1050, 1147.

Major v. Stone's River Nat. Bank, (Tenn. Ch. App.) 64 S. W. 352, p. 1153.
Majoribanks v. Hovenden, 6 Ir. Eq. 238, p. 1159, 1168.
Majors v. Cowell, 51 Cal. 478, p. 1067, 1088, 1089.
Majors v. Everton, 89 Ill. 56, 31 Am. Rep. 65, p. 2142.
Makepiece v. Rogers, 11 Jur., N. S., 215, p. 2800.
Makesey v. Ramseys, 9 Clark & Finelly, 813, Ames' Cas. on Trusts, 13, p. 1913.
Makings v. Makings, 1 De Gex, F. & J. 355, p. 2486, 2488.
Malborn v. Grow, 15 Wash. 301, 46 Pac. 330, p. 1098, 1119, 1120.
Malbye v. Malbye, 15 Wash. 648, 47 Pac. 16, p. 673.
Malcolm v. Allen, 49 N. Y. 448, p. 725.
Malcolm v. O'Callaghan, 2 Madd. 349, 353, p. 1682, 1683.
Malcolm v. Scott, 3 Hare, 39, p. 195, 2562.
Malcolm v. Scott, 3 Macn. & G. 29, p. 2566.
Malden v. Merril, 2 Atk. 8, p. 1383, 1483.
Malder v. Buffalo Bill's Wild West Co., 132 Fed. 280, p. 2121.
Malette v. Wright, (Ga.) 48 S. E. 229, p. 1030.
Malin v. Malin, 1 Wend. 625, p. 1006.
Malins v. Brown, 4 N. Y. 403, p. 2781.
Malins v. Freeman, 2 Keen, 25, p. 1518.
Malins v. Keighley, 2 Ves. 333, 335, p. 1924, 1925, 1929.
Mallabar v. Mallabar, Cas. t. Talb. 78, p. 2327.
Mallett v. Dexter, 1 Curt. 178, p. 220, 2287, 2294, 2706.
Mallett v. Kaehler, 141 Ill. 70, 30 N. E. 549, p. 1033, 1039, 1048.
Malley v. Malley, 121 Iowa, 237, 96 N. W. 751, p. 2000.
Mallin v. Wenham, 209 Ill. 252, 101 Am. St. Rep. 233, 70 N. E. 564, p. 2584.
Malloney v. Horan, 49 N. Y. 111, 115, 10 Am. Rep. 335, p. 1396, 1398, 1427, 1444.
Mallory v. Craige, 15 N. J. Eq. 73, p. 335, 580.
Mallory v. Hitchcock, 29 Conn. 127, p. 1402, 1406.
Mallory v. Kissler, 18 Utah, 11, 72 Am. St. Rep. 765, 54 Pac. 892, p. 2049.
Mallory v. Mallory-Wheeler Co., 61 Conn. 135, 23 Atl. 708, p. 1753, 1760, 2025, 2082, 2084.
Mallory v. Stodder, 6 Ala. 801, p. 1272, 1345.
Mallory v. Vanderheyden, 3 Barb. Ch. 10, 1 N. Y. 452, 462, p. 2152.
Mallory v. West Shore, etc., R. R., 35 N. Y. Sup. Ct. 175, p. 725.
Mallory's Adm'r v. Craige, 15 N. J. Eq. 73, p. 2281, 2282, 2299.
Mallow v. Walker, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158, p. 1739, 2269.
Malmesbury v. Malmesbury, 31 Beav. 407, p. 1515.
Malone v. City of Philadelphia, 147 Pa. St. 416, 23 Atl. 628, 29 Wkly. Notes Cas. 251, p. 739.
Malone v. Kelley, 54 Ala. 532, p. 2080, 2082.
Malone v. Majors, 8 Humph. 577, 579, p. 825.
Malone's Committee v. Lebus, 25 Ky. Lew Rep. 1146, 77 S. W. 180, p. 1197, 1198.
Maloy v. Sloan, 44 Vt. 311, p. 2006.
Malpas v. Ackland, 3 Russ. 273, p. 1001, 1050.
Man v. Ward, 2 Atk. 228, p. 1634.
Manahan v. Gibbons, 19 Johns. 427, p. 2094.
Manasses v. Dent, 89 Ala. 565, 8 South. 108, p. 991, 997.
Manaton v. Molesworth, 1 Eden, 25 p. 2717.
Manby v. Bewicke, 3 Kay & J. 342, p. 1726, 1727, 1728.
Manby v. Robinson, L. R. 4 Ch. 347, p. 2649.
Manchester v. McGee, 4 Gilm. 511, p. 2789.
Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816, p. 2201.
Manchester & L. R. R. v. Concord R. R., 66 N. H. 100, 130–133, 49 Am. St. Rep. 582, 587–591, 9 L. R. A. 689, p. 1690, 1713, 1721.

Manchester & M. R'y, In re, L. R. 14 Ch. Div. 645, p. 2660.
Manchester & S. R'y, In re, 19 Beav. 365, p. 2319.
Manchester Fire Assur. Co. v. Stockton C. H. & A. Works, 38 Fed. 378, p. 380.
Manchester Print Works v. Stimson, 2 R. I. 415, p. 2650.
Manchester School Case, L. R. 2 Ch. 497, p. 1963.
Manchester Sheffield & L. R'y Co. v. North Central, etc., Co., 13 App. Cas. (H. L.) 554, p. 2373.
Manchester Sheffield & L. R'y v. Workshop Board of Health, 23 Beav. 198, 209, p. 2695.
Manderson v. Commercial Bank, 28 Pa. St. 379, p. 2118.
Manderson's Appeal, 113 Pa. St. 631, 6 Atl. 893, p. 2104.
Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 37, p. 1689.
Mandeville v. Welch, 5 Wheat. 277, 286, 5 L. ed. 67, p. 195, 304, 2562, 2563, 2568.
Manes v. Durant, 2 Rich. Eq. 404, 46 Am. Dec. 65, p. 2166.
Maney v. Casserly, (Mich.) 96 N. W. 478, p. 2275.
Mangles v. Dixon, 1 Macn. & G. 437, 3 H. L. Cas. 702, 731, p. 1237, 1255, 1613.
Mangles v. Grand Dock C. Co., 10 Sim. 519, p. 1698.
Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84, p. 1101, 1116, 1118, 1121.
Mangum v. White, 16 Tex. Civ. App. 254, 41 S. W. 80, p. 1373.
Manhattan Brass & Mfg. Co. v. Thompson, 58 N. Y. 80, p. 2201.
Manhattan Co. v. Evertson, 6 Paige, 457, p. 1327.
Manhattan Fire Ins. Co. v. Weill, 28 Gratt. 389, 26 Am. Rep. 364, p. 1159.
Manhattan Life Ins. Co. v. Wright, (C. C. A.) 126 Fed. 82, p. 751, 752, 753, 763.
Manhattan Gas Light Co. v. Barker, 7 Rob. (N. Y.) 523, p. 2683.
Manhattan Mfg. & F. Co. v. N. J. Stock Yard, etc., Co., 23 N. J. Eq. 161, p. 2675.
Manhattan Mfg. & F. Co. v. Van Keuren, 23 N. J. Eq. 251, p. 2676.
Manhattan Med. Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, p. 669, 1695.
Manice v. Manice, 43 N. Y. 303, p. 1895, 2218, 2219, 2224.
Manistee Iron Works Co. v. Shores Lumber Co., 92 Wis. 21, 65 N. W. 863, p. 739.
Manley v. Bitzer, 91 Ky. 596, 16 S. W. 464, 34 Am. St. Rep. 242, p. 2573.
Manley v. Park, (Kan.) 75 Pac. 557, p. 2550.
Manlove v. Bale, 2 Vern. 84, p. 2027.
Manlove v. Burger, 38 Ind. 211, p. 2662.
Manly v. Howlett, 55 Cal. 94, p. 2780.
Manly v. Kidd, 33 Miss. 141, p. 2278.
Manly v. Slason, 21 Vt. 271, 52 Am. Dec. 60, p. 2504.
Manly v. State, 7 Md. 135, 146, p. 568.
Mann v. Appel, 31 Fed. 378, 383, p. 515.
Mann v. Bergmann, 203 Ill. 406, 67 N. E. 814, p. 1435.
Mann v. Best, 62 Mo. 497, p. 1343.
Mann v. Betterly, 21 Vt. 326, p. 1671, 1728.
Mann v. City of Utica, 44 How. Pr. 334, p. 2752, 2756.
Mann v. Copland, 2 Madd. 223, p. 2215, 2219, 2220.
Mann v. Darlington, 15 Pa. St. 310, p. 1791, 2041.
Mann v. Fairchild, 3 Abb. App. 152, p. 2662.
Mann v. Flower, 26 Minn. 479, p. 2703.
Mann v. Jackson, 84 Me. 400, 30 Am. St. Rep. 358, 24 Atl. 886, 16 L. R. A. 707, p. 1684.
Mann v. Roberts, 79 Tenn. (11 Lea) 57, p. 1070.
Mann v. Worrall, 16 Barb. 221, p. 2708.
Mannerback's Estate, In re, 133 Pa. St. 342, 19 Atl. 552, p. 1846.
Manners v. Johnson, L. R. 1 Ch. Div. 673, p. 2673, 2698.
Manners v. Manners, 2 N. J. Eq. 384, 35 Am. Dec. 512, p. 2741.
Manners v. Mew, L. R. 29 Ch. Div. 725, 730, p. 1196, 1295.
Manners v. Phila. Library Co., 93 Pa. St. 165, 39 Am. Rep. 741, p. 1939, 1976.

Manning v. Craig, 4 Pa. St. 436, 41 Am. Dec. 739, p. 2208.
Manning v. Frazier, 96 Ill. 279, p. 2499, 2509.
Manning v. Gill, L. R. 13 Eq. 485, p. 1725.
Manning v. Hayden, 5 Saw. 360, p. 1771, 2032, 2043.
Manning v. Keenan, 73 N. Y. 45, p. 1385.
Manning v. McClure, 36 Ill. 490, p. 1327.
Manning v. Manning, 1 Johns. Ch. 530, p. 65.
Manning v. Manning, 79 N. C. 300, 28 Am. Rep. 324, p. 2196.
Manning v. Markel, 19 Iowa, 103, p. 2437.
Manning v. Pippen, 86 Ala. 357, 11 Am. St. Rep. 46, 5 South. 572, p. 2039.
Manning v. Spooner, 3 Ves. 114, 117, p. 2222.
Manning v. Thesiger, 3 Mylne & K. 29, p. 889.
Manning v. Wadsworth, 4 Md. 59, p. 2772.
Mannix v. Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753, p. 1976.
Mannox v. Greener, L. R. 14 Eq. 456, p. 2488.
Mann's Appeal, 1 Pa. St. 24, p. 1276, 1381.
Mann's Ex'r v. Falcon, 25 Tex. 271, p. 2361.
Mansell v. Mansell, 2 P. Wms. 672, 678, 681, p. 168, 1198, 2016, 2029.
Manser v. Back, 6 Hare, 443, p. 1517, 1518, 1519, 1520.
Manser v. Div, 1 Kay & J. 451, p. 281.
Manser v. Dix, 8 De Gex, M. & G. 703, 712, p. 2049, 2065.
Mansfield v. Alwood, 84 Ill. 497, p. 2056, 2057, 2066, 2067.
Mansfield v. Dameron, 42 W. Va. 794, 57 Am. St. Rep. 884, 26 S. E. 527, p. 2534.
Mansfield v. Excelsior Refining Co., 135 U. S. 326, 10 S. Ct. 825, p. 1100, 1127.
Mansfield v. Garrison, (Tex. Civ. App.) 48 S. W. 554, p. 1157.
Mansfield v. Gregory, 8 Nebr. 435, p. 1102.
Mansfield v. Lynch, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285, p. 1503.
Mansfield v. Mansfield, 203 Ill. 92, 67 N. E. 497, p. 2300.
Mansfield v. Sherman, 81 Me. 365, 17 Atl. 300, p. 1517.
Mansur & Tebbetts Impl. Co. v. Beer, 19 Tex. Civ. App. 311, 45 S. W. 972, p. 1074, 1075, 1079.
Mansur & Tebbetts Impl. Co. v. Tissier Arms & Hdw. Co., 136 Ala. 597, 33 South. 818, p. 744.
Mansur & Tebbetts Impl. Co. v. Willet, (Okla.) 61 Pac. 1066, p. 728, 743.
Mant v. Leith, 15 Beav. 524, p. 1073.
Manufacturers' & Mech. Bank v. Bank of Pennsylvania, 7 Watts & S. 335, 42 Am. Dec. 240, p. 1107, 1123.
Manufacturers' & Traders Bank v. Hazard, 30 N. Y. 226, 230, p. 1426, 1442, 1443, 1444.
Manufacturers' Bank v. Rugee, 59 Wis. 223, 18 N. W. 251, p. 2375.
Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 12 Am. St. Rep. 598, 20 N. E. 193, 2 L. R. A. 699, p. 1914.
Manufacturing Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568, p. 1020.
Many v. Beekman Iron Co., 9 Paige, 188, p. 245, 265, 1478, 1490, 1515.
Mapes v. Scott, 4 Ill. App. 268, p. 2653, 2657.
Maples v. Geller, 1 Nev. 233, 237, 239, p. 683, 2607.
Maples v. Marsh, 19 Iowa, 381, p. 2269.
Mapleton Bank v. Standrod, 8 Iowa, 740, 71 Pac. 119, p. 1221.
Mapps v. Sharpe, 32 Ill. 13, p. 2417.
Mara v. Browne, [1896] 1 Ch. 199, p. 2008.
Mara v. Pierce, 9 Gray, 306, p. 1146.
Marble v. McKenney, 60 Me. 332, p. 555.
Marble Co. v. Ripley, 10 Wall. 339, 356, 357, p. 662, 2765, 2767, 2770, 2771, 2773, 2774.
Marble Sav. Bank v. Mesarvey, 101 Iowa, 286, 70 N. W. 198, p. 2413, 2414.
Marbury v. Ehlen, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467, p. 982, 1057.

Marbury v. Madison, 1 Cranch, 49, p. 282.
March v. Davison, 9 Paige, 580, p. 245, 255, 259, 263, 324.
March v. Eastern R. R., 40 N. H. 548, 567, 77 Am. Dec. 732, p. 530, 531, 2125.
March v. Ludlum, 3 Sand. Ch. 35, p. 277.
March v. Russell, 3 Mylne & C. 31, p. 2097.
Marchbanks v. Banks, 44 Ark. 48, p. 1065, 1080, 1335, 1336.
Marchioness of Annandale v. Harris, 2 P. Wms. 432, p. 667, 669.
March, Price & Co. v. Chambers, 30 Gratt. 299, p. 1273.
Marco v. Low, 55 Me. 549, p. 555.
Marcy v. Amazeen, 61 N. H. 131, 60 Am. St. Rep. 320, p. 1912.
Marcy v. Dunlap, 5 Lans. 365, p. 659, 663.
Marden v. Dorthy, 160 N. Y. 39, 54 N. E. 726, 46 L. R. A. 694, p. 1639.
Mare v. Sandford, 1 Giff. 288, p. 1790.
Mare v. Smedburgh, 8 Paige, 600, p. 1789.
Mare v. Walker, 3 Giff. 100, p. 1790.
Margarum v. J. S. Christie Orange Co., 37 Fla. 165, 19 South. 637, p. 2470, 2475.
Margetts v. Barringer, 7 Sim. 482, p. 2145.
Margraf v. Muir, 57 N. Y. 155, p. 1513, 2770, 2771.
Marie M. E. Church v. Trinity M. E. Church, (Ill.) 69 N. E. 73, p. 1900.
Marine & Fire Ins. Bank v. Jauncey, 1 Barb. 486, p. 2569.
Marine & Fire Ins. Bank v. Jauncey, 3 Sand. 257, p. 2568.
Marine & River Mfg. Co. v. Bradley, 105 U. S. 182, p. 353.
Marine Bank v. Fulton Bank, 2 Wall. 252, 17 L. ed. 785, p. 1913, 2082, 2569.
Marine Bank v. International Bank, 9 Wis. 57, 68, p. 725, 2392.
Marine Bank v. Jauncey, 1 Barb. 486, p. 1228.
Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 336, p. 307, 1461, 2702, 2708.
Mariner v. Dennison, 78 Cal. 202, 20 Pac. 386, p. 1616.
Marion Mfg. Co. v. Harding, 155 Ind. 648, 58 N. E. 194, p. 1154.
Markham v. Angier, 57 Ga. 43, p. 2709.
Markham v. Guerrant, 4 Leigh, 279, p. 1841.
Markham v. Howell, 33 Ga. 508, p. 2681.
Markham v. Huff, 72 Ga. 874, p. 567.
Markillie v. Ragland, 77 Ill. 98, p. 2489.
Markley v. Mineral City, 58 Ohio St. 430, 51 N. E. 28, 65 Am. St. Rep. 776, p. 670, 1712.
Markoe v. Andras, 67 Ill. 34, p. 192, 2522, 2525, 2527.
Marlatt v. Warwick, 18 N. J. Eq. 108, 19 N. J. Eq. 439, p. 1702, 1712, 2039.
Marlett v. Marlett, 14 Hun, 313, p. 181, 2300.
Marlow v. Barlew, 53 Cal. 456, p. 2200.
Marlow v. Marlow, 77 Ill. 633, p. 1642.
Marlow v. Pitfield, 1 P. Wms. 558, p. 2603, 2605.
Maroney v. Boyle, 141 N. Y. 462, 36 N. E. 511, 38 Am. St. Rep. 821, p. 1191, 2497, 2501, 2511, 2513.
Marples v. Bainbridge, 1 Madd. 590, p. 1683.
Marquat v. Marquat, 12 N. Y. 336, p. 231, 355.
Marquette etc. R. R. v. City of Marquette, 35 Mich. 504, p. 2756.
Marquis of Breadalbane v. Marquis of Chandos, 2 Mylne & C. 711, 719, 740, p. 1476, 1516.
Marquis of Bute v. Glamorganshire Can. Co., 1 Phill. Ch. 681, p. 2738.
Marquis of Camden v. Murray, L. R. 16 Ch. Div. 161, p. 2619.
Marquis of Cholmondeley v. Lord Clinton, 2 Jacob & W. 1, 189, p. 2437.
Marquis of Donegal v. Stewart, 3 Ves. 446, p. 283.
Marquis of Townshend v. Stangroom, 6 Ves. 328, 332, 333, 338, 339, p. 1487, 1494, 1499, 1506, 1515, 1519, 1521, 1540.
Marr v. Lewis, 31 Ark. 203, 25 Am. Rep. 553, 2187.
Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386, p. 1603.
Marriott, In re, 2 Molloy, 516, p. 847.
Marriott v. Anchor etc. Co., 3 De Gex, F. & J. 177, 2429.
Marriott v. Sam Badger, 5 Md. 306, p. 782, 855, 857.

Marrow v. Marrow, Busb. Eq. 148, p. 2300, 2302.
Marr's Appeal, 78 Pa. St. 66, p. 1603.
Marsden v. Panshall, 1 Vern. 407, 437, (1686) p. 257, 260, 284.
Marsden's Trust, In re, 4 Drew. 594, 601, p. 1657.
Marseilles, etc., Co., In re, L. R. 7 Ch. 161, p. 1160.
Marseilles, etc., Co. v. Aldrich, 86 Ill. 504, p. 2118.
Marselis v. Morris Canal Co., 1 N. J. Eq. 31, 35–39, p. 376, 397, 426, 427, 453.
Marsh v. Att'y-Gen., 2 Johns. & H. 61, p. 1962.
Marsh v. City of Brooklyn, 59 N. Y. 280, p. 2755, 2757.
Marsh v. Cook, 32 N. J. Eq. 262, p. 1603.
Marsh v. Davison, 9 Paige, 580, 584, 585, 586, p. 246, 258, 274, 323.
Marsh v. Evans, 1 P. Wms. 668, p. 2225, 2226.
Marsh v. Falker, 40 N. Y. 562, 566, p. 1576, 1583, 1584.
Marsh v. Garney, 69 N. H. 236, 45 Atl. 745, p. 1207.
Marsh v. Goodrell, 11 Iowa, 474, p. 683, 2607.
Marsh v. Kaye, 168 N. Y. 196, 61 N. E. 177, 2 Ames' Cas. Eq. Jur. 89, p. 215, 377.
Marsh v. Lee, 1 Lead. Cas. Eq. 4th Am. ed., Eng. note, 837, p. 1375.
Marsh v. Lee, 2 Vent. 337, 1 Cas. Ch. 162, p. 1374.
Marsh v. Marsh, 74 Ala. 418, p. 1516.
Marsh v. Means, 3 Jur., N. S., 790, p. 1947.
Marsh v. Milligan, 3 Jur., N. S., 979, p. 2769.
Marsh v. Pike, 10 Paige, 595, p. 2705, 2796.
Marsh v. Ramsey, 57 S. C. 121, 35 S. E. 433, p. 1327.
Marsh v. Reed, 10 Ohio, 347, p. 385.
Marsh v. Renton, 99 Mass. 132, 135, p. 2080.
Marsh v. Russell, 66 N. Y. 288, p. 1700.
Marsh v. Supervisors of Clark County, 42 Wis. 502, p. 2678.
Marsh v. Turner, 4 Mo. 253, p. 2501.
Marsh v. Wheeler, (Conn.) 59 Atl. 410, p. 1161.
Marsh v. Wheeler, 2 Edw. Ch. 156, 160, p. 2325.
Marsh v. Whitmore, 21 Wall. 178, p. 1770, 1788.
Marshal v. Crutwell, L. R. 20 Eq. 328, p. 1988, 1997, 2142.
Marshall v. Baltimore & O. R. R., 16 How. 314, p. 1699.
Marshall v. Billingsly, 7 Ind. 250, p. 1730.
Marshall v. Caldwell, 41 Cal. 611, 615, p. 2776.
Marshall v. Carson, 38 N. J. Eq. 250, 48 Am. Rep. 310, p. 2080.
Marshall v. Christmas, 3 Humph. 616, 39 Am. Dec. 199, p. 2502.
Marshall v. Collett, 1 Younge & C. 232, 238, p. 1383, 1483, 1487.
Marshall v. Crow's Adm'r, 29 Ala. 278, p. 2744.
Marshall v. Davies, 78 N. Y. 414, 420, 421, p. 2407, 2415.
Marshall v. Fisk, 6 Mass. 24, 30, 4 Am. Dec. 76, p. 1101.
Marshall v. Fowler, 16 Beav. 249, p. 646, 2173.
Marshall v. Holloway, 2 Swanst. 432, p. 2098.
Marshall v. Homier, 13 Okl. 264, 74 Pac. 308, p. 1542.
Marshall v. Hopkins, 15 East, 309, p. 1545.
Marshall v. Jaquith, 134 Mass. 138, p. 2142.
Marshall v. Joy, 17 Vt. 546, p. 1761, 1763.
Marshall v. Marshall, 11 Colo. App. 505, 53 Pac. 617, p. 1879.
Marshall v. Marshall, (Tex. Civ. App.) 42 S. W. 353, p. 1329.
Marshall v. Marshall, 27 Wkly. Rep. 399, p. 669.
Marshall v. Moore, 36 Ill. 321, 326, p. 2447.
Marshall v. Peck, 91 Ill. 187, p. 2780.
Marshall v. Pitts, 39 S. C. 390, 17 S. E. 831, p. 213.
Marshall v. Riley, 7 Ga. 367, p. 274.
Marshall v. Roberts, 18 Minn. 405, (Gil. 365) 10 Am. Rep. 201, p. 1338.
Marshall v. Ross, L. R. 8 Eq. 651, p. 1695, 2690.
Marshall v. Stephens, 8 Humph. 159, 173, 47 Am. Dec. 601, p. 1758, 2155.

Marshall v. Westrope, 98 Iowa, 324, 67 N. W. 257, p. 1482, 1486, 1487, 1489.
Marshall's Ex'rs v. Hadley, 50 N. J. Eq. (5 Dick.) 547, 25 Atl. 325, p. 2351.
Marshall's Ex'rs v. Hall, 42 W. Va. 641, 26 S. E. 300, p. 2020.
Marshall's Trustee v. Rash, 87 Ky. 117, 12 Am. St. Rep. 467, 7 S. W. 379, p. 1844.
Marston v. Brackett, 9 N. H. 336, p. 1294.
Marston v. Durgin, 54 N. H. 347, 374, p. 527, 529, 627.
Marston v. Humphrey, 24 Me. 513, 517, p. 551.
Marston v. Marston, 54 Me. 476, p. 1803.
Marston v. Williams, 45 Minn. 116, 22 Am. St. Rep. 719, 47 N. W. 644, p. 1096, 1123.
Marten v. Van Schaick, 4 Paige, 479, p. 2656.
Martin, Ex parte, 13 Ark. 198, 58 Am. Dec. 321, p. 2687.
Martin v. Baldwin, 30 Minn. 537, 16 N. W. 449, p. 1276.
Martin v. Bates, 20 Ky. Law Rep. 1798, 50 S. W. 38, p. 1101.
Martin v. Bell, 9 Rich. Eq. 42, 70 Am. Dec. 200, p. 2144, 2146.
Martin v. Berwind-White Coal Min. Co., 114 Fed. 553, p. 738.
Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 823, p. 1192, 1267, 1322, 1327, 1331, 2542.
Martin v. Brown, 4 Minn. 282, (Gil. 201) p. 1338.
Martin v. Campbell, 35 Ark. 137, p. 2259.
Martin v. Cauble, 72 Ind. 67, p. 2499, 2509, 2513.
Martin v. Cotter, 3 Jones & L. 496, 506, 507, p. 1053, 1590.
Martin v. Drinkwater, 2 Beav. 215, p. 888.
Martin v. Fancher, 21 Tenn. (2 Humph.) 510, p. 234.
Martin v. Fort, 83 Fed. 19, 23, 54 U. S. App. 325, p. 508.
Martin v. Foster, 7 De Gex, M. & G. 98, p. 2168, 2173, 2621.
Martin v. Fridley, 23 Minn. 13, p. 2364.
Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446, 448, p. 1837, 1868, 1870, 1871, 1876, 1912.
Martin v. Gale, L. R. 4 Ch. Div. 428, p. 1725.
Martin v. Graves, 5 Allen, 601, p. 310, 311, 542, 2753, 2756.
Martin v. Hamlin, 18 Mich. 354, 100 Am. Dec. 181, p. 1487.
Martin v. Headon, L. R. 2 Eq. 425, 434, p. 2687, 2698.
Martin v. Hewitt, 44 Ala. 418, p. 1389.
Martin v. Humphrey, 58 Nebr. 414, 78 N. W. 715, p. 2405.
Martin v. Jackson, 27 Pa. St. 504, 506, 509, 67 Am. Dec. 489, p. 1037, 1325.
Martin v. Jordan, 60 Me. 531, p. 1565.
Martin v. Kuntzmuller, 37 N. Y. 396, p. 1233.
Martin v. Maberry, 1 Dev. Eq. 169, p. 2642.
Martin v. McCord, 5 Watts, 493, 30 Am. Dec. 342, p. 1977.
Martin v. McCormack, 8 N. Y. 331, 335, p. 1477.
Martin v. McReynolds, 6 Mich. 70, p. 2417.
Martin v. Maine Cent. R. Co., 93 Me. 100, 21 Atl. 740, p. 1416, 1422, 1424.
Martin v. Marshall, 34 Kan. 147, 37 Pac. 977, p. 983.
Martin v. Martin, 35 Ala. 560, p. 1648.
Martin v. Martin, 46 App. Div. 445, 61 N. Y. Supp. 813, p. 1866.
Martin v. Martin, 16 B. Mon. 8, p. 2037.
Martin v. Martin, 5 Bush, 47, p. 2665.
Martin v. Martin, 1 Heisk. 644, 653, p. 1730, 1779.
Martin v. Martin, 1 Hoff. Ch. 432, 467, p. 2167.
Martin v. Martin, 164 Ill. 640, 45 N. E. 1007, 56 Am. St. Rep. 219, p. 652, 2519.
Martin v. Martin, (Iowa) 94 N. W. 493, p. 2040.
Martin v. Martin, 44 Kan. 295, 24 Pac. 418, p. 342.
Martin v. Martin, 43 Oreg. 119, 72 Pac. 639, p. 1906.
Martin v. Martin, 52 W. Va. 99, 44 S. E. 198, p. 2292, 2299, 2300.
Martin v. Melville, 11 N. J. Eq. 222, p. 725, 726.

Martin v. Michael, 23 Mo. 50, 66 Am. Dec. 656, p. 2791.
Martin v. Mobile & O. R. R., 7 Bush, 116, 124, p. 585.
Martin v. Nash, 31 Miss. 324, p. 1054.
Martin v. Nixon, 92 Mo. 26, 4 S. W. 503, p. 1272, 2476.
Martin v. Nulkin, 2 P. Wms. 266, p. 2676.
Martin v. O'Bannon, 35 Ark. 62, p. 2529, 2534.
Martin v. Ogden, 41 Ark. 186, 187, p. 1099, 1144, 1270.
Martin v. Pycroft, 2 De Gex, M. & G. 785, 800, p. 1519, 1520, 1521, 1733.
Martin v. Reed, 30 Ind. 218, p. 1861.
Martin v. Richardson, 68 N. C. 255, p. 1226, 1234.
Martin v. Righter, 10 N. J. Eq. 510, p. 1452.
Martin v. Robinson, 67 Tex. 368, 3 S. W. 550, p. 1344, 1345, 1384, 1649.
Martin v. Sale, 1 Bail. Eq. 1, 24, p. 1148.
Martin v. Sedgwick, 9 Beav. 333, p. 1211, 1214.
Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591, p. 1177.
Martin v. Spier, 1 Hayw. (N. C.) 369, p. 570.
Martin v. Thomas, (W. Va.) 49 S. E. 118, p. 1027, 1028.
Martin v. Tidwell, 36 Ga. 332, 345, p. 222, 224, 334, 335, 347.
Martin v. Frimmer, L. R. 11 Ch. Div. 341, p. 168.
Martin v. Veeder, 20 Wis. 466, p. 1703, 2555.
Martin v. Wilbourne, 66 N. C. 321, p. 2052.
Martin v. Wright, 6 Sim. 297, p. 2688.
Martin v. Wyncoop, 12 Ind. 266, 74 Am. Dec. 209, p. 1754.
Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365, p. 1430.
Martindale v. Alexander, 26 Ind. 104, 87 Am. Dec. 458, p. 2742.
Martindale v. Price, 14 Ind. 115, p. 1124.
Martineau v. McCollum, 4 Chand. 153, p. 1227.
Martinez v. Cooper, 2 Russ. 198, 214, p. 1190, 1430, 1434.
Martinez v. Lindsey, 91 Ala. 334, 8 South. 787, p. 1756.
Martinius v. Helmuth, 2 Ves. & B. 412, p. 2637.
Martin's Appeal, 97 Pa. St. 85, p. 2455.
Martinson v. Clowes, 21 Ch. D. 857, p. 1755.
Martyr v. Lawrence, 2 De Gex, J. & S. 261, 271, p. 2694.
Martzell v. Stauffer, 3 Penr. & W. 398, 401, p. 559.
Marvel v. Marvel, (Nebr.) 97 N. W. 640, p. 1900.
Marvin v. Ellwood, 11 Paige, 365, p. 2645, 2649.
Marvin v. Inglis, 39 How. Pr. 329, p. 1237, 1239.
Marvin v. Prentice, 49 How. Pr. 385, p. 2376, 2380.
Marvin v. Stimpson, 23 Colo. 174, 46 Pac. 673, p. 612, 616.
Marvin v. Titsworth, 10 Wis. 320, p. 1896.
Marvine v. Drexel's Ex'rs, 68 Pa. St. 362, p. 2676.
Marwick v. Andrews, 25 Me. 525, p. 550.
Marx v. Davis, 56 Miss. 745, 55 Miss. 376, p. 2462.
Marx & Sons, Henry v. Jordan, (Miss) 36 South. 386, p. 1101, 1124.
Maryland Clay Co. v. Simpers, 96 Md. 1, 53 Atl. 424, p. 309.
Maryland Grange Agency v. Lee, 72 Md. 161, 19 Atl. 534, p. 1844.
Mask v. Miller, 7 Baxt. 527, p. 2108.
Maskell v. Farrington, 8 Jur., N. S., 1198, 3 De Gex, J. & S. 338, p. 2488, 2490.
Maskell v. Goodall, 2 Disn. 282, p. 782, 857.
Mason v. Ainsworth, 58 Ill. 163, p. 2419.
Mason v. Armitage, 13 Ves. 25, p. 1513, 1518, 1539.
Mason v. Callender, 2 Minn. 350, 72 Am. Dec. 102, p. 734.
Mason v. Crosby, 1 Wood. & M. 342, p. 1583, 1588, 1625.
Mason v. Gardiner, 4 Brown Ch. 436, 437, p. 648, 649, 1704, 1705.
Mason v. Gardiner, (Mass.) 71 N. E. 952, p. 2238.
Mason v. Hamilton, 5 Sim. 19, p. 2646.
Mason v. Harris, L. R. 11 Ch. Div. 97, 107, p. 2125.

Mason v. Lord, 40 N. Y. 476, 487, p. 1236, 1240.
Mason v. Martin, 4 Md. 124, p. 1754, 1756.
Mason v. Mason's Ex'rs, 4 Sand. Ch. 623, p. 2051.
Mason v. Moody, 26 Miss. 184, p. 2377.
Mason v. Morley, 34 Beav. 471, 475, p. 2082.
Mason v. Mullahey, 145 Ill. 383, 34 N. E. 36, p. 986, 1039.
Mason v. Payne, 47 Mo. 517, p. 2779.
Mason v. Payne, Walk. Ch. 459, p. 2447.
Mason v. Perry, 22 R. I. 475, 48 Atl. 671, p. 1934, 1953, 1980.
Mason v. Pierson, 69 Wis. 585, 34 N. W. 921, p. 2041.
Mason v. Piggott, 11 Ill. 85, 89, p. 148, 210, 221, 2706.
Mason v. Pomeroy, 151 Mass. 164, 24 N. E. 202, 7 L. R. A. 771, p. 2103.
Mason v. Ring, 3 Abb. App. 210, p. 1769.
Mason's Ex'rs v. Meth. Epis. Ch., 27 N. J. Eq. 47, p. 888, 1933, 1943, 1945, 1953, 1961, 1975.
Massachusetts Benefit Life Ass'n v. Lohmiller, 74 Fed. 23, 29, 20 C. C. A. 274, 46 U. S. App. 103, p. 498.
Massaker v. Massaker, 13 N. J. Eq. 264, p. 2493.
Massam v. Thorley's etc. Co., L. R. 6 Ch. Div. 574, p. 2696.
Massey v. Banner, 1 Jacob & W. 241, 247, p. 2060, 2065.
Massey v. Davis, 2 Ves. 317, p. 1761, 1764.
Massey v. Fisher, 62 Fed. 958, p. 1915, 2019.
Massey v. Huntington, 118 Ill. 80, 7 N. E. 269, p. 1864, 1881.
Massey v. McIlwain, 2 Hill Eq. 421, 428, p. 2475.
Massey v. Modawell, 73 Ala. 421, p. 2312.
Massey v. Parker, 2 Mylne & K. 174, p. 2144, 2146, 2159.
Massey v. Rowen, L. R. 4 H. L. 288, 301, p. 2143, 2146.
Massey v. Thompson, 2 Nott & McC. 105, p. 1105.
Massey v. Westcott, 40 Ill. 160, p. 1272, 1279.
Massie v. Greenhow's Ex'rs, 2 Pat. & H. 255, p. 992.
Massie v. Sharpe, 13 Iowa, 542, p. 2392.
Massie v. Stradford, 17 Ohio St. 596, p. 2722.
Massie v. Watts, 6 Cranch, 148, p. 519, 520, 1764, 2632, 2633.
Massie v. Wilson, 16 Iowa, 391, p. 2448.
Massie v. Yates, (Tex. Civ. App.) 29 S. W. 1132, p. 1103.
Massie's Adm'r v. Heiskell's Trustee, 80 Va. 789, 801, p. 238.
Masson v. Bovet, 1 Denio, 69, 43 Am. Dec. 651, p. 1788.
Masson's Appeal, 70 Pa. St. 26, 29, p. 1603, 1607.
Mast v. Henry, 65 Iowa, 193, 21 N. W. 559, p. 1346.
Mast v. Raper, 81 N. C. 330, p. 2504, 2516.
Mastelar v. Edgarton, 44 Iowa, 495, p. 2727.
Masten v. Blackwell, 8 Hun, 313, p. 683, 2607.
Master v. Fuller, 4 Brown Ch. 19, 1 Ves. 513, p. 2185.
Master v. Hansard, L. R. 4 Ch. Div. 718, p. 2673.
Master v. Miller, 4 Term Rep. 320, 340, 341, p. 157, 2549.
Masters v. Masters, 1 P. Wms. 421, 423, p. 886.
Masters v. Templeton, 92 Ind. 447, p. 2499, 2513.
Masterson v. Beers, 1 Sweeny, 406, 6 Rob. (N. Y.) 368, p. 1588.
Masterson v. Burnett, 27 Tex. Civ. App. 370, 66 S. W. 90, p. 1281.
Masterson v. Cohen, 46 Tex. 520, p. 2524, 2525.
Masterson v. Hoyt, 55 Barb. 520, p. 2756.
Masterson v. Pullen, 62 Ala. 145, p. 2306, 2311, 2316.
Masterson v. West End etc. R. R., 5 Mo. App. 64, p. 1147.
Mastin v. Halley, 61 Mo. 196, p. 2769, 2773.
Mastin v. Marlow, 65 N. C. 695, p. 1743.
Masury v. Arkansas Nat. Bank, 93 Fed. 603, 35 C. C. A. 476, reversing 87 Fed. 381, p. 1219, 1221.

Mateskey v. Feldman, 75 Wis. 103, 43 N. W. 733, p. 1024, 1030.
Mather v. Scoles, 35 Ind. 1, p. 2776.
Mathews v. Aikin, 1 N. Y. 595, p. 2401.
Mathews v. Crockett's Adm'r, 82 Va. 394, p. 1665.
Mathews v. Davis, 191 Ill. 391, 61 N. E. 68, p. 2078.
Mathews v. Everitt, 23 N. J. Eq. 473, p. 1358.
Mathews v. Heyward, 2 S. C. 239, p. 2030.
Mathews v. Jones, 2 Anstr. 506, p. 2670.
Mathews v. Jones, 47 Nebr. 616, 66 N. W. 622, p. 1406.
Mathews v. Leaman, 24 Ohio St. 615, p. 1900.
Mathews v. Mathews, 2 Ves. Sr. 635, 636, p. 873, 875.
Mathews v. McPherson, 65 N. C. 189, p. 2055.
Mathews v. Missouri, K. & T. Trust Co., 69 Minn. 318, 72 N. W. 121, p. 648.
Mathews v. Stephenson, 6 Pa. St. 496, p. 2105.
Mathews v. Tyree, 53 W. Va. 298, 44 S. E. 526, p. 2292, 2300.
Mathews v. Warner, 6 Fed. 461, p. 1705.
Mathias v. Mathias, 3 Smale & G. 552, p. 950, 958, 2024.
Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015, p. 1164, 1165.
Mathis v. Stufflebeam, 94 Ill. 481, p. 1992.
Matlock v. Todd, 25 Ind. 128, 130, p. 567, 585, 2729.
Matson v. Swift, 8 Beav. 368, p. 2318.
Mattair v. Payne, 15 Fla. 682, p. 2729, 2741.
Mattes v. Frankel, 157 N. Y. 603, 52 N. E. 585, 68 Am. St. Rep. 804, p. 1436.
Matteson v. Thomas, 41 Ill. 110, p. 2424, 2447.
Mattfield v. Huntington, 17 Tex. Civ. App. 716, 43 S. W. 53, p. 1034, 1039, 1048, 1103, 1119, 1148.
Matthew v. Bowler, 6 Hare, 110, p. 2510.
Matthew v. Brise, 14 Beav. 341, 345, p. 1775.
Matthew v. Hanbury, 2 Vern. 187, p. 667, 669.
Matthewman's Case, L. R. 3 Eq. 781, 787, p. 2179, 2185.
Matthews v. Brise, 6 Beav. 239, p. 2058.
Matthews v. Daniels, (Ark.) 21 S. W. 469, p. 1756.
Matthews v. Demerritt, 22 Me. 312, 313, p. 1026, 1027.
Matthews v. Light, 32 Me. 305, p. 1764.
Matthews v. Matthews, 141 Mass. 511, 6 N. E. 776, p. 824.
Matthews v. Matthews, 133 N. Y. 679, 31 N. E. 519, p. 215.
Matthews v. Newby, 1 Vern. 134, 2 Freem. 189, p. 180, 2203.
Matthews v. Sheehan, 69 N. Y. 585, p. 1238, 1239.
Matthews v. Terwilliger, 3 Barb. 50, p. 1518, 1523.
Matthews v. Torinus, 22 Minn. 132, p. 2004.
Matthews v. Tyree, 53 W. Va. 298, 44 S. E. 526, p. 202.
Matthews v. Ward, 10 Gill & J. 443, 454, p. 1848.
Matthison v. Clarke, 3 Drew. 3, p. 2371.
Mattingly v. Nye, 8 Wall. 370, p. 1802.
Mattingly v. Speak, 4 Bush, 316, p. 1515, 2726.
Mattingly v. Wulke, 2 Ill. App. 169, p. 1802.
Mattison v. Backus, 1 N. Y. 295, 296, p. 188, 2462.
Mattison v. Mattison, 1 Strob. Eq. 387, 391, 47 Am. Dec. 541, p. 565, 571.
Mattix v. Weand, 19 Ind. 151, p. 2499.
Mattocks v. Young, 66 Me. 459, 467, p. 2776.
Mauger v. Dick, 55 How. Pr. 132, p. 2696.
Maughlin v. Perry, 35 Md. 352, 360, p. 2777, 2779.
Maught v. Getzendanner, 65 Md. 527, 5 Atl. 471, 57 Am. Rep. 331, p. 1929, 1971.
Maul v. Rider, 59 Pa. St. 167, 171, 172, p. 974, 982, 994, 1011, 1018, 1128, 1148.
Maulding v. Coffin, 6 Tex. Civ. App. 416, 25 S. W. 480, p. 1103, 1148.

Maundrell v. Maundrell, 10 Ves. 246, 259, 260, 270, 271, p. 266, 1293, 1352.
Maundry v. Maundry, 1 Ch. Rep. 66, p. 1635.
Maunsell v. O'Brien, 1 Jones, (Ir.) 176, 184, 2028.
Maunsell v. White, 1 Jones & L. 539, 567, 4 H. L. Cas. 1039, 1056, p. 1561, 2591, 2592.
Maupin v. Emmons, 47 Mo. 304, 306, 307, p. 974, 978, 979, 1142, 1143, 1147, 1355.
Maupin v. McCormick, 2 Bush, 206, p. 2500.
Maurer's Appeal, 86 Pa. St. 380, p. 2154.
Maury v. Mason, 8 Port. 211, p. 215.
Mauser v. Back, 6 Hare, 443, 447, p. 1520.
Mawhorter v. Armstrong, 16 Ohio, 188, p. 570.
Mawson v. Leavitt, 37 N. Y. Supp. 1138, 16 Misc. Rep. 289, p. 735.
Mawson v. Stock, 6 Ves. 301, p. 1790.
Maxfield v. Burton, L. R. 17 Eq. 15, 18 p. 1005, 1010, 1016, 1017, 1292, 2539.
Maxfield v. Patchen, 29 Ill. 39, p. 2371.
Maxon v. Ayers, 28 Wis. 612, p. 2750, 2752.
Maxon v. Scott, 55 N. Y. 247, p. 2200.
Maxton v. Gheen, 75 Pa. St. 166, p. 1676.
Maxwell v. Allen, 78 Me. 32, 3 Atl. 386, 57 Am. Rep. 783, p. 743.
Maxwell v. Barringer, 110 N. C. 76, 28 Am. St. Rep. 668, 14 S. E. 516, p. 2049, 2308.
Maxwell v. Campbell, 45 Ind. 360, 363, p. 1372, 2714, 2722.
Maxwell v. Hyslop, L. R. 4 Eq. 407, p. 785, 802.
Maxwell v. Kennedy, 8 How. 210, p. 1647.
Maxwell v. Lady Mountacute, Prec. Ch. 526, p. 2379.
Maxwell v. Maxwell, 2 De Gex, M. & G. 705, 713, 16 Beav. 106, p. 785, 790, 791, 802, 805.
Maxwell v. Maxwell, 109 Ill. 588, p. 2002.
Maxwell v. Pittenger, 3 N. J. Eq. 156, p. 1733, 2776.
Maxwell v. Port Tenant, etc., Co., 24 Beav. 495, p. 1764.
Maxwell Land Grant Case, 121 U. S. 325, 122 U. S. 365, 7 Sup. Ct. 1015, 1271, p. 1516.
May v. Bennett, 1 Russ. 370, p. 1471.
May v. Borel, 12 Cal. 91, p. 1163, 1171.
May v. Boyd, 97 Me. 398, 94 Am. St. Rep. 509, 54 Atl. 938, p. 2272.
May v. Cleland, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163, p. 1222.
May v. Cradford, 150 Mo. 504, 51 S. W. 693, p. 728, 748.
May v. Hansom, 6 Cal. 642, p. 683, 2607.
May v. Hill, 14 Mont. 338, 36 Pac. 877, p. 1224.
May v. Le Claire, 78 U. S. (11 Wall.) 217, p. 1338.
May v. McKeenon, 6 Humph. 209, p. 1102.
May v. May, 109 Mass. 252, p. 2099.
May v. May, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. ed. 179, p. 2107, 2108.
May v. Platt, [1900] 1 Ch. 616, p. 1521.
May v. Roper, 4 Sim. 360, p. 2331.
May v. Skey, 16 Sim. 588, p. 2603.
May v. Sturdivant, 75 Iowa, 118, 39 N. W. 221, 9 Am. St. Rep. 463, p. 1028, 1030.
May v. Taylor, 6 Man. & G. 261, p. 1838.
Maybank v. Brooks, 1 Brown Ch. 84, p. 2228.
Mayberry v. Morris, 62 Ala. 113, p. 1079, 1088.
Maybin v. Kirby, 4 Rich. Eq. 105, p. 982, 1216, 1237, 1257.
Mayburry v. Brien, 15 Pet. 21, 36, p. 680, 1281.
Maybury v. Grady, 67 Ala. 147, 159, p. 2223.
Mayd v. Field, L. R. 3 Ch. Div. 587, p. 917, 2184, 2185.
Mayer v. Foulkrod, 4 Wash. C. C. 356, Fed. Cas. No. 9,341, p. 508.
Mayer v. Galluchat, 6 Rich. Eq. 1, p. 2098.
Mayer v. Mayor, etc., 63 N. Y. 455, p. 1511.
Mayer v. Ramsey, 46 Tex. 371, p. 1454.
Mayer v. Soc. for Visitation of the Sick, 2 Brewst. 385, p. 1944, 1976.
Mayes v. Hendry, 33 Ark. 240, p. 2498, 2512.

Mayfield, In re, 17 Mo. App. 684, p. 2107.
Mayfield v. Forsyth, 164 Ill. 32, 45 N. E. 403, p. 1907.
Mayham v. Coombs, 14 Ohio, 428, p. 1105, 1140, 1272, 1275, 1358, 2502.
Mayhew v. Crickett, 2 Swanst. 185, p. 2796.
Mayhew v. Phœnix Ins. Co., 23 Mich. 105, p. 1735.
Maynard v. Brown, 41 Mich. 298, p. 2769.
Maynard v. Cleaves, 149 Mass. 307, 21 N. E. 376, p. 1844.
Maynard v. Hoskins, 9 Mich. 485, p. 2004.
Maynard v. Railey, 2 Nev. 313, p. 2654.
Maynard v. Wright, 26 Beav. 285, p. 1546.
Mayo v. Carrington, 19 Gratt. 74, p. 1665, 1743.
Mayo v. Hutchinson, 57 Me. 546, p. 2193.
Mayo v. Judah, 5 Munf. 495, p. 726.
Mayo v. Keaton, 54 Ga. 496, p. 2264.
Mayo v. Leggett, 96 N. C. 242, 1 S. E. 622, p. 1020.
Mayor of Baltimore v. Gill, 31 Md. 375, 392–395, p. 407.
Mayor of Baltimore v. Williams, 6 Md. 235, p. 1112, 1146, 1806.
Mayor of Berwick v. Murray, 7 De Gex, M. & G. 497, 519, p. 2016, 2068, 2794, 2795.
Mayor of Brooklyn v. Mesersole, 26 Wend. 132, 140, p. 403, 433.
Mayor of Cardiff v. Cardiff Water Co., 4 De Gex & J. 596, 597–599, p. 2684.
Mayor of Colchester v. Lowten, 1 Ves. & B. 226, 244, p. 2728, 2752.
Mayor of London v. Russell, Cas. t. Finch, 290, p. 888.
Mayor of New York v. North Shore etc. Co., 9 Hun, 620, p. 2758.
Mayor of York v. Pilkington, 1 Atk. 282, 283, p. 226, 363, 392, 393, 417, 419, 421, 422, 424, 428, 455.
Mayor etc. of New York v. Baumberger, 7 Rob. (N. Y.) 219, p. 2683.
Mayor etc. v. Lord Bolton, 1 Drew. 270, 289, p. 2737.
Mays v. Dwight, 82 Pa. St. 462, p. 2726.
Mays v. Shields, 117 Ga. 814, 45 S. E. 68, p. 1371.
Mays v. Taylor, 7 Ga. 238, 243, 244, p. 225, 337.
Mays v. Wherry, 3 Tenn. Ch. 34, p. 2653, 2657.
Meach v. Meach, 24 Vt. 591, p. 2233.
Meacham v. Bunting, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239, 28 L. R. A. 618, p. 2162.
Meacham v. Steele, 93 Ill. 135, p. 1403, 1406, 2448, 2453, 2455.
Meacham v. Sternes, 9 Paige, 398, p. 2099.
Meacher v. Young, 2 Mylne & K. 490, p. 2618.
Mead, In re, L. R. 15 Ch. Div. 651, p. 2232, 2236, 2238, 2246.
Mead v. Bunn, 32 N. Y. 275, p. 1563.
Mead v. Coombs, 26 N. J. Eq. 173, p. 1729, 1738, 2727.
Mead v. Gregg, 12 Barb. 653, p. 2041.
Mead v. Lord Orrery, 3 Atk. 235, 238, p. 1197.
Mead v. Merritt, 2 Paige, 402, p. 155, 2633.
Mead v. Mitchell, 17 N. Y. 210, 214, 72 Am. Dec. 455, p. 2740.
Mead v. Peabody, 183 Ill. 126, 55 N. E. 719, affirming 83 Ill. App. 297, p. 2411.
Mead v. Randolph, 8 Tex. 191, p. 1900.
Mead v. Westchester etc. Ins. Co., 64 N. Y. 453, p. 1516, 2726.
Mead v. Wheeler, 13 N. H. 301, 351, p. 742, 747.
Meader v. Norton, 11 Wall. 442, p. 1648.
Meador v. Meador, 3 Heisk. 562, p. 2540.
Meadows v. Tanner, 5 Madd. 34, p. 1694.
Meads v. Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331, p. 1326, 1331.
Meals v. Meals, 1 Dick. 373, p. 2204.
Meara's Adm'r v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633, p. 2663.
Mears v. Waples, 3 Houst. 581, p. 1384.
Meason v. Kaine, 63 Pa. St. 335, p. 1900, 2769, 2772.
Measure v. Carleton, 30 Beav. 538, p. 2208.
Mechanics' and Traders' Bank v. Dakin, 51 N. Y. 519, p. 2791.

Mechanics' and Traders' Bank v. De Bolt, 1 Ohio St. 591, p. 308.
Mechanics' Bank v. N. Y. & N. H. R. R., 13 N. Y. 599, p. 1626.
Mechanics' Nat. Bank v. Comins, 72 N. H. 12, 55 Atl. 191, p. 2017, 2397, 2551.
Medley v. Davis, 5 Humph. 387, p. 2502.
Medley v. Horton, 14 Sim. 222, p. 2157.
Medwin v. Sandham, 3 Swanst. 685, p. 1468.
Meech v. Ensign, 49 Conn. 191, 44 Am. Rep. 225, p. 2409, 2414.
Meech v. Lee, 82 Mich. 274, 46 N. W. 383, p. 1716, 1717, 1718, 1734.
Meech v. Stoner, 19 N. Y. 26, 29, p. 2552.
Meehan v. First Nat. Bank, 44 Nebr. 213, 62 N. W. 490, p. 2405.
Meehan v. Williams, 48 Pa. St. 238, p. 994, 1037, 1039, 1042, 1148.
Meek v. Briggs, 87 Iowa, 610, 43 Am. St. Rep. 410, 54 N. W. 456, p. 1918.
Meek v. Carter, 6 Week. Rep. 852, p. 755, 1466.
Meek v. Devenish, L. R. 6 Ch. Div. 566, p. 2332.
Meek v. Kettlewell, 1 Hare, 464, 1 Phill. Ch. 342, p. 619, 634, 1872, 1879, 2547, 2590.
Meek v. Perry, 36 Miss. 190, p. 1737, 1774, 1775.
Meek v. Spracher, 87 Va. 162, 12 S. E. 397, p. 238.
Meeker v. Clinton etc. R. R., 2 La. Ann. 971, p. 2383, 2388.
Meeker v. Dalton, 75 Cal. 154, 16 Pac. 764, p. 566.
Meeker v. Marsh, 1 N. J. Eq. 198, p. 578, 2281.
Meeker v. Meeker, 75 Ill. 260, p. 1738.
Meeker v. Warren, (N. J. Eq.) 57 Atl. 421, p. 1274.
Meeks v. Meeks, 34 Misc. Rep. 465, 69 N. Y. Supp. 737, p. 2283.
Meeks v. Olpherts, 100 U. S. 564, 25 L. ed. 735, p. 2017.
Meem v. Rucher, 10 Gratt. 506, p. 2710.
Meeting St. Bap. Soc. v. Hail, 8 R. I. 234, p. 1933, 1939, 1949, 1954, 1961, 1977.
Megargee v. Naglee, 64 Pa. St. 216, p. 1831.
Megargel v. Saul, 3 Whart. 19, p. 2504.
Meggison v. Moore, 2 Ves. 632, 633, p. 1923, 1924.
Mehaffey's Estate, In re, 139 Pa. St. 276, 20 Atl. 1056, p. 1846.
Meharry v. Meharry, 59 Ind. 257, p. 2624.
Meherin v. Oaks, 67 Cal. 57, 7 Pac. 47, p. 1096, 1121.
Meier v. Hess, 23 Oreg. 599, 32 Pac. 755, p. 1213.
Meier v. Kelly, 22 Oreg. 136, 29 Pac. 265, p. 1107.
Meier v. Meier, 105 Mo. 411, 16 S. W. 223, p. 1130.
Meier v. Meier, 15 Mo. App. 68, affirmed, 88 Mo. 566, p. 2483.
Meig's Appeal, 62 Pa. St. 28, 35, 1 Am. Rep. 372, p. 766.
Meighen v. King, 31 Minn. 115, 16 N. W. 702, p. 2359.
Meighen v. Strong, 6 Minn. 177, 179, 80 Am. Dec. 441, p. 2749, 2751, 2780.
Meigs v. Dimock, 6 Conn. 458, 464, p. 2503.
Meigs v. Lister, 23 N. J. Eq. 199, p. 2687.
Meikel v. Borders, 129 Ind. 529, 29 N. E. 29, p. 1343.
Meikel v. Green, 94 Ind. 344, p. 2108.
Meiley v. Butler, 26 Ohio St. 535, p. 2197.
Meinertzhagen v. Walters, L. R. 7 Ch. 670, p. 903.
Melbourne Banking Co. v. Brougham, 7 App. Cas. (Priv. Coun.) 307, p. 2372.
Melbye v. Melbye, 15 Wash. 648, 47 Pac. 16, p. 1718.
Melchor v. Burger, 1 Dev. & B. Eq. 634, p. 798, 800, 803
Melizet's Appeal, 17 Pa. St. 449, 55 Am. Dec. 573, p. 825.
Mellen v. Mellen, 139 N. Y. 210, 34 N. E. 925, p. 2055, 2333.
Mellen v. Moline Ironworks, 131 U. S. 352, 9 Sup. Ct. 781, p. 1065, 1078.
Mellen v. Whipple, 1 Gray, 317, p. 2413.
Meller v. Bradford, 12 Iowa, 14, p. 1119.

Mellers v. Duke of Devonshire, 16 Beav. 252, p. 1483, 1508.
Mellish v. Mellish, 1 Sim. & St. 138, p. 1774.
Mellish v. Robertson, 25 Vt. 603, p. 1482, 1486.
Mellon v. Mulvey, 23 N. J. Eq. 198, p. 1804.
Mellon v. Reed, 123 Pa. St. 14, 15 Atl. 906, p. 2309, 2310.
Mellon's Appeal, 32 Pa. St. 121, p. 1107, 1274, 1331.
Mellon's Appeal, 46 Pa. St. 165, p. 2209.
Mellor's Trusts, In re, L. R. 6 Ch. Div. 127, p. 2168, 2170.
Melms v. Pabst Brewing Co., 93 Wis. 140, 153, 66 N. W. 244, 518, 57 Am. St. Rep. 899, p. 826, 1172, 1647, 1648.
Melter v. Mettler's Adm'rs, 19 N. J. Eq. 457, p. 2707.
Melvin v. Melvin, 6 Md. 541, p. 1657.
Memphis & C. R. Co. v. Grayson, 88 Ala. 572, 7 South. 122, 16 Am. St. Rep. 69, p. 1453.
Memphis & C. R. R. v. Scruggs, 50 Miss. 284, p. 2764.
Memphis Barrel, etc., Co. v. Head, 99 Tenn. 172, 42 S. W. 13, 63 Am. St. Rep. 825, p. 2014.
Memphis City v. Dean, 8 Wall. 64, 19 L. ed. 326, p. 2121, 2125, 2126.
Memphis Gayoso Gas Co. v. Williamson, 9 Heisk. 314, p. 2125.
Mendenhall v. Treadway, 44 Ind. 131, p. 1625.
Mendes v. Guedalla, 2 Johns. & H. 259, p. 2094, 2095.
Mendizabel v. Machado, 2 Sim. & St. 483, p. 298.
Meneely v. Meneely, 3 Thomp. & C. 540, 1 Hun, 367, p. 2691.
Menees v. Johnson, 12 Lea, 561, p. 2198.
Meng v. Houser, 13 Rich. Eq. 210, p. 2447.
Mengel v. Lehigh Coal & Nav. Co., 24 Pa. Co. Ct. Rep. 152, p. 167, 370.
Menges v. Milton Piano Co., (Mo.) 70 S. W. 250, p. 736.
Menier v. Hooper's Tel. Works, L. R. 9 Ch. 350, p. 2118, 2125, 2126.
Menifee v. Menifee, 8 Ark. 9, p. 464.
Mennard v. Welford, 1 Smale & G. 426, p. 2106.
Mensch v. Mensch, 2 Lans. 235, p. 2488.
Menzies v. Lightfoot, L. R. 11 Eq. 459, p. 2382.
Mercantile Co-op. Bank v. Brown, 96 Va. 614, 32 S. E. 64, p. 1105, 1117.
Mercantile Ins. Co. v. Corcoran, 1 Gray, 75, p. 1216.
Mercantile Ins. Co. v. Jaynes, 87 Ill. 199, p. 2726.
Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 55 N. W. 825, 40 Am. St. Rep. 299, p. 982, 992, 1058, 1157.
Mercantile Trading Co., In re, L. R. 4 Ch. 475, p. 1573.
Merced Min. Co. v. Fremont, 7 Cal. 317, 319, 68 Am. Dec. 262, p. 2694, 2748, 2751.
Mercer v. Stark, 1 Smedes & M. Ch. 479, p. 1908.
Merchant v. Thompson, 34 N. J. Eq. 73, p. 2195.
Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 57 Pac. 468, 71 Am. St. Rep. 94, 46 L. R. A. 142, p. 1438, 1688.
Merchants' & Farmers' Bank v. Cleland, 25 Ky. Law Rep. 1169, 77 S. W. 176, 719, p. 1493.
Merchants' & Mechanics' Bank v. Hewitt, 3 Iowa, 93, 66 Am. Dec. 49, p. 1224.
Merchants' & Mechanics' Bank v. Tillman, 106 Ga. 55, 31 S. E. 794, p. 2425.
Merchants' & M. N. Bank v. Barnes, 18 Mont. 335, 48 Pac. 218, 56 Am. St. Rep. 586, 47 L. R. A. 737, p. 2567.
Merchants' & Planters' Bank v. Penland, 101 Tenn. 445, 47 S. W. 693, p. 1156.
Merchants' & Planters' Line v. Wagoner, 71 Ala. 581, p. 2121.
Merchants' Bank v. Ballou, 98 Va. 112, 81 Am. St. Rep. 715, 32 S. E. 481, p. 1157.
Merchants' Bank v. Davis, 3 Ga. 112, p. 324.
Merchants' Bank v. Evans, 51 Mo. 335, 343, p. 2753, 2756.
Merchants' Bank v. Spalding, 12 Barb. 302, p. 1478, 1506.

Merchants' Bank v. Weill, 163 N. Y. 486, 79 Am. St. Rep. 605, 57 N. E. 749, p. 1297, 1298.
Merch. Bank Co. v. Merch. Bank, L. R. 9 Ch. Div. 560, p. 2690.
Merchants' B. & L. Ass'n v. Barber, (N. J. Eq.) 30 Atl. 865, p. 1275
Merchant's Estate. In re, (Cal.) 77 Pac. 475, p. 1942.
Merchants' Ex. Bank v. Commercial etc. Co., 49 N. Y. 635, 643, p. 1706.
Merchants' Ins. Co. v. Abbott, 131 Mass. 397, p. 1327.
Merchants' Nat. Bank v. Clark, 139 N. Y. 314, 34 N. E. 910, 36 Am. St. Rep. 710, p. 1164.
Merchants' Nat. Bank v. Coates, 79 Mo. 168, p. 2569.
Merchants' Nat. Bank v. Greenhood, 16 Mont. 395, 41 Pac. 250, 851, p. 1332.
Merchants' Nat. Bank v. Lovitt, 114 Mo. 519, 21 S. W. 825, 35 Am. St. Rep. 770, p. 1177.
Merchants' Nat. Bank v. McAnulty, (Tex. Civ. App.) 31 S. W. 1091, p. 1156.
Merchants' Nat. Bank. v. Phillip etc. Co., (Tex. Civ. App.) 39 S. W. 217, p. 2030.
Merchants' Nat. Bank v. Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491, p. 2359.
Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201, p. 245, 293.
Merchant Tailors' Co. v. Att'y-Gen., L. R. 11 Eq. 35, 6 Ch. 512, p. 1963.
Mercier v. Hemme, 50 Cal. 606, p. 2017, 2034.
Mercier v. Mercier, [1903] 2 Ch. 98, p. 1993.
Meredith v. Heneage, 1 Sim. 542, 550, 551, 553, p. 1925, 1929, 1930.
Meredith v. Holmes, (Mo. App.) 80 S. W. 61, p. 1516.
Meredith v. Meredith, 149 Ind. 299, 50 N. E. 29, p. 1993, 2008.
Merediths v. Saunders, 2 Dow. 514, p. 1664, 1670.
Meredith Sav. Bank v. Simpson, 22 Kan. 414, p. 2662.
Meredith Village Sav. Bank v. Marshall, 68 N. H. 417, 44 Atl. 526, p. 1220.
Meres v. Crisman, 7 B. Mon. 422, p. 215, 219.
Merest v. James, 6 Madd. 118, p. 1396.
Merigan v. McGonigle, 205 Pa. St. 321, 54 Atl. 994, p. 1904.
Meriweather v. Herran, 8 B. Mon. 162, p. 1743.
Merkel, Estate of, 131 Pa. St. 584, 18 Atl. 931, p. 2100.
Merrett v. Poulter, 96 Mo. 237, 9 S. W. 586, p. 2039.
Merriam v. Boston etc. R. R., 117 Mass. 241, p. 1447, 2193.
Merriam v. Goss, 139 Mass. 83, 28 N. E. 449, p. 2428.
Merriam v. Hemmenway, 26 Vt. 565, p. 2290.
Merrian, Ex parte, 4 Denio, 254, p. 2447.
Merrick v. Wallace, 19 Ill. 486, p. 1050, 1118.
Merrill, In re, 71 N. Y. 325, p. 2569.
Merrill v. Allen, 38 Mich. 487, p. 2500, 2509.
Merrill v. Bickford, 65 Me. 118, p. 2489, 2492.
Merrill v. Green, 55 N. Y. 270, 274, p. 1233.
Merrill v. Houghton, 51 N. H. 61, p. 2463.
Merrill v. Humphrey, 24 Mich. 170, p. 651.
Merrill v. Hurley, 6 S. Dak. 592, 62 N. W. 958, 55 Am. St. Rep. 859, p. 1300.
Merrill v. Hutchinson, 45 Kan. 59, 25 Pac. 215, 23 Am. St. Rep. 713, p. 1341.
Merrill v. Ireland, 40 Me. 569, p. 1101, 1146.
Merrill v. Lake, 16 Ohio, 373, 47 Am. Dec. 377, p. 221, 2706.
Merrill v. Luce, 6 S. Dak. 354, 61 N. W. 43, 55 Am. St. Rep. 844, p. 1299, 1300.
Merrill v. McLaughlin, 75 Me. 64, p. 552, 1637.
Merrill v. Plainfield, 45 N. H. 126, 134, p. 407, 408.
Merrill v. Ressler, 37 Minn. 82, 5 Am. St. Rep. 882, 33 N. W. 117, p. 2461.
Merrill v. Smith, 37 Me. 394, p. 2193.
Merrill v. Wilson, 66 Mich. 232, 33 N. W. 716, p. 1602, 1646.

Merrill v. Wright, (Nebr.) 91 N. W. 697, p. 1080, 1088.
Merriman v. Hyde, 9 Nebr. 120, p. 1102.
Merriman v. Miles, 54 Nebr. 566, 74 N. W. 861, 69 Am. St. Rep. 731, p. 2408.
Merriman v. Polk, 5 Heisk. 717, p. 1264, 2752, 2758.
Merriman v. Russell, 2 Jones Eq. 470, p. 2737.
Merritt v. Bartholick, 36 N. Y. 44, 47 Barb. 253, p. 2419, 2460.
Merritt v. Brown, 19 N. J. Eq. 286, p. 2372, 2774.
Merritt v. Brown, 21 N. J. Eq. 401, 404, p. 2039, 2768, 2775.
Merritt v. Buchnam, 78 Me. 504, 7 Atl. 383, p. 2489.
Merritt v. Judd, 14 Cal. 59, p. 2534.
Merritt v. Lambert, 10 Paige, 352, 2 Denio, 607, p. 1769.
Merritt v. Richey, 97 Ind. 236, p. 2446.
Merritt v. Seaman, 6 N. Y 168, p. 1234.
Merritt v. Wells, 18 Ind. 171, p. 2499.
Merry v. Abney, 1 Cas. Ch. 38, p. 1198, 1293.
Merryman v. Euler, 59 Md. 588, 43 Am. Rep. 564, p. 1770.
Merryweather v. Jones, 4 Giff. 509, p. 1543.
Mersey Docks Trustees v. Gibbs, 11 H. L. Cas. 686, L. R. 1 H. L. 93, p. 2101.
Mertins v. Jolliffe, Amb. 313, p. 1293.
Mesick v. Mesick, 7 Barb. 120, p. 2095.
Mesick v. Sunderland, 6 Cal. 297, p. 1127, 1136.
Messeena v. Carr, L. R. 9 Eq. 260, p. 2049.
Messenger v. Peter, 129 Mich. 93, 88 N. W. 209, p. 1338.
Messer v. The Fadettes, 168 Mass. 140, 60 Am. St. Rep. 371, 46 N. E. 407, 37 L. R. A. 721, p. 669, 1695.
Messner v. Giddings, 65 Tex. 301, p. 84, 2619.
Messop v. Eadon, 16 Ves. 430, 433, 434, p. 468.
Mestaer v. Gillespie, 11 Ves. 621, 627, 628, 638, p. 1535, 1653, 1658, 1659.
Metcalf v. American School Furn. Co., 122 Fed. 115, p. 2127.
Metcalf v. Cook, 2 R. I. 355, p. 2154.
Metcalf v. Hervey, 1 Ves. Sr. 248, p. 2646.
Metcalf v. Kincaid, 87 Iowa, 443, 54 N. W. 867, 43 Am. St. Rep. 391, p. 2572, 2584.
Metcalf v. Putnam, 9 Allen, 97, p. 1523.
Metcalfe v. Archbishop of York, 6 Sim. 224, 1 Mylne & C. 547, 556, p. 191, 2473.
Metcalfe v. Hutchinson, L. R. 1 Ch. Div. 591, p. 2486, 2488.
Metcalfe v. Metcalfe, [1891] 3 Ch. 1, p. 1843.
Metcalfe's Trusts, In re, 2 De Gex, J. & S. 122, p. 1738.
Metford v. Reynolds, 1 Phill. Ch. 185, p. 1933.
Methodist Ch. v. Remington, 1 Watts, 218, 26 Am. Dec. 61, p. 1938, 1977.
Methodist Church of Newark v. Clark, 41 Mich. 730, p. 1896, 1961, 1970, 2749, 2752.
Methodist Episcopal Church v. Jackson Square Evangelical Church, 84 Md. 173, 35 Atl. 8, p. 1971, 1987.
Meth. Epis. Church v. Jaques, 1 Johns. Ch. 65, p. 283.
Meth. Epis. Ch. v. Jaques, 3 Johns. Ch. 77, 90–92, p. 2147.
Methodist Episcopal Church v. Warren, 28 Md. 353, 388, p. 1971.
Methodist Epis. Soc. v. Heirs of Harriman, 54 N. H. 444, 445, p. 529, 2280.
Methodist Protestant Church v. Baltimore, 6 Gill, 391, 48 Am. Dec. 540, p. 2702.
Methven v. Staten Island L., H. & P. Co., 66 Fed. 113, 13 C. C. A. 362, 35 U. S. App. 67, p. 1206, 1212.
Methwold v. Walbank, 2 Ves. Sr. 238, p. 1699.
Metler's Adm'rs v. Metler, 18 N. J. Eq. 270, 19 N. J. Eq. 457, p. 245, 263, 2670, 2707, 2729.
Metropolitan Bank v. Godfrey, 23 Ill. 579, 607, p. 1032, 1327, 1494.
Metropolitan Bk. v. Loyd, 90 N. Y. 530, p. 1913.
Metropolitan Bank v. Taylor, 53 Mo. 444, 62 Mo. 338, p. 2143, 2145, 2153, 2194.

Metropolitan Board v. London etc. R'y. L. R. 17 Ch. Div. 246, p. 2686.
Metropolitan Loan Ass'n v. Esche, 75 Cal. 513, 17 Pac. 675, p. 1510.
Metropolitan Nat. Bk. v. Campbell Com. Co., 77 Fed. 705, p. 2022.
Metteer v. Wiley, 34 Iowa, 214, 215, p. 812, 851.
Metts v. Bright, 4 Dev. & B. 173, 32 Am. Dec. 173, 683, p. 1097, 1117.
Metts v. Northern R'y, L. R. 5 Ch. 621, p. 2677.
Metz v. State Bank of Brownville, 7 Nebr. 171, p. 1102.
Metzgar v. Metzgar, 1 Rawle, 227, p. 1257.
Meux v. Anthony, 11 Ark. (6 Eng.) 411, 52 Am. Dec. 274, p. 1078.
Meux v. Bell, 1 Hare, 73, 84, 85, p. 1210, 1213.
Meux v. Maltby, 2 Swanst. 277, 281, p. 1025, 1047.
Meux's Ex'rs' Case, 2 De Gex, M. & G. 522, p. 1625.
Mews v. Mews, 15 Beav. 529, p. 2142.
Meyer v. Estes, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283, p. 737.
Meyer v. Graeber, 19 Kan. 165, p. 725.
Meyer v. Jacobs, 123 Fed. 900, p. 1738.
Meyer v. Jefferson Ins. Co., 5 Mo. App. 245, p. 1862.
Meyer v. Phillips, 97 N. Y. 485, 49 Am. Rep. 538, p. 424.
Meyer v. Portis, 45 Ark. 420, p. 1099, 1127.
Meyer v. Saul, 82 Md. 459, 33 Atl. 539, p. 237.
Meyer v. Simonsen, 5 De Gex & S. 723, p. 2321.
Meyer v. United, etc., Co., 7 De Gex, M. & G. 112, p. 2470.
Meyer v. Webber, 133 Cal. 681, 65 Pac. 1110, p. 1297.
Meyer v Yesser, 32 Ind. 294, p. 659.
Meyer Bros. v. Cook, 85 Ala. 417, 5 South. 147, p. 1366.
Meyers v. Farquharson, 46 Cal. 190, p. 2262.
Meyers v. Field, 37 Mo. 434, 441, p. 386, 564, 569.
Meyers v. Merillion, 118 Cal. 352, 50 Pac. 662, p. 670.
Meyers v. Rahte, 46 Wis. 655, 1 N. W. 353, p. 2200.
Meyerstein v. Barber, L. R. 2 Com. P. 38, 51, L. R. 4 H. L. 317, p. 2461.
Mezes v. Greer, 1 McAll. 401, 402, p. 494, 514.
Mhoon v. Wilkerson, 47 Miss. 633, p. 2776.
Miaghan v. Hartford F. Ins. Co., 12 Hun, 321, p. 2726.
Miall v. Brain, 4 Madd. 119, p. 836, 837.
Michael v. City of St. Louis, 112 Mo. 610, 20 S. W. 666, p. 405, 411, 454.
Michel v. Tinsley, 69 Mo. 442, p. 2726.
Michell v. Oakley, 7 Paige, 68, p. 2705.
Michelmore v. Mudge, 2 Giff. 183, p. 2172.
Michels' Trust, 28 Beav. 39, p. 1939.
Michener v. Cavender, 38 Pa. St. 334, 337, 80 Am. Dec. 486, p. 1734.
Michigan Air Line R. R. Co. v. Mellen, 44 Mich. 321, 6 N. W. 845, p. 2017, 2024, 2030.
Mich. & Ohio P. Co. v. White, 44 Mich. 25, p. 2635, 2636, 2649.
Mich. Ins. Co. v. Brown, 11 Mich. 265, p. 2383.
Mich. Paneling M. & M. Co. v. Parcell, 38 Mich. 475, 480, p. 1429, 1451, 1452.
Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co., 111 Fed. 284, 49 C. C. A. 324, p. 657, 659, 662, 765.
Michigan St. Bank v. Hammond, 1 Doug. (Mich.) 527, p. 717, 766.
Michigan State Ins. Co. v. Soule, 51 Mich. 312, 16 N. W. 662, p. 2451.
Michigan Trust Co. v. Probasco, 29 Ind. App. 109, 63 N. E. 255, p. 2033, 2039.
Michoud v. Girod, 4 How. 503, 561, p. 1648, 1753, 1754, 1785, 1788.
Mickle v. Rambo, 1 N. J. Eq. 501, p. 2455.
Mickles v. Dillaye, 15 Hun, 296, p. 1410.
Mickles v. Dillaye, 17 N. Y. 80, p. 2430.
Mickles v. Townsend, 18 N. Y. 575, 584, p. 1410, 2361, 2364.
Micklethwait v. Micklethwait, 1 De Gex & J. 504, 519, p. 2682.
Micklethwaite v. Atkinson, 1 Coll. C. C. 173, Adams's Eq. 8, p. 263.
Mickley v. Tomlinson, 79 Iowa, 383, 41 N. W. 311, 44 N. W. 684, p. 2448.

Micou v. Lamar, 17 Blatchf. 378, 1 Fed. Rep. 14, p. 2130.
Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054, p. 1097, 1112.
Middle States L. B. & C. Co. v. Hagerstown M. & U. Co., 82 Md. 506, 33 Atl. 886, p. 352.
Middlebrook v. Merchants' Bank, 41 Barb. 481, 3 Abb. App. 295, p. 2784.
Middleton v. Chichester, L. R. 6 Ch. 152, p. 2053.
Middleton v. Dodswell, 13 Ves. 266, 268, p. 2658.
Middleton v. Flat R. B. Co., 27 Mich. 533, p. 397.
Middleton v. Greenwood, 2 De Gex, J. & S. 142, p. 345, 2766.
Middleton v. Lord Onslow, 1 P. Wms. 768, p. 1790.
Middleton v. Middleton, 1 Jacob & W. 94, 96, p. 1654, 1734, 2035.
Middleton v. Spicer, 1 Br. Ch. Cas. 201, p. 1848.
Middleton v. Sherburne, 4 Younge & C. 358, 389, p. 1734.
Middleton v. Welles, 1 Cox, 112, 4 Brown Parl. C. 245, p. 1767.
Middleton Bank v. Russ, 3 Conn. 135, 139, 140, 8 Am. Dec. 164, p. 321, 326, 331, 333, 569.
Middletown Sav. Bank v. Bates, 11 Conn. 519, 523, p. 2346.
Midland Gr. W. Co. v. Johnson, 6 H. L. Cas. 798, p. 1483.
Midland Nat. Bk. v. Brightwell, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 994, p. 1913, 1914, 2023.
Midland R'y v. Taylor, 8 H. L. Cas. 751, p. 1252.
Midleton v. Eliot, 15 Sim. 531, 536, p. 2429.
Midleton v. Jackson, 17 Ch. 18, p. 362.
Midmer v. Midmer's Ex'rs, 26 N. J. Eq. 299, p. 1993.
Miers v. Zanesville etc. Co., 11 Ohio, 273, p. 2788.
Miesell v. Globe Ins. Co., 76 N. Y. 115, 120, p. 1467.
Mifflin Co. Bank's Appeal, 98 Pa. St. 150, p. 1258.
Miggeridge v. Stanton, 1 De Gex, F. & J. 107, p. 2146.
Miggett's Appeal, 109 Pa. St. 520, p. 1758.
Mikiska v. Mikiska, (Minn.) 95 N. W. 910, p. 1516, 1542.
Milbank v. Crane, 25 How. Pr. 193, p. 1833.
Milbank v. Revett, 2 Mer. 405, p. 2657.
Mildmay v. Hungerford, 2 Vern. 243, p. 1487, 1494, 1499, 1520.
Mildmay v. Quicke, L. R. 6 Ch. Div. 553, p. 2321.
Mildred v. Austin, L. R. 8 Eq. 220, p. 2436.
Miles v. Blanton, 3 Dana, 525, p. 1354.
Miles v. Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261, p. 1731.
Miles v. Dyer, 5 Sim. 435, p. 1546.
Miles v. Ervin, 1 McCord Eq. 524, 16 Am. Dec. 623, p. 1770.
Miles v. Gray, 4 B. Mon. 417, p. 2417.
Miles v. King, 5 S. C. 146, p. 1277, 1381.
Miles v. Langley, 1 Russ. & M. 39, 2 Russ. & M. 626, p. 1001, 1019, 1039.
Miles v. Lefl, 60 Iowa, 168, 14 N. W. 233, p. 1077.
Miles v. Miles, L. R. 1 Eq. 462, p. 2212.
Miles v. Miles, (Miss.) 37 South. 112, p. 1504, 1542, 1559.
Miles v. Miles, 6 Oreg. 267, 25 Am. Rep. 522, p. 2402.
Miles v. Thorne, 38 Cal. 335, 90 Am. Dec. 384, p. 1699, 1901.
Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314, p. 2683.
Milhaus v. Sally, 43 S. C. 318, 21 S. E. 268, 885, 49 Am. St. Rep. 834, p. 665, 670, 1692.
Milholland v. Tiffany, 64 Md. 455, 2 Atl. 831, p. 987.
Milholland v. Whalen, 89 Md. 212, 43 Atl. 43, 44 L. R. A. 205, p. 1866.
Milkman v. Ordway, 106 Mass. 232, 253, p. 343, 344, 345, 543, 2782.
Mill v. Hill, 12 Ir. Eq. 107, 3 H. L. Cas. 828, p. 1093.
Millar v. Craig, 6 Beav. 433, p. 1785.
Millar v. Smith, 28 Tex. Civ. App. 386, 67 S. W. 429, p. 743.
Millard v. Eyre, 2 Ves. 94, p. 2108
Millard v. Hathaway, 27 Cal. 119, p. 179, 1992, 2006.
Millard v. Richard, 13 La. Ann. 572, p. 2750.
Millard v. Wegner, (Nebr.) 94 N. W. 802, p. 1039.

Miller v. Albertson, 73 Ind. 343, p. 2192.
Miller v. Atkinson, 63 N. C. 537, p. 1961, 1971.
Miller v. Baker, 166 Pa. St. 414, 31 Atl. 121, 45 Am. St. Rep. 680, p. 1269, 1279, 1993.
Miller v. Bingham, 1 Ired. Eq. 423, 36 Am. Dec. 58, p. 1847, 2161.
Miller v. Bingham, 29 Vt. 82, p. 1295.
Miller v. Birdsong, 7 Baxt. 531, p. 1995, 2024.
Miller v. Blose's Ex'r, 30 Gratt. 744, p. 1999.
Miller v. Bradford, 12 Iowa, 14, p. 1100, 1122.
Miller v. Brown, 47 Mo. 504, 4 Am. Rep. 345, p. 2194.
Miller v. Campbell, 52 Ind. 125, p. 2769.
Miller v. Chetwood, 2 N. J. Eq. 99, p. 1532.
Miller v. Chittenden, 2 Iowa, 315, 352, p. 1967, 1974.
Miller v. Clark, 40 Fed. 15, p. 1873, 1912.
Miller v. Consolidated etc. Co., 110 Fed. 480, p. 2085.
Miller v. Cooch, 5 Del. Ch. 161, p. 2216.
Miller v. Cook, L. R. 10 Eq. 641, p. 1742, 1743, 1744.
Miller v. Cotten, 5 Ga. 341, 346, p. 1658.
Miller v. Cresson, 5 Watts & S. 284, p. 994, 1107.
Miller v. Davis, 10 Kan. 541, p. 2725, 2726.
Miller v. Davison, 31 Iowa, 435, p. 2749.
Miller v. Dayton, 47 Iowa, 312, p. 2789.
Miller v. Drane, 100 Wis. 1, 75 N. W. 413, p. 2294, 2298.
Miller v. Elliott, 1 Ind. (1 Cart.) 484, 50 Am. Dec. 475, p. 737.
Miller v. Fasler, 42 Minn. 366, 44 N. W. 256, p. 2411.
Miller v. Fichthorn, 31 Pa. St. 252, 259, p. 1405.
Miller v. Fraley, 23 Ark. 735, p. 1341.
Miller v. Fulton, 47 Cal. 146, p. 2715.
Miller v. Gaskins, Smedes & M. Ch. 524, p. 228, 304, 2703.
Miller v. Goodwin, 8 Gray, 542, p. 535, 536.
Miller v. Harrison, 32 N. J. Eq. 76, p. 2709.
Miller v. Henderson, 10 Serg. & R. 290, p. 1507.
Miller v. Highland Ditch Co., 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550, p. 423.
Miller v. Holland, 84 Va. 652, 5 S. E. 701, p. 2446.
Miller v. Hollingsworth, 36 Iowa, 163, p. 2200.
Miller v. Huddlestone, 3 Macn. & G. 513, p. 2225.
Miller v. Ill. Cent. R. R., 24 Barb. 312, p. 1164.
Miller v. Jeffress, 4 Gratt. 472, 479, p. 2233, 2243.
Miller v. Johnson, 27 Md. 6, p. 2193.
Miller v. Kennedy, 12 S. Dak. 478, 81 N. W. 906, p. 2407.
Miller v. Kershaw, 1 Bail. Eq. 479, 23 Am. Dec. 183, p. 1068.
Miller v. Lincoln, 6 Gray, 556, p. 2429.
Miller v. Little, 2 Beav. 259, p. 2208.
Miller v. Mackenzie, 29 N. J. Eq. 291, p. 2662.
Miller v. Meetch, 8 Pa. St. 417, p. 1890.
Miller v. Merine, 43 Fed. 261, p. 992, 1194.
Miller v. Miller, 148 Mo. 113, 49 S. W. 852, p. 2056.
Miller v. Miller, 17 Oreg. 423, 21 Pac. 938, p. 2142.
Miller v. Miller, 68 Pa. St. 486, p. 1734.
Miller v. Miller, 3 P. Wms. 356, p. 2232, 2236, 2245, 2246.
Miller v. Miller's Adm'r, 92 Va. 510, 23 S. E. 891, p. 2139, 2143.
Miller v. Minor Lumber Co., 98 Mich. 163, 57 N. W. 101. 39 Am. St. Rep. 524, p. 1734.
Miller v. Monroe, 59 App. Div. 623, 69 N. Y. Supp. 861, p. 2004.
Miller v. Mut. Ben. Life Ass'n, 31 Iowa, 216, 7 Am. Rep. 122, p. 1158.
Miller v. Neiman, 27 Ark. 233, p. 2753, 2754, 2756.
Miller v Newell, 20 S. C. 123, 47 Am. Rep. 833, p. 2552.
Miller v. Newton, 23 Cal. 554, p. 2154, 2190.
Miller v. Porter, 53 Pa. St. 292, p. 1954, 1976.
Miller v. Price, 66 S. C. 85, 44 S. E. 584, p. 2381.

Miller v. Priddon, 1 De Gex, M. & G. 335, p. 2109.
Miller v. Proctor, 20 Ohio St. 442, p. 2066.
Miller v. Rich, 204 Ill. 444, 68 N. E. 488, p. 1755.
Miller v. Rogers, 49 Tex. 398, p. 2447.
Miller v. Rosenberger, 144 Mo. 292, 46 S. W. 167, p. 1948, 1955, 1975.
Miller v. Rowan, 5 Clark & F. 99, p. 1933.
Miller v. St. Louis & K. C. R. Co., 162 Mo. 424, 63 S. W. 85, p. 342.
Miller v. Sanders, 98 Ky. 535, 33 S. W. 621, p. 2192.
Miller v. Sauerbier, 30 N. J. Eq. 71, p. 1791.
Miller v. Scammon, [1873] 52 N. H. 609, 610, p. 320, 329, 526, 527, 1637.
Miller v. Sherry, 2 Wall. 237, p. 1064, 1072, 1073, 1079, 1080.
Miller v. Simonds, 5 Mo. App. 33, p. 1738, 1778.
Miller v. Simonton, 5 S. C. 20, p. 2052.
Miller v. Stark, 29 S. C. 325, 7 S. E. 501, p. 2287.
Miller v. Stephens, 158 Ind. 438, 63 N. E. 847, p. 823.
Miller v. Stoddard, 54 Minn. 486, 56 N. W. 131, p. 1097.
Miller v. Stokely, 5 Ohio St. 197, p. 1900.
Miller v. Thomas, 14 Ill. 428, p. 2374.
Miller v. Thompson, 34 Mich. 10, p. 2404, 2405, 2412.
Miller v. Thurgood, 33 Beav. 496, p. 811, 812, 813, 854.
Miller v. Tobie, 41 N. H. 84, p. 2781.
Miller v. U. S. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 599, p. 251, 321.
Miller v. Vernoy, 2 Tex. Civ. App. 675, 22 S. W. 64, p. 1328.
Miller v. Voss, 62 Ala. 122, p. 2139, 2143, 2145, 2153, 2189.
Miller v. Warmington, 1 Jacob & W. 484, p. 1472, 2737, 2738.
Miller v. Wayne International B. & L. Ass'n, (Ind. App.) 70 N. E. 180, p. 2411.
Miller v. Whelan, 158 Ill. 544, 42 N. E. 59, p. 1157.
Miller v. Whittier, 36 Me. 577, p. 2383.
Miller v. Williamson, 5 Md. 219, p. 2154.
Miller v. Wilson, 15 Ohio, 108, p. 1990.
Miller v. Woodward, 8 Mo. 169, p. 2279.
Miller & Co. v. Florer, 15 Ohio St. 148, 151, p. 1234.
Miller Brewing Co. v. Manasse, 99 Wis. 99, 67 Am. St. Rep. 854, 74 N. W. 535, p. 1227, 1305.
Miller's Adm'r v. Miller, 25 N. J. Eq. 354, p. 2778.
Miller's & Bowman's Appeal, 60 Pa. St. 404, p. 2309.
Millett v. Davey, 31 Beav. 470, p. 2429.
Milligan v. Mitchell, 6 Sim. 186, p. 261.
Milligan v. Poole, 35 Ind. 64, p. 2740.
Milligan's Appeal, 104 Pa. St. 503, p. 2446.
Milliken v. Bailey, 61 Me. 316, p. 2428.
Milliken v. Ham, 36 Ind. 166, p. 1994, 2005.
Millingar v. Sorg, 55 Pa. St. 215, 225, p. 1437.
Millingar v. Sorg, 61 Pa. St. 471, p. 1452.
Millington v. Laurer, 89 Iowa, 322, 56 N. W. 533, 48 Am. St. Rep. 385, p. 2584.
Million v. Taylor, 38 Ark. 428, p. 1779.
Milliron v. Milliron, 9 S. Dak. 181, 68 N. W. 286, 62 Am. St. Rep. 863, p. 2177.
Millis v. Scottish Union & National Ins. Co., 95 Mo. App. 211, 68 S. W 1066, p. 1158.
Mill River Ass'n v. Claflin, 9 Allen, 101, p. 540.
Mills v. Bliss, 55 N. Y. 139, p. 1088.
Mills v. Bowyer's Soc., 3 Kay & J. 66, p. 1549.
Mills v. Brown, 21 Beav. 1, p. 2210.
Mills v. Buttrick, 4 Colo. 53, 123, p. 2722, 2752.
Mills v. Campbell, 2 Younge & C. 389, p. 399.
Mills v. City of Chicago, 127 Fed. 731, p. 2126.
Mills v. Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. Rep. 594, p. 1941, 1975.
Mills v. Dunham, [1891] 1 Ch. 576, p. 1691.
Mills v. Evansville Seminary, 52 Wis. 669, 9 N. W. 925, p. 765.

Mills v. Farmer, 1 Mer. 55, 96, 19 Ves. 483, 485, p. 1933, 1943, 1958, 1962.
Mills v. Harris, 104 N. C. 626, 10 S. E. 704, p. 2308, 2309, 2311.
Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177, p. 2794.
Mills v. Lockwood, 42 Ill. 111, p. 1515.
Mills v. Lumpkin, 1 Ga. 511, 44 Am. Dec. 677, p. 2264.
Mills v. Mills, 28 Barb. 454, p. 811, 820, 828, 829.
Mills v. Mills, 26 Conn. 213, p. 2372
Mills v. Mills, 40 N. Y. 543, 100 Am. Dec. 535, p. 1699.
Mills v. Mills, 7 Sim. 501, p. 2205, 2322.
Mills v. Newberry, 112 Ill. 123, 54 Am. Rep. 213, p. 1952, 1973.
Mills v. Paul, (Tex. Civ. App.) 30 S. W. 558, p. 739, 740.
Mills v. Swearingen, 67 Tex. 269, 3 S. W. 268, p. 2018.
Mills v. Van Voorhis, 23 Barb. 125, p. 2437.
Mills v. Van Voorhies, 20 N. Y. 412, p. 1280, 2437.
Mills v. Watson, 1 Sweeny, 374, p. 2407.
Mills' Adm'r v. Talley's Arm'r, 83 Va. 361, 5 S. E. 368, p. 2057.
Mills' Appeal, 44 Conn. 484, p. 1727.
Millsaps v. Chapman, 76 Miss. 942, 71 Am. St. Rep. 547, 20 South. 369, p. 1783.
Millsaps v. Pfeiffer, 44 Miss. 805, p. 228, 244, 250, 255, 259, 261, 466.
Millspaugh v. McBride, 7 Paige, 509, 34 Am. Dec. 360, p. 1402, 1411.
Mills' Trusts, In re, [1895] 2 Ch. 564, p. 1839.
Milmine v. Burnham, 76 Ill. 362, p. 2726.
Milner v. Freeman, 40 Ark. 62, p. 1995.
Milner v. Nelson, 86 Iowa, 452, 53 N. W. 405, 41 Am. St. Rep. 506, 19 L. R. A. 279, p. 1100, 1114.
Milnes v. Busk, 2 Ves. 488, p. 2147.
Milnes v. Duncan, 6 Barn. & C. 671, p. 1477.
Milnes v. Gery, 14 Ves. 400, 403, p. 2602, 2773.
Milroy v. Lord, 4 De Gex, F. & J. 264, 274, p. 1865, 1870, 1874.
Milton v. Hogue, 4 Ired. Eq. 415, 422, p. 148, 212.
Miltonville State Bank v. Kuhnle, 50 Kan. 420, 31 Pac. 1057, 34 Am. St. Rep. 129, p. 1100, 1125.
Milwaukee El. R. & L. Co. v. Bradley, 108 Wis. 467, 84 N. W. 870, p. 390, 452.
Milwaukee Iron Co. v. Town of Hubbard, 29 Wis. 51, p. 2757.
Milwaukee & Minn. R. R. v. Wilwaukee etc. R. R., 20 Wis. 174, 183, 88 Am. Dec. 740, p. 2556.
Milwaukee & Minn. R. R. Co. v. Soutter, 2 Wall. 521, p. 2653.
Mims v. Lockett, 23 Ga. 237, 68 Am. Dec. 521, p. 2503.
Mims v. Lockett, 33 Ga. 9, p. 2782.
Mims v. Macon etc. R. R., 3 Ga. 333, p. 2503.
Mims v. Mims, 35 Ala. 23, p. 1104.
Mims v. West, 38 Ga. 18, 95 Am. Dec. 379, p. 1079.
Miner v. Atherton's Ex'rs, 35 Pa. St. 528, 537, p. 896, 902, 909.
Miner v. Beekman, 50 N. Y. 337, p. 191, 2430, 2435, 2481.
Miner v. Hess, 47 Ill. 170, p. 1517.
Miner v. Miner, 11 Ill. 43, p. 2612, 2614.
Miner v. Pearson, 16 Kan. 27, p. 2192.
Miner v. Wilson, 107 Mich. 57, 64 N. W. 874, p. 1020.
Miners' Ditch Co. v. Zellerbach and Powers, 37 Cal. 543, 99 Am. Dec. 300, p. 1722.
Mines v. Mines, 35 Ala. 23, p. 1118.
Minet v. Morgan, L. R. 11 Eq. 234, 284, L. R. 8 Ch. 361, 363, p. 270, 273, 277, 281, 288.
Mingus v. Condit, 23 N. J. Eq. 313, p. 1327, 1330.
Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co., 116 Iowa, 681, 88 N. W. 1082, p. 1338.
Minnesota Oil Co. v. Palmer, 20 Minn. 468, p. 403, 433.
Minnich's Estate, In re, 206 Pa. St. 405, 55 Atl. 1067, p. 1846.
Minns v. Billings, 183 Mass. 126, 97 Am. St. Rep. 420, 66 N. E. 593, p. 1936, 1943, 1946, 1947, 1979.
Minor v. Rogers, 40 Conn. 512, 16 Am. Rep. 69, p. 1872, 1876.
Minor v. Webb, 10 Abb. Pr. 284, p. 2716.

Minor v. Willoughby, 3 Minn. 225, p. 1146.
Minors v. Battison, L. R. 1 App. C. 428, p. 1890.
Minot v. Baker, 147 Mass. 348, 17 N. E. 839, 9 Am. St. Rep. 713, p. 1956, 1959, 1963, 1964, 1965, 1979.
Minot v. Tappan, 127 Mass. 333, p. 1844.
Minot v. Taylor, 129 Mass. 160, p. 2302.
Minot v. Tilton, 64 N. H. 371, 10 Atl. 682, p. 1489, 1490, 1905.
Minshaw v. Jordan, 3 Brown Ch. 16, 17, p. 2728, 2729.
Minton v. New York El. R. Co., 130 N. Y. 332, 29 N. E. 319, p. 1452.
Minturn v. Farmers' Loan & T. Co., 3 N. Y. 498, 500, 501, p. 461.
Minturn v. Seymour, 4 Johns. Ch. 497, p. 619, 634, 1872, 2590, 2768, 2770.
Minturn v. Smith, 3 Saw. 142, p. 2755, 2757.
Mintz v. Brock, 193 Pa. St. 294, 44 Atl. 417, p. 2052.
Mirams, In re, [1891] 1 Q. B. 594, p. 2554.
Mirehouse v. Scaife, 2 Mylne & C. 695, p. 2209.
Miskey's Appeal, 107 Pa. St. 611, p. 1778.
Missionary Society v. Humphreys, 91 Md. 131, 46 Atl. 320, 80 Am. St. Rep. 432, p. 1971.
Mission Society's Appeal, 30 Pa. St. 425, p. 1977.
Mississippi & Mo. R. R. v. Cromwell, 91 U. S. 643, p. 662, 2767.
Miss. & Mo. R. R. v. Ward, 2 Black, 485, p. 519, 2633, 2683.
Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 76, p. 499, 505.
Mississippi R. Com. v. Gulf & S. I. R. Co., 78 Miss. 750, 29 South. 789, p. 764, 765.
Mississippi Val. Co. v. C. etc. R. R. Co., 58 Miss. 846, p. 1273.
Missouri v. Fank, 51 Mo. 98, p. 684.
Missouri Broom Mfg. Co. v. Guymon, 115 Fed. 112, 53 C. C. A. 16, p. 1327, 1330, 2018, 2034.
Missouri-Edison Elect. Co. v. M. J. Steinberg Hat & Fur Co., 94 Mo. App. 543, 68 S. W. 383, p. 736.
Missouri Historical Society v. Academy of Science, 94 Mo. 459, 8 S. W. 346, p. 1946, 1959, 1965, 1967, 1975, 1980.
Missouri, K. & T. R'y Co. v. Bacon, (Tex. Civ. App.) 80 S. W. 572, p. 1155.
Missouri, K. & T. R'y Co. v. Belcher, 88 Tex. 549, 32 S. W. 518, p. 1161.
Missouri, K. & T. R'y Co. v. Elliott, 56 Fed. 775, p. 498.
Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 359, 19 Sup. Ct. 179, s. c., 77 Fed. 32, 23 C. C. A. 1, 40 U. S. App. 620, p. 500, 648, 671, 672, 1706, 1714, 1716, 1719.
Missouri, L. M. & S. Co. v. Reinhard, 114 Mo. 218, 21 S. W. 488, 35 Am. St. Rep. 746, p. 2012.
Mitchel v. Reynolds, 1 P. Wms. 181, 1 Smith's Lead. Cas. 705, p. 1688, 1690.
Mitchell, Ex parte, 2 Atk. 173, p. 2621.
Mitchell v. Barnes, 22 Hun, 194, p. 2655.
Mitchell v. Berry, I Met. 602, p. 1801.
Mitchell v. Branhan, (Mo. App.) 79 S. W. 739, p. 1691.
Mitchell v. Burnham, 44 Me. 286, 299, 302, p. 550, 2367.
Mitchell v. Butt, 45 Ga. 162, p. 2521.
Mitchell v. Cline, 84 Cal. 409, 24 Pac. 164, p. 1696.
Mitchell v. Dawson, 23 W. Va. 86, p. 1335, 2515, 2516.
Mitchell v. Denson, 29 Ala. 327, 65 Am. Dec. 403, p. 1467, 1469.
Mitchell v. Dors, 6 Ves. 147, p. 2693.
Mitchell v. Farrish, 69 Md. 235, 14 Atl. 712, p. 1315, 1369.
Mitchell v. Great Works etc. Mfg. Co., 2 Story, 648, p. 517, 2799.
Mitchell v. Greene, 10 Met. 101, p. 317, 319.
Mitchell v. Hayne, 2 Sim. & St. 63, p. 2642.
Mitchell v. Hackett, 25 Cal. 538, 85 Am. Dec. 151, p. 1212, 1254.
Mitchell v. Jones, 50 Mo. 438, p. 1072, 1668.
Mitchell v. Koecker, 11 Beav. 380, p. 275.
Mitchell v. Ladew, 36 Mo. 526, 88 Am. Dec. 156, p. 2392, 2394.
Mitchell v. McDougall, 62 Ill. 498, p. 1616.

Mitchell v. Mims, 8 Tex. 6, p. 1625.
Mitchell v. Mitchell, 18 Md. 405, 29 Md. 581, p. 1684.
Mitchell v. National R'y B. & L. Ass'n, (Tex. Civ. App.) 49 S. W. 624, p. 2411.
Mitchell v. Otey, 23 Miss. 236, 240, p. 229, 462, 465.
Mitchell v. Peters, 18 Iowa, 119, p. 1145.
Mitchell v. Reed, 61 N. Y. 123, 139, 19 Am. Rep. 252, p. 2026.
Mitchell v. Richmond, 164 Pa. St. 566, 30 Atl. 486, p. 2197.
Mitchell v. Skinner, 17 Kan. 563, p. 2005.
Mitchell v. Smith, 4 De Gex, J. & S. 422, p. 2232, 2234, 2246.
Mitchell v. Smith, 32 Iowa, 484, 487, p. 2200.
Mitchell v. Smith, 53 N. Y. 413, 1 Paige, 287, p. 256, 1064, 1088.
Mitchell v. Steinmetz, 97 Pa. St. 251, p. 2771, 2775.
Mitchell v. Steward, L. R. 1 Eq. 451, p. 1450.
Mitchell v. Wellman, 80 Ala. 16, p. 2376.
Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673, p. 2470, 2576, 2578, 2580, 2581.
Mitchell v. Word, 60 Ga. 525, p. 2707.
Mitchell v. Worden, 20 Barb. 253, p. 1621.
Mitchell v. Zimmerman, 4 Tex. 75, 51 Am. Dec. 717, p. 1583.
Mitchell's Case, L. R. 9 Eq. 363, p. 1435.
Mitford v. Mitford, 9 Ves. Jr. 87, p. 646, 1332.
Mitford v. Reynolds, 1 Phill. Ch. 185, p. 176, 1948.
Mitler v. Mitler, 18 N. J. Eq. 270, 19 N. J. Eq. 257, 457, p. 310, 312.
Mitteer v. Wiley, 34 Iowa, 214, p. 821, 829.
Mix v. Balduc, 78 Ill. 215, p. 2779.
Mix's Appeal, 35 Conn. 121, 95 Am. Dec. 222, p. 2263.
Mixer's Case, 4 De Gex & J. 575, 586, p. 1574.
Mixon v. Dunklin, 48 Ala. 455, p. 2790.
Mize v. Barnes, 78 Ky. 506, p. 2521.
Moale v. Buchanan, 11 Gill & J. 314, 325, p. 1525, 1529, 1533.
Moberly v. City of Trenton, (Mo.) 81 S. W. 169, p. 765, 767.
Mobile & C. P. R. R. v. Talman, 15 Ala. 472, p. 2474.
Mobile & O. R. R. Co. v. Moseley, 52 Miss. 127, 137, p. 418.
Mobile Branch Bank v. Hunt, 8 Ala. 876, p. 1407.
Mobile Life Ins. Co. v. Randall, 71 Ala. 220, p. 1330.
Mobile Marine Dock etc. Co. v. Huder, 35 Ala. 713, p. 2447.
Mobray v. Leckie, 42 Md. 474, p. 725.
Mocatta v. Murgatroyd, 1 P. Wms. 393, 394, p. 1194, 1401.
Mock v. Pleasants, 34 Ark. 63, p. 2258.
Model Lodging H. Ass'n v. Boston, 114 Mass. 133, p. 1404.
Modisett v. Johnson, 2 Blackf. 431, p. 1072.
Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426, p. 1339, 1340.
Moeller v. Wolkenburg, 67 App. Div. 487, 73 N. Y. Supp. 890, p. 1086.
Moens v. Heyworth, 10 Mees & W. 147, p. 1576, 1625.
Moers v. Reading, 21 Pa. St. 188, p. 407.
Moet v. Pukering, L. R. 6 Ch. Div. 770, p. 2690.
Moetzel & Muttera v. Koch, (Iowa) 97 N. W. 1079, p. 1732.
Moffat v. Winslow, 7 Paige, 124, p. 1788.
Moffatt v. Bulson, 96 Cal. 106, 30 Pac. 1022, 31 Am. St. Rep. 192, p. 1696.
Moffett v. Parker, 71 Minn. 139, 70 Am. St. Rep. 319, 73 N. W. 850, p. 1298.
Mogg v. Baker, 3 Mees. & W. 195, p. 2576.
Moggridge v. Thackwell, 1 Ves. 464, 3 Brown Ch. 517, 7 Ves. 36, 36b, 69, 6 R. R. 76, p. 888, 958, 1933, 1943, 1959, 1962, 1963.
Mohawk & Hudson R. R. v. Artcher, 6 Paige, 83, p. 2687.
Mohawk & Hudson R. R. v. Clute, 4 Paige, 384, 391, p. 2635, 2639, 2648, 2649.
Mohawk Bridge Co. v. Utica etc. R. R., 6 Paige, 554, p. 2683.
Mohler v. Carder, 73 Iowa, 582, 35 N. W. 647, p. 1583.

Mohn v. Mohn, 112 Ind. 285, 13 N. E. 859, p. 1906.
Moinett v. Days, 1 Baxt. 431, p. 1764.
Moke v. Norrie, 14 Hun, 128, p. 2110.
Mole v. Mansfield, 15 Sim. 41, p. 2741.
Moloney v. Tilton, 22 Misc. Rep. 682, 51 N. Y. Supp. 19, p. 1910.
Molony v. Kennedy, 10 Sim. 254, p. 2162.
Molony v. Kernan, 2 Dru. & War. 31, p. 1333, 1763.
Molony v. Rourke, 100 Mass. 190, p. 1486.
Molony v. Scanlan, 53 Ill. 122, p. 882.
Molony v. Sloans, 44 Vt. 311, p. 179.
Monaghan, In re, 3 Jones & L. 258, p. 2623.
Monahan v. Monahan, (Vt.) 59 Atl. 169, p. 1996, 1997, 2001, 2006.
Monck v. Lord Monck, 1 Ball & B. 248, 298, 303, p. 899, 902, 910, 933, 937, 943, 946.
Moncrief v. Ross, 50 N. Y. 431, p. 2305, 2309, 2312, 2315.
Monell v. Monell, 5 Johns. Ch. 283, 9 Am. Dec. 298, p. 2061, 2094, 2095, 2096.
Money v. Dorsey, 7 Smedes & M. 15, p. 1269, 2534.
Money v. Jordan, 2 De Gex, M. & G. 318, 332, p. 1561.
Money v. Jorden, 15 Beav. 372, 2 De Gex, M. & G. 318, 5 H. L. Cas. 185, p. 2593.
Mong v. Roust, 29 W. Va. 119, 11 S. E. 906, p. 1972.
Monmouth Co. Elect. Co. v. Central R. Co., (N. J. Eq.) 54 Atl. 140, p. 2473.
Monmouth Park Ass'n v. Warren, 55 N. J. L. 598, 27 Atl. 932, p. 743.
Monnin v. Beroujon, 51 Ala. 196, p. 2130.
Monotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383, p. 1914, 2023.
Monro v. Taylor, 3 Macn. & G. 713, 718, p. 1528, 1529.
Monroe v. Armstrong, 96 Pa. St. 307, p. 759.
Monroe v. Fuchtler, 121 N. C. 101, 28 S. E. 63, p. 1756.
Monroe v. Hanson, 47 Nebr. 30, 66 N. W. 12, p. 1022.
Monroe v. Holmes, 13 Allen, 109, p. 2052.
Monroe v. May, 9 Kan. 466, p. 2192.
Monroe v. Smith, 79 Pa. St. 459, p. 1802, 1803.
Monroe v. South, (Tex. Civ. App.) 64 S. W. 1014, p. 738.
Monroe v. Trenholm, 112 N. C. 634, 17 S. E. 439, 114 N. C. 590, 19 S. E. 377, p. 1846.
Monson v. Hutchin, 194 Ill. 431, 62 N. E. 788, p. 1907.
Montacute v. Maxwell, 1 P. Wms. 618, 1 Strange, 236, 1 Eq. Cas. Abr. 19, p. 1535, 1659.
Montagne v. Mitchell, 28 Ill. 481, 486, p. 461.
Montagu, Ex parte, L. R. 1 Ch. Div. 554, p. 2561.
Montagu, In re, [1897] 2 Ch. 8, p. 1856.
Montagu v. Earl of Sandwich, L. R. 32 Ch. Div. 525, 546–548, p. 917, 919, 920.
Montague, In re, 28 Ch. Div. 82, p. 2618.
Montague v. Allan's Ex'r, 78 Va. 592, 49 Am. Rep. 384, p. 1751.
Montague v. Boston etc. R. R., 124 Mass. 242, p. 2429.
Montague v. Dudman, 2 Ves. Sr. 398, 399, p. 244, 245, 255, 257, 259, 273.
Montague v. Flockton, L. R. 16 Eq. 189, p. 2674.
Montague v. Hays, 10 Gray, 609, p. 1904.
Montague v. Montague, 15 Beav. 565, 571, p. 896, 909.
Montague v. Pacific Bank, 81 Fed. 602, p. 1915, 2019.
Montana Ore-Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co., 27 Mont. 536, 70 Pac. 1114, 71 Pac 1005, p. 159, 160.
Montefiore v. Browne, 7 H. L. Cas. 241, 266, 269, p. 1127, 1292, 1855.
Montefiore v. Guedalla, [1903] 2 Ch. 26, p. 1210.
Montefiore v. Guedalla, 1 De Gex, F. & J. 93, p. 903.
Montesquieu v. Sandys, 18 Ves. 302, p. 1767, 1769.
Montford, Ex parte, 14 Ves. 606, p. 189.
Montford v. Cadogan, 17 Ves. 485, 489, 19 Ves. 635, 638, p. 1904.
Montgomery v. Agricultural Bank, 10 Smedes & M. 566, 276, p. 2155.

Montgomery v. Bayliss, 96 Ala. 342, 11 South. 198, p. 983.
Montgomery v. Bruere, 4 N. J. L. 260, 268, 279, 5 N. J. L. 865, p. 2351, 2367.
Montgomery v. Chadwick, 7 Iowa, 114, p. 2428, 2430.
Montgomery v. Gordon, 51 Ala. 377, p. 1448.
Montgomery v. Keppel, 75 Cal. 128, 7 Am. St. Rep. 125, 19 Pac. 178, p. 981, 997, 1007, 1284.
Montgomery v. McEwen, 7 Minn. 351, p. 231, 355, 586, 1524.
Montgomery v. McGee, 7 Humph. 234, p. 2788, 2790.
Montgomery v. Milliken, Smedes & M. Ch. 495, p. 2309.
Montgomery v. Noyes, 73 Tex. 203, 11 S. W. 138, p. 1051, 1055.
Montgomery v. Reilly, 1 Bligh, N. S., 364, 1 Dow. & C. 62, p. 1561, 2591.
Montgomery v. Shockey, 37 Iowa, 107, p. 1487, 2729.
Montgomery v. Spect, 55 Cal. 352, p. 2381.
Montgomery v. Sprankle, 31 Ind. 113, p. 2191.
Montgomery v. United States, 36 Fed. 4, p. 521.
Montgomery v. United States, 15 Wall. 395, p. 1696.
Montgomery Traction Co. v. Harmon, (Ala.) 37 South. 371, p. 2127.
Monticello Hydraulic Co. v. Loughry, 72 Ind. 562, p. 2470, 2474.
Montijo v. Owen, 14 Blatchf. 325, Fed. Cas. No. 9,722, p. 495.
Moodalay v. Morton, 1 Brown Ch. 469, 2 Dick. 652, p. 260, 284, 298.
Moody v. Bibb, 50 Ala. 245, p. 2130.
Moody v. Ellerbie, 36 Ga. 666, p. 2264.
Moody v. Harper, 38 Miss. 599, p. 2278.
Moody v. Matthews, 7 Ves. 174, 185, p. 2028.
Moody v. Miller, 103 Ga. 452, 30 S. E. 258, p. 1062, 1076.
Moody v. Moody, 68 Me. 155, p. 2426.
Moody v. Sitton, 2 Ired. Eq. 382, p. 1226.
Moody v. Wright, 13 Met. 17, 32, 46 Am. Dec. 706, p. 2576.
Moog v. Strang, 69 Ala. 98, p. 1704, 1735.
Moon v. National Wall-Paper Co., 66 N. Y. Supp. 33, 31 Misc. Rep. 631, p. 342.
Mooney v. Miller, 102 Mass. 217, 220, p. 1563, 1565.
Moons v. De Bernales, 1 Russ. 301, p. 2079.
Moor v. Anglo-Italian Bank, L. R. 10 Ch. Div. 681, p. 2703.
Moor v. Black, Cas. t. Talb. 126, p. 2734.
Moore v. Adams, 8 Ohio, (8 Ham.) 372, 32 Am. Dec. 723, p. 667, 1703, 1712.
Moore v. Alden, 80 Me. 301, 14 Atl. 199, 6 Am. St. Rep. 203, p. 2227.
Moore v. Anders, 14 Ark. 628, 634, 60 Am. Dec. 551, p. 2529, 2530.
Moore v. Baker, 4 Ind. App. 115, 51 Am. St. Rep. 203, 30 N. E. 629, p. 769, 794.
Moore v. Beasom, 44 N. H. 215, p. 1402.
Moore v. Beckwith's Ex'r, 14 Ohio St. 129, 135, p. 2494.
Moore v. Bennett, 2 Ch. Cas. 246, p. 1050.
Moore v. Blondheim, 19 Md. 172, p. 1803.
Moore v. Booker, 4 N. Dak. 543, 62 N. W. 607, p. 2406.
Moore v. Bowman, 47 N. H. 494, p. 1445.
Moore v. Burrows, 34 Barb. 173, p. 621.
Moore v. Butler, 2 Schoales & L. 266, 268, p. 786, 856.
Moore v. Cable, 1 Johns. Ch. 385, 387, 388, p. 2429, 2430, 2431, 2482.
Moore v. Calkins, 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. 583, p. 2100.
Moore v. Campbell, 113 Ala. 587, 21 South. 353, p. 1906.
Moore v. Church, 70 Iowa, 208, 59 Am. Rep. 439, 30 N. W. 855, p. 1858.
Moore v. Clay, 7 Ala. 742, p. 1348.
Moore v. Colt, 127 Pa. St. 289, 18 Atl. 8, 14 Am. St. Rep. 845, p. 737.
Moore v. Copeley, 165 Pa. St. 294, 44 Am. St. Rep. 664, 30 Atl. 829, 35 Wkly. Notes Cas. 563, p. 2197.
Moore v. Cord, 14 Wis. 213, p. 2758.
Moore v. Craven, L. R. 7 Ch. 94, note, p. 273, 283.

Moore v. Crawford, 130 U. S. 122, 128, 9 Sup. Ct. Rep. 447, 32 L. ed. 878, p. 2033.
Moore v. Crump, (Miss.) 37 South. 109, p. 1542, 2034.
Moore v. Curry, 36 Tex. 668, p. 1346.
Moore v. Darton, 4 De Gex & S. 517, p. 1879, 2238, 2242.
Moore v. Degraw, 5 N. J. Eq. 346, p. 2428.
Moore v. Durnam, 63 N. J. Eq. 96, 51 Atl. 449, p. 727, 760, 1463, 1464.
Moore v. Frowd, 3 Mylne & C. 45, 48, p. 2098.
Moore v. Fuller, 6 Oreg. 272, 25 Am. Rep. 524, p. 1328.
Moore v. Gamble, 9 N. J. Eq. 246, p. 2707.
Moore v. Giesecke, 76 Tex. 543, 13 S. W. 290, p. 1516.
Moore v. Gleaton, 23 Ga. 142, p. 2265.
Moore v. Gravelot, 3 Ill. App. 442, p. 2563.
Moore v. Harper, 27 W. Va. 362, p. 787.
Moore v. Harrisburg Bank, 8 Watts, 138, p. 1403.
Moore v. Hart, 1 Vern. 110, 201, 2 Ch. Rep. 284, p. 1561, 2591.
Moore v. Hegeman, 72 N. Y. 376, p. 1896.
Moore v. Hilton, 12 Leigh, 1, p. 896, 909.
Moore v. Holcombe, 3 Leigh, 597, 24 Am. Dec. 683, p. 1257, 1382.
Moore v. Holt, 3 Tenn. Ch. 248, p. 1641.
Moore v. Hood, 9 Rich. Eq. 311, 70 Am. Dec. 210, p. 2633.
Moore v. Ingram, 91 N. C. 376, p. 2504.
Moore v. Jaeger, 2 McAr. 465, p. 155, 2633.
Moore v. Jervis, 2 Coll. C. C. 60, p. 1229.
Moore v. Jordan, 65 Miss. 229, 3 South. 737, 7 Am. St. Rep. 641, p. 664, 1989, 1991.
Moore v. Jourdan, 14 La. Ann. 414, p. 1146.
Moore v. Kidder, 55 N. H. 488, p. 527.
Moore v. Lackey, 53 Miss. 85, p. 2522, 2525, 2527.
Moore v. Lesueur, 33 Ala. 237, p. 2255.
Moore v. McIntyre, 110 Mich. 237, 68 N. W. 130, p. 468.
Moore v. McLure, 124 Ala. 120, 27 South. 499, p. 2024.
Moore v. Mandlebaum, 8 Mich. 433, p. 1763, 1764.
Moore v. Metropolitan Bank, 55 N. Y. 41, 46–49, 14 Am. Rep. 173, p. 1238, 1239, 1247, 1248, 1249, 1443.
Moore v. Mitchell, 2 Woods, 483, p. 2057, 2068, 2077.
Moore v. Moore, 5 Barb. 256, p. 1761.
Moore v. Moore, 47 Barb. 257, p. 1895.
Moore v. Moore, 29 Beav. 496, p. 2214.
Moore v. Moore, 14 B. Mon. 208, p. 2169.
Moore v. Moore, 56 Cal. 89, p. 1640, 1729, 1738.
Moore v. Moore, 1 Coll. C. C. 54, 57, p. 2157.
Moore v. Moore, 4 Dana, 354, 29 Am. Dec. 417, p. 1980.
Moore v. Moore, (Ga.) 30 S. E. 535, p. 697.
Moore v. Moore, 112 Ind. 149, 13 N. E. 673, 2 Am. St. Rep. 170, p. 1246.
Moore v. Moore, 43 L. J. Ch., N. S., 623, p. 1870.
Moore v. Moore, L. R. 18 Eq. 474, p. 2232, 2236, 2237, 2246.
Moore v. Moore, 67 Tex. 293, 3 S. W. 284, p. 1066, 1071.
Moore v. Moore, 2 Ves. Sr. 596, 600, p. 1471.
Moore v. Morris, 4 Drew. 33, 37, p. 2143, 2161.
Moore v. Northwestern Bank, [1891] 2 Ch. 599, p. 1256.
Moore v. Page, 111 U. S. 117, 4 Sup. Ct. 388, 28 L. ed. 373, p. 2140, 2141.
Moore v. Pickett, 62 Ill. 158, p. 1903.
Moore v. Pierson, 6 Iowa, 279, 71 Am. Dec. 409, p. 1145.
Moore v. Platte, 8 Mo. 467, p. 717, 753.
Moore v. Ragland, 74 N. C. 343, p. 2383.
Moore v. Ransdel, 156 Ind. 658, 59 N. E. 936, 60 N. E. 1068, p. 1911, 2036.
Moore v. Reed, 2 Ired. Eq. 580, p. 1788.
Moore v. Sargent, 117 Ind. 484, 14 N. E. 466, p. 724, 726.
Moore v. Scott, (Tex. Civ. App.) 38 S. W. 394, p. 1056.
Moore v. Shurtleff, 128 Ill. 370, 21 N. E. 775, p. 2452.
Moore v. Sinnott, 117 Ga. 1010, 44 S. E. 810, p. 1843.

Moore v. Spier, 80 Ala. 129, p. 1751.
Moore v. Stinson, 144 Mass. 596, 12 N. E. 410, p. 1994.
Moore v. Swift, (Tex. Civ. App.) 67 S. W. 1065, p. 1342.
Moore v. Tisdale, 5 B. Mon. 352, p. 2039.
Moore v. Titman, 44 Ill. 367, p. 2428.
Moore v. Usher, 7 Sim. 383, p. 2642.
Moore v. Wade, 8 Kan. 380, p. 2376, 2381.
Moore v. Waller's Heirs, 1 A. K. Marsh. 488, p. 2271.
Moore v. Ware, 38 Me. 496, p. 2394.
Moore v. Worthy, 56 Ala. 163, p. 2498, 2509, 2511, 2514.
Moore v. Young, 1 Dana, 516, p. 2793.
Moore & Handley Hdw. Co. v. Hardware Co., 87 Ala. 206, 6 South. 41, 13 Am. St. Rep. 23, p. 1690.
Moore's Adm'rs v. Fitz Randolph, 6 Leigh, 175, p. 2769.
Moore's Appeal, 88 Pa. St. 450, 32 Am. Rep. 469, p. 2402.
Moore's Estate, In re, 198 Pa. St. 611, 48 Atl. 884, p. 1846.
Moorhouse v. Colvin, 15 Beav. 341, p. 1561, 2593.
Moorman v. Arthur, 90 Va. 455, 18 S. E. 869, p. 1449.
Moorman v. Collier, 32 Iowa, 138, p. 1486.
Moorman v. Gibbs, 75 Iowa, 537, 39 N. W. 832, p. 1271.
Moorman v. Hoge, 2 Saw. 78, p. 2691.
Moors v. Albro, 129 Mass. 9, p. 2369.
Moote v. Scriven, 33 Mich. 500, p. 2778.
Moran v. Johnston, 26 Gratt. 108, p. 2659.
Moran v. McLarty, 75 N. Y. 25, p. 1541, 2725, 2727.
Moran v. Moran, 104 Iowa, 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443, p. 1935, 1938, 1952, 1974.
Moran v. Palmer, 13 Mich. 367, 370, p. 2749, 2752, 2753.
Moran v. Wheeler, 87 Tex. 179, 27 S. W. 54, p. 1103.
Moran v. Woodyard, 8 B. Mon. 537, p. 2703.
Mordant v. Thorold, 2 Lev. 275, p. 2735.
Mordaunt v. Benwell, L. R. 19 Ch. Div. 302, p. 2321.
Mordecai v. Seignious, 53 S. C. 95, 30 S. E. 717, p. 2018.
Mordecai v. Stewart, 37 Ga. 364, 375–377, 382, p. 567.
Mordue v. Palmer, L. R. 6 Ch. 22, p. 1549.
More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621, p. 1688.
More v. Calkins, 95 Cal. 455, 29 Am. St. Rep. 128, 30 Pac. 583, p. 2049, 2101.
More v. Lackey, 53 Miss. 85, p. 2523.
More v. Massini, 32 Cal. 590, p. 2686, 2694.
More v. Mayhow, 1 Cas. Ch. 34, p. 1201, 1333, 1347.
More v. More, 2 Atk. 157, p. 2621.
More v. Smedburgh, 8 Paige, 600, p. 1788.
Morecock v. Dickins, Amb. 678, p. 1108, 1109.
Morehead v. Eades, 3 Bush. 121, p. 1565, 1590, 1594.
Morehead v. Horner, 30 W. Va. 548, 4 S. E. 448, p. 1052, 1191, 2522.
Morehead v. Hunt, 1 Dev. Eq. 35, p. 1694.
Morehouse v. Ballou, 16 Barb. 289, p. 682, 2607.
Morehouse v. Cotheal, 22 N. J. Eq. 521, p. 2681.
Moreland v. Atchison, 19 Tex. 303, p. 1493, 1495.
Moreland v. Brown, 86 Fed. 257, p. 1915.
Moreland v. Myall, 14 Bush, 474, p. 2192.
Moreland v. Richardson, 24 Beav. 33, p. 1025.
Moren v. McCown, 23 Ark. 93, p. 574, 2258.
Moreton v. Harrison, 1 Bland, 491, p. 2500, 2505.
Morgan, In re, L. R. 18 Ch. Div. 93, p. 2539, 2728.
Morgan, Re, 63 Barb. 621, p. 2107.
Morgan v. Annis, 3 De Gex & S. 461, p. 1653.
Morgan v. Bergen, 3 Nebr. 209, p. 2778, 2779, 2780, 2781.
Morgan v. Bostic, 132 N. C. 743, 44 S. E. 639, p. 1068, 1087.
Morgan v. Crabb, 3 Port. 470, p. 2789.
Morgan v. Dillon, 9 Mod. 135, 139, p. 2612.

Morgan v. Dinges, 23 Nebr. 271, 36 N. W. 544, 8 Am. St. Rep. 121, p. 1566.
Morgan v. Dod, 3 Colo. 551, p. 1500.
Morgan v. Elford, L. R. 4 Ch. 352, p. 1613.
Morgan v. Evans, 3 Clark & F. 159, 195, p. 1772.
Morgan v. Fillmore, 18 Abb. Pr. 217, p. 2644, 2648.
Morgan v. Hannas, 49 N. Y. 667, p. 2098.
Morgan v. Higgins, 1 Giff. 270, 277, p. 1772.
Morgan v. Holford, 1 Smale & G. 101, p. 2006.
Morgan v. Lehman, Durr & Co., 92 Ala. 440, 9 South. 314, p. 212.
Morgan v. Lewes, 4 Dow. 29, 46, 47, p. 1769, 1772.
Morgan v. Lowe, 5 Cal. 325, 63 Am. Dec. 132, p. 1207.
Morgan v. Malleson, L. R. 10 Eq. 475, p. 1867, 1868, 1870, 1875, 1876.
Morgan v. Marsack, 2 Mer. 107, p. 2637.
Morgan v. Masterton, 4 Sand. 442, p. 1896.
Morgan v. Mather, 2 Ves. 15, p. 1549.
Morgan v. Michigan A. L. R. Co., 57 Mich. 430, 25 N. W. 161, 26 N. W. 865, p. 1155.
Morgan v. Minett, L. R. 6 Ch. Div. 638, p. 1751, 1766.
Morgan v. Morgan, 16 Abb. Pr., N. S., 291, p. 293.
Morgan v. Morgan, 14 Beav. 72, 77, p. 2321.
Morgan v. Morgan, 5 Madd. 408, p. 1849, 2162.
Morgan v. Morgan, 48 N. J. Eq. 399, 22 Atl. 545, p. 2431.
Morgan v. Morgan, 3 Stew. 383, 21 Am. Dec. 638, p. 442, 1021, 1024, 1269.
Morgan v. Palmer, 48 N. H. 336, p. 148, 308, 2692.
Morgan v. Chicago & Alton Railroad Co., 96 U. S. 716, p. 1429.
Morgan v. Railroad Co., 1 Woods, 15, Fed. Cas. No. 9,806, p. 2121.
Morgan v. Seaward, 1 Web. Pat. Cas. 167, p. 285.
Morgan v. Smith, 70 N. Y. 537, p. 2794.
Morgan v. South Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872, p. 2406.
Morgan v. Swansea etc. Authority, L. R. 9 Ch. Div. 582, 584, p. 2529, 2533.
Morgan v. Thomas, L. R. 6 Ch. Div. 176, p. 2214.
Morgan v. Titus, 3 N. J. Eq. 201, p. 827.
Morgan v. Turner, 35 Misc. Rep. 399, 71 N. Y. Supp. 996, p. 2004.
Morgan's Appeal, 126 Pa. St. 500, 17 Atl. 666, p. 982, 988.
Morgan's Assignees v. Shinn, 15 Wall. 105, 21 L. ed. 87, p. 2380.
Morgan's Heirs v. Morgan, 2 Wheat. 290, p. 2771.
Morganthau v. White, 1 Sweeny, 395, p. 1513.
Moriarty v. Martin, 3 Ir. Ch. 26, p. 796.
Morice v. Bishop of Durham, 9 Ves. 399, 405, 10 Ves. 321, 521, 522, 535, 536, 537, 541, p. 176, 1923, 1925, 1933, 1949, 1950, 1986.
Morisey v. Swinson, 104 N. C. 555, 10 S. E. 754, p. 652.
Morison v. Moat, 9 Hare, 241, p. 2670.
Morison v. Morison, 7 De Gex, M. & G. 214, p. 2103.
Moritz v. Lavelle, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803, p. 958, 2024.
Morland v. Cook, L. R. 6 Eq. 252, 263, 265, p. 1014, 1199.
Morley, In re, [1895] 2 Ch. 738, p. 2056.
Morley v. Bird, 3 Ves. 628, 631, p. 681, 2208.
Morley v. Dickinson, 12 Cal. 561, p. 2793.
Morley v. Loughnan, [1893] 1 Ch. 736, p. 1780.
Morley v. Morley, 5 De Gex, M. & G. 610, p. 1407, 1411.
Morley v. Rennoldson, 2 Hare, 570, 579, 580, p. 1681, 1683, 1684.
Morley Bros. v. Stringer, (Mich.) 95 N. W. 978, p. 663.
Mormon Church v. United States, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. ed. 478, p. 512, 1965, 1978.
Morningstar v. Selby, 15 Ohio, 345, 45 Am. Dec. 579, p. 1636.

Mornington, Countess of, v. Keane, 2 De Gex & J. 292, 313, p. 2470, 2471.
Mornington v. Keane, 2 De Gex & J. 292, p. 950, 952, 954.
Mornington v. Mornington, 2 Johns. & H. 697, p. 279.
Moroney's Appeal, 24 Pa. St. 372, p. 2383.
Morrall v. Waterson, 7 Kan. 199, p. 2005.
Morrell v. Cowan, L. R. 6 Ch. Div. 166, p. 2185.
Morrell v. Fisher, 4 Ex. 591, p. 1547.
Morrell v. Wootten, 13 Beav. 105, p. 287.
Morrell v. Wootten, 16 Beav. 197, p. 2564.
Morret v. Paske, 2 Atk. 52, 54, p. 182, 2032.
Morrey Kyrles Settlement, In re, [1900] 2 Ch. 839, p. 1839.
Morrice v. Swaby, 2 Beav. 500, p. 287.
Morrill v. Morrill, 1 Allen, 132, p. 2052.
Morrill v. Morrill, 53 Vt. 74, 38 Am. Rep. 659, p. 1098, 1114.
Morrill v. Nightingale, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207, p. 1734.
Morrill v. Noyes, 56 Me. 458, 471, 96 Am. Dec. 486, p. 2581, 2583.
Morrill v. Weeks, 70 N. H. 178, 46 Atl. 32, p. 735.
Morris v. Barnwell, 60 Ga. 147, p. 2707.
Morris v. Beans, 123 Fed. 618, p. 340.
Morris v. Budlong, 78 N. Y. 543, 552, p. 2380.
Morris v. Burroughs, 1 Atk. 404, p. 783.
Morris v. Clarkson, 1 Jacob & W. 107, p. 1679.
Morris v. Coleman, 18 Ves. 436, 437, p. 1688, 2676.
Morris v. Daniels, 35 Ohio St. 406, p. 1148, 1356, 1357.
Morris v. Floyd, 5 Barb. 130, p. 1706.
Morris v. Garland's Adm'r, 78 Va. 215, p. 2218.
Morris v. Hogle, 37 Ill. 150, 87 Am. Dec. 243, p. 1050, 1145.
Morris v. Griffiths, 26 Ch. Div. 601, p. 2312.
Morris v. Ham, 47 Ark. 293, 1 S. W. 519, p. 2527.
Morris v. Hoyt, 11 Mich. 9, 18, p. 2777.
Morris v. Ile, 152 Ill. 190, 202, 204, 43 Am. St. Rep. 233, 38 N. E. 762, p. 1072.
Morris v. Islip, 20 Beav. 654, p. 2432.
Morris v. Joyce, 63 N. J. Eq. 549, 53 Atl. 139, p. 1442.
Morris v. Kettle, (N. J. Eq.) 34 Atl. 376, p. 765.
Morris v. McCoy, 7 Nev. 399, p. 734, 743.
Morris v. MacCullock, 2 Eden, 190, Amb. 432, p. 1697, 1716.
Morris v. Morgan, 10 Sim. 341, p. 319.
Morris v. Morris, 3 Houst. 568, p. 878.
Morris v. Morris, 2 Phill. Ch. 205, p. 296.
Morris v. Morris, 15 Sim. 505, p. 2682.
Morris v. Mowatt, 2 Paige, 586, 590, 22 Am. Dec. 661, p. 1269, 1279.
Morris v. Nyswanger, 5 S. Dak. 307, 58 N. W. 800, p. 2477.
Morris v. Pate, 31 Mo. 315, p. 1284, 2573.
Morris v. Reigel, (S. Dak.) 101 N. W. 1086, p. 2027.
Morris v. Thomas, 17 Ill. 112, 115, p. 222.
Morris v. Thompson's Ex'rs, 19 N. J. Eq. 307, p. 1934.
Morris v. Tuskaloosa Mfg. Co., 83 Ala. 565, 3 South. 689, p. 2596.
Morris v. Wadsworth, 17 Wend. 103, p. 1127.
Morris & Essex R. R. v. Prudden, 20 N. J. Eq. 530, p. 2687.
Morris Canal Co. v. Emmett, 9 Paige, 168, 37 Am. Dec. 388, p. 1560, 1588.
Morris Canal & B. Co. v. Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423, p. 1218, 1382.
Morris Canal & B. Co. v. Jersey City, 12 N. J. Eq. 227, p. 2757.
Morriso v. Philliber, 30 Mo. 145, p. 1668.
Morrison, In re, [1901] 1 Ch. 701, p. 2050.
Morrison v. Arnold, 19 Ves. 670, p. 296.
Morrison v. Ashburn, (Tex. Civ. App.) 21 S. W. 993, p. 748.
Morrison v. Barrow, 1 De Gex, F. & J. 633, p. 2769.

Morrison v. Barry, 10 Tex. Civ. App. 22, 30 S. W. 376, p. 2410.
Morrison v. Beckwith, 20 Ky. (4 T. B. Monroe) 73, 16 Am. Dec. 136, p. 1231.
Morrison v. Beirer, 2 Watts & S. 81, p. 1977.
Morrison v. Bowman, 29 Cal. 337, 346–348, p. 809, 811, 841, 843.
Morrison v. Brand, 5 Daly, 40, p. 2372, 2376.
Morrison v. Funk, 23 Pa. St. 421, p. 1276, 1381.
Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537, p. 1026, 1047.
Morrison v. Hershire, 32 Iowa, 271, p. 651.
Morrison v. Jones, (Mont.) 77 Pac. 507, p. 2376.
Morrison v. Juden, 145 Mo. 282, 46 S. W. 994, p. 663.
Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169, p. 1050.
Morrison v. Kinstra, 55 Miss. 71, p. 1912, 2194.
Morrison v. Lods, 39 Cal. 381, p. 1603.
Morrison v. McLeod, 2 Dev. & B. Eq. 221, p. 1733.
Morrison v. March, 4 Minn. 422, p. 1048, 1146.
Morrison v. Marker, (C. C. A.) 93 Fed. 692, 695, p. 503.
Morrison v. Miller, 46 Iowa, 84, p. 1705.
Morrison v. Morrison, 27 Gratt. 190, p. 2729.
Morrison v. Morrison, 140 Ill. 560, 30 N. E. 768, p. 1021.
Morrison v. Rogers, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. Rep. 95, p. 1678.
Morrison v. Smith, 130 Ill. 304, 23 N. E. 241, p. 1770.
Morrison v. Snow, 26 Utah, 247, 72 Pac. 924, p. 1639.
Morrison v. Thistle, 67 Mo. 596, p. 2143, 2144, 2194.
Morris Run etc. Co. v. Barclay C. Co., 68 Pa. St. 173, p. 1688.
Morris' Ex'r v. Morris' Devisees, 48 W. Va. 430, 37 S. E. 570, p. 1972.
Morrow v. Brenizer, 2 Rawle, 184, 185, 189, p. 621, 2325, 2327.
Morrow v. Graves, 77 Cal. 218, 19 Pac. 489, p. 1271.
Morrow v. Saline Co. Comm'rs, 21 Kan. 484, p. 2051, 2056, 2066, 2080, 2085.
Morrow v. Turney's Adm'r, 35 Ala. 131, p. 191, 2470.
Morrow's Assignees v. Bright, 20 Mo. 298, p. 1234.
Morrow Shoe Co. v. New England Shoe Co., 60 Fed. 341, 18 U. S. App. 616, 8 C. C. A. 652, 24 L. R. A. 425, p. 505.
Morse v. Brockett, 67 Barb. 234, p. 1262.
Morse v. Buckworth, 2 Vern. 443, p. 257, 260.
Morse v. Curtis, 140 Mass. 112, 2 N. E. 929, 54 Am. Rep. 456, p. 1101, 1137, 1359, 1360,
Morse v. Godfrey, 3 Story, 364, 389, Fed. Cas. No. 9,856, p. 1327.
Morse v. Hackensack Sav. Bk., 47 N. J. Eq. 279, 20 Atl. 961, 12 L. R. A. 62, p. 854.
Morse v. Hill, 136 Mass. 60, p. 2086.
Morse v. Inhabitants of Natick, 176 Mass. 510, 57 N. E. 996, p. 1934, 1979.
Morse v. Machias etc. Co., 42 Me. 119, 127, p. 555.
Morse v. Martin, 34 Beav. 500, p. 962, 1468.
Morse v. O'Reilly, Fed. Cas. No. 9,858, p. 765.
Morse v. Rathburn, 42 Mo. 594, 97 Am. Dec. 359, p. 732, 742, 748.
Morse v. Royal, 12 Ves. 355, 373, p. 1667, 1671, 1758, 1784.
Morse v. Slason, 13 Vt. 296 p. 2290.
Morse v. Stafford, 95 Me. 31, 49 Atl. 45, p. 2347.
Morse v. Steinbach, 127 U. S. 70, 8 Sup. Ct. 1067, 1072, p. 504.
Morse Twist Drill & M. Co. v. Morse, 103 Mass. 73, 4 Am. Rep. 513, p. 1690.
Morss v. Elmendorf, 11 Paige, 277, p. 343, 344, 345, 2782.
Mortgage Security Co. v. Gay, 33 Fed. 636, p. 501.
Mortimer v. Bell, L. R. 1 Ch. 10, p. 1694.
Mortimer v. Capper, 1 Brown Ch. 156, p. 1460, 1669, 2774.
Mortimer v. Latimer, 11 Jurist, 721, Ames' Cas. on Trusts, 508, p. 2059.

Mortimer v. Pritchard, 1 Bail. Eq. 505, p. 1493, 1518, 1539.
Mortimer v. Shortail, 2 Dru. & War. 363, 372, 374, p. 1515, 1516.
Mortimore v. Mortimore, 4 De Gex & J. 472, p. 2070, 2073.
Mortlock v. Buller, 10 Ves. 292, 305, 306, 308, p. 2048, 2600, 2766, 2775.
Morton v. Barrett, 22 Me. 257, 261, 39 Am. Dec. 575, p. 553, 1829.
Morton v. Lowell, 56 Tex. 643, 646, p. 1333, 1355.
Morton v. Naylor, 1 Hill, 583, p. 195, 2561, 2563.
Morton v. Noble, 22 Ind. 160, p. 2358.
Morton v. Robards, 4 Dana, 258, p. 1044, 1271.
Morton v. Scull, 23 Ark. 289, p. 1625.
Morton v. Sims, 64 Ga. 298, p. 2624.
Morton v. Southgate, 28 Me. 41, p. 552, 553, 2051, 2072.
Morton's Est., In re, 201 Pa. St. 269, 50 Atl. 933, p. 2052.
Morville v. Fowle, 144 Mass. 109, 10 N. E. 766, p. 1940, 1979.
Mosby v. Wall, 23 Miss. 81, 55 Am. Dec. 71, p. 1517.
Mosby v. Ward, 29 Beav. 407, p. 786.
Moseby v. Burrow, 52 Tex. 396, p. 2662.
Moseby v. Partee, 5 Heisk. 26, p. 2198.
Moseler v. Jacobs, 66 Ill. App. 571, p. 660.
Moseley v. Boush, 4 Rand. 392, p. 469. 2557.
Moseley v. Brown, 76 Va. 419, p. 1705.
Mosely v. Mosely, 86 Ala. 289, 5 South. 732, p. 2037, 2040, 2382.
Mosely v. Virgin, 3 Ves. 184, 185, p. 2765.
Moser v. Johnson, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146, p. 2533.
Moser v. Libenguth, 2 Rawle, 428, p. 1489.
Moses, In re, [1902] 1 Ch. 100, p. 2215.
Moses v. Franklin Bank, 34 Md. 574, p. 2569.
Moses v. Johnson, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146, p. 2530.
Moses v. Murgatroyd, 1 Johns. Ch. 119, 129, 7 Am. Dec. 478, p. 1856, 2796.
Moses v. Sanford, 2 Lea, 655, p. 2704.
Mosher v. Funk, 194 Ill. 351, 62 N. E. 782, p. 1910.
Moshier v. Meek, 80 Ill. 79, p. 2499, 2512, 2519.
Mosier's Appeal, 56 Pa. St. 76, 93 Am. Dec. 783, p. 2424.
Mosley v. Massey, 8 East, 149, p. 1545.
Mosley v. Ward, 29 Beav. 407, p. 784.
Moss, In re, [1899] 2 Ch. 314, p. 2228.
Moss v. Atkinson, 44 Cal. 3, 17, p. 1019, 1023, 1024, 1045, 1144.
Moss v. Bainbrigge, 6 De Gex, M. & G. 292, p. 1769.
Moss v. Barton, L. R. 1 Eq. 474, p. 2761.
Moss v. Cohen, 32 N. Y. Supp. 1078, 11 Misc. Rep. 184, p. 2017.
Moss v. Culver, 64 Pa. St. 414, 3 Am. Rep. 601, p. 2782.
Moss v. Green, 10 Leigh, 251, 34 Am. Dec. 731, p. 2372.
Moss v. Helsley, 60 Tex. 426, p. 841.
Moss v. Moss, 95 Ill. 449, p. 1993, 2006, 2024.
Moss v. Odell, 141 Cal. 335, 74 Pac. 999, p. 2431.
Mossop v. Eadon, 16 Ves. 430, 433, 434, p. 464, 1464.
Mosteller v. Mosteller, 40 Kan. 658, 20 Pac. 464, p. 1993, 2005.
Motley v. Jones, 98 Ala. 443, 13 South. 782, p. 1037, 1273.
Motley v. Sawyer, 34 Me. 540, p. 2193.
Mott v. Ackerman, 92 N. Y. 539, p. 1921.
Mott v. Buxton, 7 Ves. 201, p. 1919.
Mott v. Clark, 9 Pa. St. 399, 400, 49 Am. Dec. 566, p. 1108, 1113, 1257, 1346.
Mott v. Consumers' Ice Co., 2 Abb. N. C. 143, 52 How. Pr. 148, 244, p. 293.
Mott v. Harrington, 12 Vt. 199, p. 1769.
Mott v. Maris, (Tex. Civ. App.) 29 S. W. 825, p. 2403.
Mott v. Mott, 11 Barb. 127, 134, p. 727, 747.
Mott v. Pennsylvania R. R. Co., 30 Pa. St. 9, 62 Am. Dec. 664, p. 407.
Mott v. Shoolbred, L. R. 20 Eq. 22, p. 2687.
Moulson v. Moulson, 1 Brown Ch. 82, p. 917.

Moulton v. Holmes, 57 Cal. 337, p. 2050.
Moulton v. Smith, 16 R. I. 126, 27 Am. St. Rep. 728, 12 Atl. 891, p. 83, 462, 533, 2250, 2287.
Mounce v. Byars, 16 Ga. 469, p. 2503.
Mounger v. Duke, 53 Ga. 277, p. 2143.
Mounin v. Beroujon, 51 Ala. 196, p. 1550.
Mount v. Potts, 23 N. J. Eq. 188, p. 2447, 2455.
Mount v. Suydam, 4 Sand. Ch. 399, p. 2426.
Mount v. Waite, 7 Johns. 434, p. 1721.
Mountford v. Scott, Turn. & R. 274, p. 1168.
Mountfort, Ex parte, 14 Ves. 606, p. 2463.
Mountfort, Ex parte, 15 Ves. 445, p. 2617.
Mount Holly etc. Co. v. Ferree, 17 N. J. Eq. 117, p. 1219, 1221, 1223, 1382, 2635, 2642, 2644, 2649.
Movan v. Hays, 1 Johns. Ch. 339, 342, p. 1901.
Mowatt v. Wright, 1 Wend. 355, 360, 19 Am. Dec. 508, p. 1477.
Mowbry v. Mowbry, 64 Ill. 383, p. 823.
Mower v. Orr, 7 Hare, 473, p. 2310, 2321.
Mowry v. Crocker, 33 S. C. 436, 12 S. E. 3, p. 1105.
Mowry v. Hill, 11 Wis. 146, 149, p. 588.
Mowry v. Wood, 12 Wis. 413, p. 2478, 2540, 2542.
Moxey v. Bigwood, 4 De Gex, F. & J. 351, p. 1539.
Moxhay v. Inderwick, 1 De Gex & S. 708, p. 1199.
Moxon v. Bright, L. R. 4 Ch. 292, p. 211, 542, 2799, 2800.
Moxon v. Payne, L. R. 8 Ch. 881, p. 1738.
Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060, p. 1701.
Moyer v. Hinman, 13 N. Y. 180, 17 Barb. 137, p. 621, 1270, 1279.
Moyle v. Landers, 83 Cal. 579, 23 Pac. 798, p. 2127.
Moyle v. Moyle, 2 Russ. & M. 710, p. 2058.
Mozley v. Alston, 1 Phill. Ch. 790, p. 2121.
Muckleston v. Brown, 6 Ves. 52, 63, p. 1987, 2035.
Mucklow v. Fuller, Jacob, 198, p. 2095.
Mueller v. Brigham, 53 Wis. 173, 10 N. W. 336, p. 1149.
Mueller v. Engeln, 12 Bush, 441, 444, p. 1050, 1056, 1145.
Mueller v. Renkes, (Mont.) 77 Pac. 512, p. 1665.
Muir v. Berkshire, 52 Ind. 149, 151, p. 2423.
Muir v. Cross, 10 B. Mon. 277, p. 2500.
Muir v. Jolly, 26 Beav. 143, p. 1028, 1029.
Muir v. Jones, 23 Oreg. 332, 31 Pac. 646, 19 L. R. A. 441, p. 1385.
Muir v. Schenck, 3 Hill, 228, 38 Am. Dec. 633, p. 692, 1212, 1224, 1254, 1256, 1257.
Muir v. Trustees, 3 Barb. Ch. 477, p. 1635.
Muldoon v. Muldoon, 133 Mass. 111, p. 2274.
Muldrow v. Robison, 58 Mo. 331, p. 1147.
Mulford v. Minch, 11 N. J. Eq. 16, 64 Am. Dec. 472, p. 1756.
Mulford v. Mulford, (N. J. Eq.) 53 Atl. 79, p. 2281.
Mulford v. Peterson, 35 N. J. L. 127, p. 1406, 1483.
Mulhall v. Quinn, 1 Gray, 105, 107, 61 Am. Dec. 414, p. 2553.
Mulhallen v. Marum, 3 Dru. & War. 317, p. 1763, 1773, 1776, 1785.
Mulholland v. Washington Match Co., (Wash.) 77 Pac. 497, p. 1573, 1591.
Mulkern v. Ward, L. R. 13 Eq. 619, p. 545, 2696.
Mulky v. Karsell, 31 Ind. App. 595, 68 N. E. 689, p. 2499.
Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401, p. 1154, 1301, 2014.
Mullany v. Mullany, 4 N. J. Eq. 10, 16, 31 Am. Dec. 238, p. 1884, 1886.
Mullen v. Wilson, 44 Pa. St. 413, 84 Am. Dec. 461, p. 1802.
Mullens v. Miller, 22 Ch. Div. 194, p. 1624.
Muller, In re, 31 App. Div. 80, 52 N. Y. Supp. 565, p. 2070.
Muller v. Bayly, 21 Gratt. 521, p. 2199.
Muller v. Wadlington, 5 S. C. 342, p. 2417, 2418.

Muller's Adm'rs v. Stone, 84 Va. 834, 10 Am. St. Rep, 889, and note, 6 S. E. 223, p. 1863.
Mulligan v. Baring, 3 Daly, 75, p. 2755, 2757.
Mulliken v. Carlton, 72 Pa. St. 484, 490, p. 994.
Mulliken v. Graham, 72 Pa. St. 484, 490, p. 985, 998.
Mulliner v. Midland R'y, L. R. 11 Ch. Div. 611, p. 1722.
Mullineux v. Mullineux, Toth. 39, p. 2737.
Mullins v. Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430, p. 1022, 1027, 1354.
Mullins v. Smith, 1 Drew. & S. 204, 210, p. 2209, 2219, 2224.
Mullins v. Wimberly, 50 Tex. 457, 464, p. 1023, 1030, 1148.
Mullison's Estate, 68 Pa. St. 212, p. 1011.
Mulloy v. Ingalls, 4 Nebr. 115, p. 1728.
Mulock v. Mulock, 156 Mo. 431, 57 S. W. 122, p. 1911.
Mulock v. Mulock, 31 N. J. Eq. 594, p. 1738, 1779.
Mulqueen v. Schlichter Jute Cordage Co., 108 Fed. 931, p. 495.
Mulvany v. Kennedy, 26 Pa. St. 44, p. 560, 2694.
Mumford v. Am. Life Ins. & T. Co., 4 N. Y. 463, 483, p. 644, 649.
Mumford v. Murray, 6 Johns. Ch. 1, p. 2082.
Mumford v. Stohwasser, L. R. 18 Eq. 556, 562, 563, p. 1288, 1289.
Mumford, Estate of, In re, Myrick's Prob. Rep. 133, p. 849.
Mumma v. Potomac Co., 8 Pet. 281, 286, p. 2011.
Mumper v. Rushmore, 79 N. Y. 19, p. 1858.
Munch v. Cockerrell, 5 Mylne & C. 178, p. 2096.
Munch v. Cockerell, 8 Sim. 219, p. 2092.
Munch v. Shabel, 37 Mich. 166, p. 2004.
Muncie Nat. Gas Co. v. City of Muncie, 160 Ind. 97, 66 N. E. 436, 441, p. 357, 367, 414.
Munden v. Bailey, 70 Ala. 63, p. 2057.
Mundine v. Pitts, 14 Ala. 84, p. 1314.
Mundorff v. Wickersham, 63 Pa. St. 87, 3 Am. Rep. 531, p. 1625.
Munds v. Cassidy, 98 N. C. 558, 4 S. E. 355, p. 630.
Mundy v. Culver, 18 Barb. 336, p. 738.
Mundy v. Jolliffe, 5 Mylne & C. 167, 177, p. 2601, 2781.
Mundy v. Mundy, 2 Ves. 122, 128, p. 2734.
Mundy v. Vawter, 3 Gratt. 518, p. 1124, 1149.
Munger v. Shannon, 61 N. Y. 251, p. 2561.
Munn v. Achey, 110 Ala. 628, 18 South. 299, p. 1037.
Munn v. Best, 62 Mo. 491, p. 1338.
Munn v. Burch, 25 Ill. 35, p. 2570.
Munn v. Burges, 70 Ill. 604, p. 1754, 1756, 2085.
Munn v. McDonald, 10 Watts, 270, p. 1324, 1325.
Munnerlyn v. Augusta Bank, 88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554, p. 2057.
Munnerlyn v. Augusta Sav. Bank, 94 Ga. 356, 21 S. E. 575, p. 2017.
Munns v. Isle of Wight R'y, L. R. 5 Ch. Div. 414, p. 2659, 2660.
Munro v. Collins, 95 Mo. 33, 7 S. W. 461, p. 2030.
Munro v. Wivenhoe etc. R'y, 4 De Gex, J. & S. 723, p. 2674.
Munroe v. Dewey, 176 Mass. 184, 79 Am. St. Rep. 304, 57 N. E. 340, p. 1844.
Munroe v. Eastman, 31 Mich. 283, p. 977, 982, 992, 1009, 1146.
Munroe v. Ward, 4 Allen, 150, p. 2750.
Munsell v. Loree, 21 Mich. 491, p. 2769.
Munson v. Carter, 19 Nebr. 293, 27 N. W. 208, p. 1738.
Munson v. Ensor, 94 Mo. 506, p. 1343.
Munson v. German-American Fire Ins. Co., (W. Va.) 47 S. E. 160, p. 265.
Munson v. Hallowell, 26 Tex. 475, 84 Am. Dec. 582, p. 1648.
Munson v. Munson, 28 Conn. 582, 73 Am. Dec. 693, p. 2753, 2756.
Munson v. Syracuse, G. & C. R'y Co., 103 N. Y. 58, 8 N. E. 355, p. 1783.
Murchison v. Mexia, (Tex. Civ. App.) 36 S. W. 828, p. 1103.
Murdoch v. Finney, 21 Mo. 138, p. 1212.
Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275, p. 2428.

Murdock v. Ford, 17 Ind. 52, p. 2392, 2396.
Murdock v. Holland's Heirs, 3 Blackf. 114, p. 2268.
Murgrove v. Bowser, 5 Oreg. 313, 20 Am. Rep. 737, p. 1115.
Murless v. Franklin, 1 Swanst. 13, p. 1997, 2001, 2002.
Murley v. Ennis, 2 Colo. 300, p. 958.
Murphree v. Countiss, 58 Miss. 712, p. 2535.
Murphy v. Barnard, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29, p. 1227, 1301, 1305.
Murphy v. Carlin, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786, p. 1927.
Murphy v. City of Wilmington, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345, p. 433.
Murphy v. Clark, 9 Miss. (Smedes & M.) 221, p. 234.
Murphy v. Dallam, 1 Bland, 529, p. 1971.
Murphy v. Green, 120 Ala. 112, 22 South. 112, p. 1278.
Murphy v. Gumaer, 12 Colo. App. 472, 55 Pac. 951, p. 1163.
Murphy v. Hanscome, 76 Iowa, 192, 40 N. W. 717, p. 2000.
Murphy v. Hendricks, 57 Ind. 593, p. 1124.
Murphy v. Hinds, 15 Minn. 182, p. 2749.
Murphy v. Hubert, 16 Pa. St. 50, 7 Pa. St. 420, p. 1659, 1898, 1900.
Murphy v. Murphy, 121 Mass. 167, p. 2584.
Murphy v. Paynter, 1 Dill. 333, p. 2729.
Murphy v. Peabody, 63 Ga. 522, p. 1993, 1999.
Murphy v. O'Shea, 2 Jones & L. 422, 425, p. 1760, 1762, 1763.
Murphy v. Plankington Bank, 13 S. Dak. 501, 83 N. W. 575, p. 1271.
Murphy v. Rooney, 45 Cal. 78, p. 1520, 1523, 1524, 1528, 2769.
Murphy's Estate, In re, 184 Pa. St. 310, 39 Atl. 70, 63 Am. St. Rep. 802, p. 1956, 1957, 1977.
Murray v. Ballou, 1 Johns. Ch. 566, 576, 581, 615, p. 1063, 1064, 1067, 1069, 1132, 1168, 1202, 1336, 2017.
Murray v. Barlee, 3 Mylne & K. 209, 220, 223, p. 183, 1724, 2133, 2179, 2185.
Murray v. Barney, 34 Barb. 336, p. 2383.
Murray v. Barth, 30 Abb. N. Cas. 303, 24 N. Y. Supp. 921, p. 1086.
Murray v. Beard, 102 N. Y. 508, 7 N. E. 553, p. 1760.
Murray v. Blatchford, 1 Wend. 583, 19 Am. Dec. 537, p. 1076.
Murray v. Clayton, L. R. 15 Eq. 115, p. 271, 273.
Murray v. Dake, 46 Cal. 644, p. 1507, 1523, 1529, 2726.
Murray v. Feinour, 2 Md. Ch. 418, 419, p. 2077.
Murray v. Finster, 2 Johns. Ch. 155, p. 1064, 1337, 1348.
Murray v. First Nat. Bank, 5 Kan. App. 456, 49 Pac. 326, p. 1329.
Murray v. Governeur, 2 Johns. Cas. 438, 1 Am. Dec. 177, p. 1230.
Murray v. Hay, 1 Barb. Ch. 59, 43 Am. Dec. 773, p. 397, 398, 451, 453.
Murray v. Jones, 50 Ga. 109, p. 1445.
Murray v. Lord Elibank, 10 Ves. 84, 1 Lead. Cas. Eq., 4th Am. ed., 623, 639, 670, and notes, p. 644.
Murray v. Lord Elibank, 13 Ves. 1, 14 Ves. 496, p. 2174.
Murray v. Lylburn, 2 Johns. Ch. 441, 443, p. 1064, 1077, 1079, 1256, 1257, 1382, 2030.
Murray v. Marshall, 94 N. Y. 611, p. 2402, 2408.
Murray v. Murray, 2 Johns. Ch. 60, p. 2011.
Murray v. Palmer, 2 Schoales & L. 474, 486, p. 1665, 1671, 1732, 1785.
Murray v. Parker, 19 Beav. 305, 308, p. 1513, 1515.
Murray v. Sells, 53 Ga. 257, p. 1445.
Murray v. Williamson, 3 Binn. 135, p. 559.
Murrell v. Watson, 1 Tenn. Ch. 342, p. 1050, 1148.
Murrey v. Walter, Craig & P. 114, p. 287.
Murry v. Sell, 23 W. Va. 476, p. 1995.
Murtha v. Curley, 90 N. Y. 373, p. 354.
Muscogee Lumber Co. v. Hyer, 18 Fla. 698, 43 Am. Rep. 332, p. 2100.

Muse v. Swayne, 70 Tenn. (2 Lea) 251, 31 Am. Rep. 607, p. 728, 730, 737.
Musgrove v. Bonser, 5 Oreg. 313, 20 Am. Rep. 737, p. 1107, 1148, 1358.
Musham v. Musham, 87 Ill. 80, p. 1046, 2017.
Musselman v. Kent, 33 Ind. 452, p. 665.
Musselman v. Marquis, 1 Bush, 463, 89 Am. Dec. 637, p. 308, 2694.
Musselman's Appeal, 62 Pa. St. 81, 1 Am. Rep. 382, p. 2028.
Musselman's Estate, 5 Watts, 9, p. 908.
Musson v. Trigg, 51 Miss. 172, p. 2143, 2155, 2194.
Mussoorie Bank v. Raynor, 7 App. Cas. (Priv. Coun.) 321, p. 1925, 1929.
Mustard v. Robinson, 52 Me. 54, p. 554.
Musters v. Wright, 2 De Gex & S. 777, p. 2162.
Mustin's Estate, 194 Pa. St. 437, 45 Atl. 313, 75 Am. St. Rep. 702, p. 2310, 2312.
Mutlow v. Bigg, L. R. 1 Ch. Div. 385, p. 2333.
Mutual Accident Ass'n v. Jacobs, 141 Ill. 261, 33 Am. St. Rep. 302, 31 N. E. 414, 16 L. R. A. 516, p. 2022.
Mut. Ass. Soc. v. Stone, 3 Leigh, 218, p. 1349.
Mutual Ben. Life Ins. Co. v. Huntington, 57 Kan. 744, 48 Pac. 19, p. 2417.
Mut. Ben. Life Ins. Co. v. Wayne Co. Bank, 68 Mich. 116, 35 N. W. 853, p. 2193.
Mut. L. Ins. Co. v. Bigler, 79 N. Y. 568, p. 2677, 2681.
Mut. L. Ins. Co. v. Boughrum, 24 N. J. Eq. 44, p. 2447, 2451.
Mutual Life Ins. Co. v. Dake, 87 N. Y. 257, 1 Abb. N. C. 381, p. 1095, 1117, 1119.
Mutual Life Ins. Co. v. Langley, L. R. 26 Ch. Div. 686, p. 1210.
Mut. Life Ins. Co. v. Norris, 31 N. J. Eq. 583, 585, p. 1437, 1438, 1442, 1444.
Mutual Life Ins. Co. v. Pearson, 114 Fed. 395, p. 1639.
Mut. L. Ins. Co. v. Wager, 27 Barb. 354, p. 1477, 1511.
Muzzey v. Reardon, 57 N. H. 378, p. 2195.
Mycock v. Beatson, L. R. 13 Ch. Div. 384, p. 2484.
Myer v. Rives, 11 Ala. 760, p. 1775.
Myers, In re, 131 N. Y. 409, 30 N. E. 135, p. 2089.
Myers v. Board of Education, 51 Kan. 87, 37 Am. St. Rep. 263, 32 Pac. 658, p. 2020, 2023.
Myers v. Davis, 22 N. Y. 489, 490, p. 1233.
Myers v. Eddy, 47 Barb. 263, p. 2491, 2493.
Myers v. Hazzard, 50 Fed. 155, p. 1079.
Myers v. James, 2 Lea, 159, p. 2198.
Myers v. Jones, 61 Kan. 191, 59 Pac. 275, p. 1065.
Myers v. Kinzie, 26 Ill. 36, p. 290.
Myers v. Myers, 167 Ill. 52, 47 N. E. 309, p. 1907.
Myers v. Myers, 47 W. Va. 487, 35 S. E. 868, p. 2024.
Myers v. Perigal, 2 De Gex, M. & G. 599, p. 2318.
Myers v. Ross, 3 Head, 59, 60, p. 1152, 1157, 1358.
Myers v. Sierra Val. Stock & Agric. Ass'n, 122 Cal. 669, 55 Pac. 689, p. 161, 215, 218, 380, 584.
Myers v. State ex rel. McCray, 47 Ind. 293, 297, p. 683, 685, 2608.
Myers v. United etc. Ass. Co., 7 De Gex, M. & G. 112, p. 1229, 2561.
Myers v. Van Wagoner, 56 Mo. 115, p. 2194.
Myers v. Wheelock, 60 Kan. 747, 57 Pac. 956, p. 1299.
Myer's Appeal, 2 Pa. St. 463, p. 1764.
Myers' Estate, In re, 205 Pa. St. 413, 54 Atl. 1093, p. 2108.
Myerstown Bank v. Roessler, 186 Pa. St. 431, 40 Atl. 963, 44 L. R. A. 442, p. 1298.
Mytton v. Mytton, L. R. 19 Eq. 30, p. 2218.

N.

Nabours v. McCord, (Tex. Civ. App.) 75 S. W. 827, p. 2082.
Nace v. Boyer, 31 Pa. St. 99, p. 1728.
Nachtrieb v. Harmony Settlement, 3 Wall. Jr. 66, p. 1780.
Nagengast v. Alz, 93 Md. 522, 49 Atl. 333, p. 2040.

Nagle's Appeal, 13 Pa. St. 260-264, p. 2325.
Nagle v. Baylor, 3 Dru. & War. 60, p. 1733, 1788.
Nagle v. Macy, 9 Cal. 426, p. 2357, 2364.
Naglee v. Pacific Wharf Co., 20 Cal. 529, 530, 533, p. 1221, 1253.
Naglee's Appeal, 33 Pa. St. 89, p. 1831.
Nairn v. Prowse, 6 Ves. 752, 760, p. 2513.
Nakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551, p. 1566.
Nalle v. Young, 160 U. S. 624, 16 Sup. Ct. 420, p. 494.
Nally v. Long, 56 Md. 567, p. 2794.
Naltner v. Dolan, 108 Ind. 504, 58 Am. Rep. 61, 8 N. E. 289, p. 2058.
Nance v. Busby, 91 Tenn. (7 Pickle) 303, 18 S. W. 874, 15 L. R. A. 801, p. 1960, 1977.
Nance v. Gregory, 6 Lea, 343, 40 Am. Rep. 41, p. 1706.
Nancrede v. Voorhis, 32 N. J. Eq. 524, p. 2068, 2071, 2077.
Nanney v. Williams, 22 Beav. 452, p. 1654.
Nantes v. Corrock, 9 Ves. 182, 189, p. 183, 2133.
Nant-y Glo etc. v. Grave, L. R. 12 Ch. Div. 738, p. 2029, 2032.
Nantz v. McPherson, 7 T. B. Mon. 597, 18 Am. Dec. 216, p. 1393.
Nanz v. Oakley, 120 N. Y. 84, 24 N. E. 306, 9 L. R. A. 223, p. 2094.
Napier v. Napier, 1 Dru. & War. 407, p. 646, 2174.
Narcissa v. Wathan, 2 B. Mon. 241, p. 1754.
Narron v. Wilmington & W. R. Co., 122 N. C. 856, 29 S. E. 356, 40 L. R. A. 415, p. 1839.
Nash, In re, 16 Ch. Div. 504, p. 2107.
Nash v. Allen, 42 Ch. Div. 54, p. 1886.
Nash v. Bean, 74 Me. 340, p. 1341.
Nash v. Hermosilla, 9 Cal. 584, 70 Am. Dec. 676, p. 743.
Nash v. McCathern, 183 Mass. 345, 67 N. E. 323, p. 220, 381.
Nash v. Minnesota etc. Co., 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. 1039, 28 L. R. A. 753, p. 1568, 1578.
Nash v. Morley, 5 Beav. 177, p. 176, 1933.
Nash v. Norment, 5 Mo. App. 545, p. 2194.
Nash v. Smallwood, 6 Md. 394, p. 2224.
Nash v. Smith, 6 Conn. 421, p. 2649.
Nashua Trust Co. v. U. S. Edwards Manuf'g Co., 99 Iowa, 109, 61 Am. St. Rep. 226, 68 N. W. 587, p. 1299.
Nashville & Chattanooga R. R. Co. v. Elliott, 1 Cold. 611, 78 Am. Dec. 506, p. 1155.
Nashville, C. & St. L. R. Co. p. McConnell, 82 Fed. 65, 75, p. 424, 454, 456.
Nashville Trust Co. v. Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710, p. 1332.
Nashville Trust Co. v. Smythe, 94 Tenn. 513, 45 Am. St. Rep. 748, 29 S. W. 903, p. 1227, 2393, 2394, 2395.
Nason v. First Church, 66 Me. 100, p. 553, 1905, 2272.
Natal etc. Co., In re, L. R. 3 Ch. 355, p. 1226, 1228, 1229.
Natal Land etc. Co. v. Good, L. R. 2 P. C. 121, 129, p. 993.
Nathan v. Lehman, 39 Ark. 256, p. 2258.
Nathan v. Tompkins, 82 Ala. 437, 2 South. 747, p. 2127.
National Bank v. Ellicott, 31 Kan. 173, 1 Pac. 593, p. 1913.
National Bank v. Fink, 86 Tex. 303, 24 S. W. 256, 40 Am. St. Rep. 833, p. 2555.
Nat. Bank v. Ins. Co., 104 U. S. 54, 26 L. ed. 693, p. 2017, 2020, 2082.
National Bank v. Norton, 1 Hill, 572, p. 1164, 1165.
National Bank of America v. Ind. Banking Co., 114 Ill. 483, 2 N. E. 401, p. 2570.
National Bank of Australia v. Cherry, L. R. 3 P. C. 299, p. 2538.
National Bank of Commerce v. Lock, 17 Wash. 528, 61 Am. St. Rep. 923, 50 Pac. 478, p. 2535.
National Bank of Commerce v. Feeney, (S. Dak.) 70 N. W. 874, p. 1165.
National Bank of Commerce v. Morris, 114 Mo. 255, 35 Am. St. Rep. 754, 21 S. W. 511, 19 L. R. A. 463, p. 1051, 1056.
National Bank of Deposit v. Rogers, 166 N. Y. 380, 59 N. E. 922, p. 622.

National Bank of Columbus v. Tennessee, C. I. & R. Co., 62 Ohio St. 564, 57 N. E. 450, p. 1273.
Nat. Bank of Metropolis v. Sprague, 20 N. J. Eq. 159, p. 1692, 1694.
Nat. Bank of West Grove v. Earle, 196 Pa. St. 217, 46 Atl. 268, p. 277.
National Benefit Co. v. Union Hospital Co., 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437, p. 1691.
National Cash Register Co. v. New Columbus Watch Co., (C. C. A.) 129 Fed. 114, p. 1002.
National Dock & N. J. J. C. R. R. Co. v. Penn. R'y Co., 54 N. J. Eq. 10, 33 Atl. 219, p. 338.
Nat. Docks R'y v. Central R. R., 32 N. J. Eq. 755, p. 2680, 2685.
National Exchange Bank v. Cumberland Lumber Co., 100 Tenn. 479, 47 S. W. 85, p. 2198.
National Exchange Bank v. McLoon, 73 Me. 498, 40 Am. Rep. 388, p. 2564.
National Exch. Co. v. Drew, 2 Macq. 103, 125, p. 1569, 1577, 1625.
National Foundry & Pipe Works v. Oconto City Water Supply Co., 113 Fed. 793, 802, 51 C. C. A. 465, p. 1081.
National Life Association v. Hopkins' Adm'r, 97 Va. 167, 33 S. E. 539, p. 2291.
National Mahaiwe Bank v. Barry, 125 Mass. 20, p. 537.
National Mut. B. & L. Ass'n v. Blair, 98 Va. 490, 36 S. E. 513, p. 1106, 1149, 1450, 1602, 1647.
National Mut. B. & L. Ass'n v. Culberson, (Ala.) 25 South. 173, p. 1366.
National Mut. B. & L. Ass'n v. Retzman, (Nebr.) 96 N. W. 205, p. 2404.
National Oil & Pipe Line Co. v. Teel, 95 Tex. 586, 68 S. W. 979, (Tex. Civ. App.) 67 S. W. 545, p. 1191.
National Park Bank v. Goddard, 62 Hun, 31, 16 N. Y. Supp. 343, 2 Ames' Cas. Eq. Jur. 82, 131 N. Y. 503, 30 N. E. 566, Keene's Cas. Eq. Jur. 142, p. 417, 419, 457.
National Park Bank v. Peavey, 64 Fed. 912, p. 502.
National Permanent Benefit Building Soc., In re, L. R. 5 Ch. 309, 313, p. 1722, 2605.
National Provincial Bank v. Jackson, L. R. 33 Ch. Div. 1, p. 1196, 1296.
National Prov. Bank v. Marshall, L. R. 40 Ch. Div. 112, p. 749.
National Security Bank v. Cushman, 121 Mass. 490, p. 1152, 1156.
National State Bank v. Sandford Fork & Tool Co., 157 Ind. 10, 60 N. E. 699, p. 1106.
National Surety Co. v. State Bank, 120 Fed. 593, (C. C. A.) p. 497.
National Traders' Bank v. Ocean Ins. Co., 62 Me. 519, p. 2726.
National Tr. Co. v. Miller, 33 N. J. Eq. 155, p. 2660.
National Union Bank v. London & R. P. Bank, 37 N. Y. Supp. 741, 2 App. Div. 208, p. 380.
National Valley Bank v. Hancock, 100 Va. 101, 107, 93 Am. St. Rep. 933, 938, 57 L. R. A. 728, 729, 40 S. E. 611, p. 2618, 2619.
Nattack v. Shaffer, 51 Kan. 208, 32 Pac. 890, 37 Am. St. Rep. 270, p. 1639.
Naudain v. Fullenwider, (Nebr.) 100 N. W. 296, p. 1271.
Nave v. King, 27 Ind. 356, p. 408.
Navulshaw v. Brownrigg, 1 Sim., N. S., 573, 2 De Gex, M. & G. 441, p. 2799.
Nayloe v. Throckmorton, 7 Leigh (Va.) 98, 30 Am. Dec. 492, p. 1263.
Naylor v. Minch, 1 Sim. & St. 555, 564, p. 2033.
Naylor v. Minock, 96 Mich. 182, 55 N. W. 664, 35 Am. St. Rep. 595, p. 2194.
Naylor v. South Devon R'y Co., 1 De Gex & S. 32, p. 764.
Naylor v. Winch, 1 Sim. & St. 555, 564, p. 1492, 1499, 1501, 1508.
Neal v. Bleckley, 51 S. C. 506, 29 S. E. 249, p. 1838.
Neal v. Briggs, 110 Fed. 477, p. 652.
Neal v. Davis, 5 De Gex, M. & G. 258, 263, p. 2051.
Neal v. Gregory, 19 Fla. 356, p. 1384, 1439.
Neal v. Jones, 100 Ga. 765, 28 S. E. 427, p. 1021.
Neal v. M. E. Smith & Co., 116 Fed. 20, p. 1161.

Neal v. Speigle, 33 Ark. 63, p. 2498, 2513.
Neale v. Hagthrop, 3 Bland, 551, 590, p. 2430.
Neale v. Neale, 1 Keen, 672, p. 1501, 1502.
Neale v. Neale, 9 Wall. 1, p. 2782.
Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508, p. 182.
Neap v. Abbott, Coop. C. P. 333, p. 1578.
Nease v. Capehart, 8 W. Va. 95, p. 1899.
Neate v. Duke of Marlborough, 3 Mylne & C. 407, p. 2436, 2789.
Neblett v. Macfarland, 92 U. S. 101, p. 1605, 1628.
Needles v. Martin, 33 Md. 609, p. 1934, 1952, 1961, 1971.
Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85, p. 1743, 2574.
Needles's Ex'r v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85, p. 2172.
Neel v. Clay, 48 Ala. 252, p. 2528.
Neel v. Moore, 19 Ky. Law Rep. 918, 39 S. W. 1042, p. 1994, 2005.
Neeley v. Anderson, 2 Strob. Eq. 262, p. 1672.
Neely v. Remhart, (Ark.) 71 S. W. 259, p. 1579, 1594.
Neely's Appeal, 85 Pa. St. 387, p. 697.
Neesom v. Clarkson, 2 Hare, 163, p. 1174.
Neesom v. Clarkson, 4 Hare, 97, p. 639, 2429, 2481.
Negaunee Iron Co. v. Iron Cliffs Co., (Mich.) 96 N. W. 468, p. 765, 767.
Negley v. Lindsay, 67 Pa. St. 217, 228, 5 Am. Rep. 427, p. 1625, 1645, 2097.
Nehawka Bank v. Ingersoll, (Nebr.) 89 N. W. 618, p. 1161.
Neide v. Pennypacker, 9 Phila. 86, p. 1300.
Neil, In re, 62 L. T. R. 649, p. 1842.
Neil v. Cummings, 75 Ill. 170, p. 1565.
Neil v. Kinney, 11 Ohio St. 58, p. 2502.
Neilson v. Fry, 16 Ohio St. 552, 91 Am. Dec. 110, p. 2796.
Neilson v. McDonald, 6 Johns. Ch. 201, p. 1605, 1627, 1731.
Neilson v. Weber, 107 Tenn. 161, 64 S. W. 161, p. 1167.
Neimcewicz v. Gahn, 3 Paige, 614, 11 Wend. 312, p. 2793.
Neininger v. State, 50 Ohio St. 394, 34 N. E. 633, p. 1528.
Neligh v. Michenor, 11 N. J. Eq. 539, p. 2477.
Nell v. Dayton, 43 Minn. 242, 45 N. W. 229, p. 1444.
Nellis v. Rickard, 132 Cal. 617, 85 Am. St. Rep. 227, 66 Pac. 32, p. 1834, 1835, 1895.
Nelson v. Allen, 117 Wis. 91, 93 N. W. 807, p. 1566.
Nelson v. Allen, 1 Yerg. 360, p. 1052.
Nelson v. Barter, 2 Hem. & M. 334, 33 L. J. Ch. 705, 10 Jur., N. S., 832, p. 2636, 2647.
Nelson v. Booth, 3 De Gex & J. 119, p. 2432.
Nelson v. Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755, p. 2410.
Nelson v. Carter, 5 Sim. 530, p. 2209.
Nelson v. Davis, 40 Ind. 366, p. 1486.
Nelson v. Duncombe, 9 Beav. 211, p. 1726, 2622.
Nelson v. Dunn, 15 Ala. 501, p. 220, 1358, 2394, 2396.
Nelson v. Ferris, 30 Mich. 497, p. 2417, 2418.
Nelson v. Goree's Adm'r, 34 Ala. 565, p. 2651.
Nelson v. Hagerstown Bank, 27 Md. 51, 76, p. 1106, 2475.
Nelson v. Kowndar, 79 Va. 468, p. 821.
Nelson v. Nelson, (Ind. App.) 72 N. E. 482, p. 2312.
Nelson v. Oldfield, 2 Vern. 76, p. 1635.
Nelson v. Owen, 113 Ala. 372, 21 South. 75, p. 1243, 1390, 1391, 2463.
Nelson v. Pinegar, 30 Ill. 473, p. 2347, 2682.
Nelson v. Rockwell, 14 Ill. 375, p. 2708.
Nelson v. Rogers, 47 Minn. 103, 49 N. W. 526, p. 2414.
Nelson v. Sims, 23 Miss. 383, 388, 57 Am. Dec. 144, p. 974, 977, 984.
Nelson v. Stocker, 4 De Gex, F. & J. 458, 464, p. 663, 1387, 1448, 1587, 1594, 1596, 1725, 1781.
Nelson v. Trigg, 75 Tenn. (7 Lea) 69, p. 1212.
Nelson v. Turner, 2 Md. Ch. 73, p. 2702.
Nelson v. Wade, 21 Iowa, 49, p. 1048, 1124.

Nelson v. Worrall, 20 Iowa, 469, p. 179, 2037.
Nelson's Adm'r v. Cornwell, 11 Gratt. 724, p. 2291.
Nelson's Heirs v. Boyce, 7 J. J. Marsh. 401, 23 Am. Dec. 411, p. 2387.
Neosho Val. Inv. Co. v. Sharpless, 63 Kan. 885, 65 Pac. 667, p. 1299.
Neponset L. & L. Co. v. Dixon, 10 Utah, 334, 37 Pac. 573, p. 982, 1022.
Neresheimer v. Smyth, 167 N. Y. 202, 60 N. E. 449, p. 1906.
Nesbit v. Lockman, 34 N. Y. 167, p. 1767, 1773.
Nesbit v. St. Patrick's Church, 9 N. J. Eq. 76, p. 2799.
Nesbitt v. Berridge, 32 Beav. 282, p. 1773.
Nesbitt v. Stevens, 161 Ind. 519, 69 N. E. 256, p. 1904.
Nesbitt v. Tredennick, 1 Ball & B. 29, 48, p. 2028.
Neslin v. Wells, 104 U. S. 434, p. 1113.
Nesmith v. Drum, 8 Watts & S. 9, 42 Am. Dec. 260, p. 2561.
Nest v. Jones, 1 Sim., N. S., 205, 208, p. 1583.
Nester v. Continental Brewing Co., 161 Pa. St. 473, 29 Atl. 102, 34 Wkly. Notes Cas. 387, 24 L. R. A. 247, 41 Am. St. Rep. 894, p. 1689, 1712.
Nester v. Gross, 66 Minn. 371, 69 N. W. 39, p. 2034.
Nettles v. Nettles, 67 Ala. 599, p. 1993.
Neuell v. Randall, 32 Minn. 171, p. N. W. 972, 50 Am. Rep. 562, p. 1611, 1619.
Neuendorff v. World etc. Ins. Co., 69 N. Y. 389, p. 1760, 1761.
Neuman v. Godfrey, 2 Brown Ch. 332, p. 264.
Neuman v. Neuman, 1 Brown Ch. 186, p. 848.
Nevada Co. etc. Canal Co. v. Kidd, 37 Cal. 282, p. 2748.
Neves v. Scott, 13 How. 270, 14 L. ed. 140, p. 493, 512.
Neves v. Scott, 9 How. 196, p. 1872, 1885, 1886, 1887.
Nevil v. Saunders, 1 Vern. 415, p. 1824.
Neville v. Fortescue, 16 Sim. 333, p. 2205.
Neville v. Merchants' etc. Ins. Co., 19 Ohio, 452, p. 2764.
Neville v. Wilkinson, 1 Brown Ch. 543, 546, 547, Jacob, 67, p. 1561, 1581, 1678, 1711, 2591.
Nevin, In re, [1891] 2 Ch. 299, p. 2613, 2618.
Nevin v. Drysdale, L. R. 4 Eq. 517, 519, p. 896, 902, 904, 905, 908.
Nevins v. Dunlap, 33 N. Y. 676, p. 1523, 1541.
Nevitt v. Gillespie, 1 How. (Miss.) 108, 26 Am. Dec. 696, p. 383.
Nevius v. Egbert, 31 N. J. Eq. 460, p. 2434.
New, In re, [1901] 2 Ch. 534, p. 2051.
New v. Bonaker, L. R. 4 Eq. 655, p. 1945, 1964.
New v. Jones, 1 Macn. & G. 688, p. 2098.
New v. Nicoll, 73 N. Y. 127, 130, 131, 29 Am. Rep. 111, p. 1897, 2088, 2101, 2102.
Newberry v. Bank of Princeton, 98 Va. 471, 36 S. E. 515, p. 994.
Newberry's Trusts, In re, L. R. 5 Ch. Div. 746, p. 2328.
Newbery, In re, L. R. 1 Ch. 263, 1 Eq. 431, p. 2618.
Newbery v. James, 2 Mer. 446, 451, p. 2670, 2673.
Newbold v. Newbold, 1 Del. Ch. 310, p. 2346.
Newbold v. Pesbody Heights Co., 70 Md. 493, 17 Atl. 372, 3 L. R. A. 579, p. 1199.
Newbold v. Peoria, etc., R. R., 5 Ill. App. 367, p. 2662.
Newbold v. Roadknight, 1 Russ. & M. 677, p. 2210.
Newbro v. Undeland, (Nebr.) 96 N. W. 635, p. 1695.
New Brunswick & Canada R'y v. Conybeare, 9 H. L. Cas. 711, 1 De Gex, F. & J. 578, p. 1560.
New Brunswick etc. Co. v. Muggridge, 7 Jur., N. S., 132, p. 1452.
New Brunswick etc. R'y v. Muggridge, 1 Drew. & S. 363, 381, p. 1567, 1572, 1581.
Newby v. Hill, 2 Met. (Ky.) 530, p. 2562.
Newby v. Oregon Cent. R. R., 1 Saw. 63, 67, 68, Fed. Cas. No. 10,145, p. 2121, 2125, 2126.

Newby v. Sharpe, L. R. 8 Ch. Div. 39, p. 1702, 1711.
Newby v. Skinner, 1 Dev. & B. Eq. 488, 31 Am. Dec. 397, p. 2325, 2326.
Newcomb v. Horton, 18 Wis. 566, 568, 569, p. 434, 439.
Newcomb v. Trustees of St. Peter's Ch., 2 Sand. Ch. 636, p. 2212.
Newcombe v. Bonham, 1 Vern. 7, p. 2370.
Newcomen v. Hassard, 4 Ir. Ch. Rep. 268, 274, p. 2149.
Newcomer v. Kline, 11 Gill & J. 457, 37 Am. Dec. 74, p. 1515.
Newell v. Newell, 14 Kan. 202, p. 2034.
Newell v. Smith, 49 Vt. 255, p. 2663.
Newell v. Wheeler, 48 N. Y. 486, p. 2754, 2757.
Newen, In re, [1894] 2 Ch. 297, p. 1852, 2106.
New England Bank v. Lewis, 8 Pick. 113, 118, p. 1856.
New England Iron Co. v. New York Loan etc. Co., 55 How. Pr. 351, p. 293.
New England Jewelry Co. v. Merriam, 2 Allen, 390, 391, p. 1285, 1402.
New England Loan & T. Co. v. Avery, (Tex. Civ. App.) 41 S. W. 673, p. 987.
New England L. & T. Co. v. Miller, (Tex. Civ. App.) 40 S. W. 646, p. 1073.
New England Loan & Tr. Co. v. Robinson, 56 Nebr. 50, 71 Am. St. Rep. 657, 76 N. W. 415, p. 2395.
New England Mortg. Sec. Co. v. Gay, 33 Fed. 636, p. 501.
New England Mortgage Sec. Co. v. Ober, 84 Ga. 294, 10 S. E. 625, p. 1273.
New England M. S. Co. v. Powell, 97 Ala. 483, 12 South. 55, p. 649.
Newhall v. Kastens, 70 Ill. 156, p. 2636, 2637, 2639.
Newhall v. Lynn F. C. Savings Bank, 101 Mass. 428, 431, 3 Am. Rep. 387, p. 1412.
Newhall v. Pierce, 5 Pick. 450, p. 1028, 1030.
Newham v. May, 13 Price, 749, 751, p. 1633.
New Hampshire Bank v. Willard, 10 N. H. 210, p. 2383.
New Haven etc. Bank v. McPartlan, 40 Conn. 90, p. 2346.
New Hope Bridge Co. v. Phœnix Bank, 3 N. Y. 156, p. 1156.
Newhouse v. Hill, 7 Blackf. 584, p. 2477.
Newington etc. Board v. Cottingham etc. Board, 12 Ch. Div. 725, 734, p. 2686.
Newis v. Topfer, 121 Iowa, 433, 96 N. W. 905, p. 2034.
New Jersey B., L. & Inv. Co. v. Bachelor, 54 N. J. Eq. 600, 35 Atl. 745, p. 1282, 1284.
New Jersey Ins. Co. v. Meeker, 40 N. J. L. 18, p. 1403.
Newkirk v. Marshall, 35 Kan. 77, 10 Pac. 571, p. 604.
Newkirk v. Place, 47 N. J. Eq. 477, 21 Atl. 124, p. 1903.
Newkumet v. Kraft, 10 Phila. 127, p. 2780.
Newland v. Att'y-Gen., 3 Mer. 684, p. 1948.
Newland v. First Baptist Church, (Mich.) 100 N. W. 612, p. 1542.
Newland v. Gaines, 1 Heisk. 720, p. 1672.
Newlands v. Paynter, 4 Mylne & C. 408, p. 304, 1193, 1268, 1836, 2139, 2140, 2146, 2161.
Newlin v. Freeman, 4 Ired. Eq. 312, p. 2153.
Newlin v. McAfee, 64 Ala. 357, p. 2475.
New London v. Brainard, 22 Conn. 552, 556, 557, p. 407.
New London Bank v. Lee, 11 Conn. 112, 121, 27 Am. Dec. 713, p. 565.
Newman, In re, 30 Beav. 196, p. 1772.
Newman v. Chapman, 2 Rand. 93, 14 Am. Dec. 766, p. 1076, 1149.
Newman v. Commercial Nat. B'k, 156 Ill. 530, 41 N. E. 156, p. 220.
Newman v. Edwards, 34 Pa. St. 32, p. 1444.
Newman v. Franco, 2 Anstr. 519, p. 276.
Newman v. Home Ins. Co., 20 Minn. 422, p. 2752.
Newman v. James, 12 Ala. 29, p. 2144.
Newman v. Meek, 1 Freem. Ch. 441, p. 1692.
Newman v. Moore, 94 Ky. 147, 21 S. W. 759, 42 Am. St. Rep. 343, p. 1446.

Newman v. Morris, 52 Miss. 402, p. 2710.
Newman v. Newman, L. R. 28 Ch. Div. 674, p. 1288.
Newman v. Payne, 2 Ves. 200, p. 1769.
Newman v. Piercey, L. R. 4 Ch. Div. 41, p. 1543.
Newman v. Samuels, 17 Iowa, 528, 535, p. 1859, 1860.
Newman v. Smith, 77 Cal. 22, 18 Pac. 791, p. 1556.
Newman v. Willetts, 52 Ill. 98, p. 2789.
Newman & Co., George, In re, (1895) 1 Ch. 675, p. 2084.
Newmeyer v. Missouri etc. R. R. Co., 52 Mo. 81, 84–89, 14 Am. Rep. 391, p. 406, 410.
New Orleans v. Louisiana Construction Co., 129 U. S. 46, 47, 9 Sup. Ct. 223, 224, p. 494.
New Orleans v. McDonogh, 12 La. Ann. 240, p. 1974.
New Orleans v. Morris, 3 Woods, 103, p. 2702, 2708.
New Orleans, M. & C. R. R. v. Dunn, 51 Ala. 128, p. 2678.
New Parish v. Odiorne, 1 N. H. 232, 236, p. 1828, 1829.
Newport v. Kynaston, Cas. t. Finch, 294, p. 885.
Newrath v. Hecht, 62 Md. 221, p. 1705.
New River County v. Graves, 2 Vern. 431, 432, p. 363, 435.
New River Mineral Co. v. Seeley, 120 Fed. 193, p. 1783.
Newsom v. Bufferlow, 1 Dev. Eq. 383, p. 1523.
Newsom v. Thornton, 82 Ala. 402, 8 South. 261, 60 Am. Rep. 743, p. 2494.
Newsome v. Bowyer, 3 P. Wms. 37, p. 2175.
Newsome v. Collins, 43 Ala. 656, 663, p. 1050, 1058, 1144.
Newsome v. Flowers, 30 Beav. 461, p. 2051.
New Somhers etc. Co. v. Erlanger, L. R. 5 Ch. Div. 73, p. 1573, 1613.
Newson v. Chrisman, 9 Tex. 113, 117, p. 571, 588, 2288.
New South Bldg. & Loan Ass'n v. Gann, 101 Ga. 678, 29 S. E. 15, p. 1104, 2045.
Newstead v. Searles, 1 Atk. 265, p. 1152.
Newton, In re [1896] 1 Ch. 740, p. 2618.
Newton v. Berresford, 1 Younge, 378, p. 280.
Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89, p. 155, 2633.
Newton v. Holley, 6 Wis. 564, p. 1517.
Newton v. Hunt, 5 Sim. 511, p. 1742.
Newton v. McLean, 41 Barb. 285, p. 694, 1095, 1184, 1188, 1266, 1285, 1373.
Newton v. Marsden, 2 Johns. & H. 356, p. 1684.
Newton v. Newton, L. R. 6 Eq. 135, 140, 141, 4 Ch. 143, 146, p. 692, 1187, 1188, 1189, 1261, 1368, 2016, 2539, 2728.
Newton v. Porter, 69 N. Y. 133, 136–140, 25 Am. Rep. 152, p. 2017, 2030.
Newton v. Stanley, 28 N. Y. 61, p. 2219.
Newton v. Swazey, 8 N. H. 9, 11, p. 524, 2602, 2780.
Newton v. Taylor, 32 Ohio St. 399, p. 2030, 2032.
Newtown Sav. Bank v. Lawrence, (Conn.) 41 Atl. 1054, p. 1332.
New York & Harlem R. R. v. Haws, 56 N. Y. 175, p. 1470, 2711.
N. Y. & Harlem R. R. v. Mayor, etc., 1 Hilt. 562, 587, p. 648.
N. Y. & N. E. R. Co. v. City of Providence, 16 R. I. 746, 19 Atl. 759, p. 213, 757.
N. Y. & N. H. R. R. v. Schuyler, 38 Barb. 534, 554, p. 643.
New York & N. H. R. R. v. Schuyler, 17 N. Y. 592, 599, 600, 605–608, 34 N. Y. 30, 44–46, 80, p. 162, 226, 379, 411, 412, 420, 431, 455, 1219, 1626, 2717.
New York & T. Land Co. v. Gulf, W. T. & P. R. Co., 100 Fed. 830, 41 C. C. A. 87, p. 233.
N. Y. Cent. Ins. Co. v. National Protec. Ins. Co., 20 Barb. 465, 14 N. Y. 85, 90, p. 586, 1163, 1760, 2085, 2714, 2722.
New York Commercial Co. v. Francis, 83 Fed. 769, 28 C. C. A. 199, p. 1220.
New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. ed. 484, p. 2557.
N. Y. Ice Co. v. N. W. Ins. Co., 23 N. Y. 357, 359, 360, p. 94, 231, 355, 586, 1524.

New York Ins. Co. v. Roulet, 24 Wend. 505, p. 321, 460.
N. Y. L. Ins. Co. v. Aitkin, 125 N. Y. 660, 26 N. E. 732, p. 2409.
New York Life Ins. Co. v. Bangs, 103 U. S. 780, p. 2730.
New York Life Ins. Co. v. Beard, 80 Fed. 66, p. 360, 378, 423.
New York Life Ins. Co. v. Cutler, 3 Sand. Ch. 176, 179, p. 1030, 2452.
New York Life Ins. Co. v. Eggleston, 96 U. S. 572, p. 1452.
New York Life Ins. Co. v. Patterson & Wallace, (Tex. Civ. App.) 80 S. W. 1058, p. 2570.
New York Life Ins. & T. Co. v. Smith, 2 Barb. Ch. 82, p. 1224, 1301.
N. Y. Printing etc. Estab. v. Fitch, 1 Paige, 98, p. 2667.
New York Security & Trust Co. v. Keyser, [1901] 1 Ch. 666, p. 2626.
New York S. & T. Co. v. Lombard Inv. Co., 65 Fed. 271, p. 2392.
New York State L. & T. Co. v. Helmer, 77 N. Y. 64, p. 1721.
New Zealand Bank, Ex parte, L. R. 3 Ch. 154, p. 1226.
New Zealand B'k'g Co., In re, L. R. 4 Eq. 226, p. 2478.
Nexsen v. Nexsen, 2 Keyes, 229, p. 1768.
Neyland v. Bendy, 69 Tex. 711, 7 S. W. 497, p. 2051.
Neyland v. Texas Yellow Pine Lumber Co., 26 Tex. Civ. App. 417, 64 S. W. 656, p. 1103, 1124.
Neylans v. Burge, 14 Smedes & M. 201, p. 2277.
Niagara Bank v. Rosevelt, 9 Cow. 409, p. 2437.
Niagara Falls etc. Co. v. Great W. R'y, 39 Barb. 212, 224, p. 2684, 2695.
Niagara Fire Ins. Co. v. Raden, 87 Ala. 311, 5 South. 876, 13 Am. St. Rep. 56, p. 1494.
Nias v. Northern etc. R'y Co., 3 Mylne & C. 355, 357, p. 281.
Niblack v. Cosler, 80 Fed. 586, (C. C. A.) affirming 74 Fed. 1000, p. 1156, 1176.
Niblock v. Park Nat. Bank, 169 Ill. 517, 48 N. E. 438, 61 Am. St. Rep. 203, p. 2570.
Nice's Appeal, 54 Pa. St. 200, p. 1107, 1148, 1355, 1358.
Nice's Appeal, 50 Pa. St. 143, p. 1830.
Nichol v. Nichol, 4 Baxt. 145, p. 1803.
Nichol v. Stewart, 36 Ark. 612, p. 352.
Nicholas v. Adams, 2 Whart. 17, p. 2233.
Nicholas v. McCarthy, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93, p. 1757.
Nicholas v. Ward, 1 Head, 323, 73 Am. Dec. 177, p. 1803, 1804.
Nicholls v. Danvers, 2 Vern. 671, p. 2175.
Nicholls v. Judson, 2 Atk. 300, p. 874, 875.
Nicholls v. Nicholls, 1 Atk. 409, p. 1734.
Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445, p. 1878, 1952, 1985, 1986.
Nichols v. Cabe, 3 Head, 92, p. 2380.
Nichols v. Eaton, 91 U. S. 716, p. 1840.
Nichols v. Emery, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089, p. 1864.
Nichols v. Glover, 41 Ind. 24, p. 2499, 2511, 2521.
Nichols v. Haines, 98 Fed. 692, 39 C. C. A. 235, p. 763.
Nichols v. Lee, 10 Mich. 526, 82 Am. Dec. 57, p. 1297.
Nichols v. Levy, 5 Wall. 433, 441, p. 1840.
Nichols v. McCarthy, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93, p. 1718, 1746, 1750, 1751, 1758, 1759.
Nichols v. McEwen, 17 N. Y. 22, p. 1858.
Nichols v. Mudgett, 32 Vt. 546, p. 1699.
Nichols v. Otto, 132 Ill. 91, 23 N. E. 411, p. 1756.
Nichols v. Overacker, 16 Kan. 54, p. 1284.
Nichols v. Perry Pat. Arm Co., 11 N. J. Eq. 126, p. 2654.
Nichols v. Pinner, 18 N. Y. 295, 23 N. Y. 264, p. 1609, 1621.
Nichols v. Jones, 19 Fed. 855, 2 Hem. & M. 588, p. 282, 382, 450.
Nichols v. Reynolds, 1 R. I. 30, 36 Am. Dec. 238, p. 1118.
Nichols v. Voorhis, 9 Hun, 171, p. 2756.
Nichols v. Williams, 22 N. J. Eq. 63, p. 2769.
Nicholson v. Caress, 59 Ind. 39, p. 2726.

Nicholson v. Condon, 71 Md. 620, 18 Atl. 812, p. 1384.
Nicholson v. Gloucester Charity School, 93 Va. 101, 24 S. E. 899, p. 1105, 1115.
Nicholson v. Hooper, 4 Mylne & C. 179, 185, 186, p. 1195, 1386, 1434, 2481.
Nicholson v. Leavitt, 6 N. Y. 510, 519, 57 Am. Dec. 499, p. 1857, 1858.
Nicholson v. Pim, 5 Ohio St. 25, p. 570.
Nicholson v. Rose, 4 De Gex & J. 10, p. 2673, 2676.
Nicholson v. Tutin, 2 Kay & J. 18, p. 1855, 1856.
Nicholson v. Tutin, 3 Kay & J. 159, p. 2431.
Nickel v. Brown, 75 Md. 172, 23 Atl. 736, p. 1106.
Nickels v. Phillips, 18 Fla. 732, p. 2107.
Nickelson v. Wilson, 60 N. Y. 362, p. 1699.
Nickerson v. Loud, 115 Mass. 94, p. 2758.
Nickley v. Thomas, 22 Barb. 652, p. 1611.
Nickolson v. Knowles, 5 Madd. 47, p. 2640, 2645.
Nicol v. Stockdale, 3 Swanst. 687, p. 2688.
Nicol v. Vaughan, 1 Clark & F. 495, p. 1765.
Nicoll v. Mason, 49 Ill. 358, p. 2725.
Nicoll v. Miller, 37 Ill. 387, p. 2046.
Nicoll v. Mumford, 4 Johns. Ch. 522, 529, 20 Johns. 611, p. 1856, 2483, 2484.
Nicollet Nat. Bank v. City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643, p. 1220, 1222.
Nicol's Case, 3 De Gex & J. 387, 437, p. 1570, 1588, 1594, 1624.
Nidever v. Ayres, 83 Cal. 39, 23 Pac. 192, p. 1343.
Niell v. Morley, 9 Ves. 478, 482, p. 1726.
Nielsen v. City of Albert, Lea (Minn.) 98 N. W. 195, p. 1224.
Niggeler v. Maurin, 34 Minn. 118, 24 N. W. 369, p. 2372.
Nightingale v. Goulburn, 5 Hare, 484, p. 176, 1933.
Nightingale v. Goulbourn, 2 Phill. Ch. 594, p. 1948.
Nightingale v. Hidden, 7 R. I. 115, p. 2144.
Nightingale v. Nightingale, 13 R. I. 113, p. 2055.
Niles v. Grahan, 181 Mass. 41, 62 N. E. 986, p. 532.
Niles v. Harmon, 80 Ill. 396, p. 2448.
Niles v. Mathusa, 162 N. Y. 546, 57 N. E. 184, p. 1212, 1254.
Niles v. N. Y. Central & H. R. R. Co., 176 N. Y. 119, 68 N. E. 142, p. 2121.
Nill v. Jenkinson, 15 Ind. 425, p. 408.
Nilson v. Town of Jonesboro, 57 Ark. 168, 20 S. W. 1093, p. 728.
Nimick's Estate, In re, 179 Pa. St. 591, 36 Atl. 350, p. 1058.
Nimmo v. Davis, 7 Tex. 26, p. 1743, 2574.
Nims v. Vaughn, 40 Mich. 356, p. 2770.
Niolon v. McDonald, 71 Miss. 337, 13 South. 870, p. 2100, 2101.
Nisbet v. Smith, 2 Brown Ch. 579, 582, p. 2793.
Niven v. Belknap, 2 Johns. 573, p. 1386, 1436.
Niver v. Crane, 98 N. Y. 40, p. 1995, 2004.
Niver v. Rossman, 18 Barb. 50, p. 734, 743.
Nives v. Nives, L. R. 15 Ch. Div. 649, p. 2529.
Nix v. Bradley, 6 Rich. Eq. 43, 48, p. 2144, 2158, 2161.
Nixon v. Bynum, 1 Bail. 148, p. 2361.
Nixon v. Hamilton, 2 Dru. & Walsh, 364, 387, p. 1168, 1673.
Nixon v. Nixon, 2 Jones & L. 416, p. 2156.
Nixon v. Rose, 12 Gratt. 425, p. 2144, 2153, 2158.
Nixon's Appeal, 63 Pa. St. 279, p. 1993.
Noakes & Co., Ltd., v. Rice, [1902] App. Cas. 24, p. 2370.
Noble v. Butler, 25 Kan. 645, p. 2710.
Noble v. Hines, 72 Ind. 12, p. 1640.
Noble v. McGinnis, 55 Ind. 528, p. 2268.
Noble v. Smith, 2 Johns. 52, 3 Am. Dec. 399, p. 2242.
Noble v. Tait, 119 Ala. 399, 24 South. 438, p. 2255.
Noble v. Thompson Oil Co., 79 Pa. St. (29 P. F. Smith) 354, 21 Am. Rep. 66, p. 1207.

Noble v. Turner, 69 Md. 519, 16 Atl. 124, p. 1222.
Noble v. Vincennes, 42 Ind. 125, p. 407.
Noble v. Walker, 32 Ala. 456, p. 648, 1705.
Noble v. Willock, L. R. 8 Ch. 778, p. 2156.
Noble's Adm'r v. Moses, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175, p. 1747, 1775, 1778.
Noe v. Kern, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. 239, p. 1929, 1930.
Noel v. Harton, 50 Iowa, 687, p. 1641.
Noel v. Kinney, 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423, p. 1446.
Noel v. Lord Walsingham, 2 Sim. & St. 99, p. 921.
Noel v. Noel, 1 De Gex, J. & S. 468, p. 286.
Noel v. Robinson, 1 Vern. 90, 94, p. 1471.
Noel's Ex'r v. Gill, 84 Ky. 241, p. 1534.
Noesen v. Port Washington, 37 Wis. 168, p. 408.
Noetling v. Wright, 72 Ill. 390, p. 1566.
Nokes v. Gibbon, 3 Drew. 618, 681, 693, p. 717, 753, 758, 759.
Nolan v. Grant, 53 Iowa, 392, 5 N. W. 513, p. 1356.
Noland v. Chambers, 84 Ky. 516, 2 S. W. 121, p. 2144.
Nolte v. Meyer, 79 Tex. 351, 15 S. W. 276, p. 1953, 1977.
Noonan v. Lee, 2 Black, 499, 509, p. 494, 497, 512.
Noonan v. Orton, 21 Wis. 283, 28 Wis. 386, p. 231, 293, 355, 588.
Norcross v. Norcross, 105 Mass. 265, p. 2349.
Norcross v. Widgery, 2 Mass. 505, p. 1142.
Norcum v. D'Oench, 17 Mo. 98, p. 1469.
Nordeen v. Buck, 79 Minn. 352, 82 N. W. 644, p. 217.
Nordenfelt v. Maxim-Nordenfelt Co., [1894] App. Cas. 535, p. 1691.
Nordholt v. Nordholt, 87 Cal. 552, 22 Am. St. Rep. 268, 26 Pac. 599, p. 1833, 2039.
Norfleet v. Beall, (Miss.) 34 South. 328, p. 1780.
Norfleet v. Cromwell, 70 N. C. 634, 16 Am. Rep. 787, p. 1200.
Norfolk & N. B. Hosiery Co. v. Arnold, 143 N. Y. 265, 38 N. E. 271, p. 388, 452.
Norfolk & W. R. Co. v. Postal Tel. Cable Co., 88 Va. 932, 14 S. E. 689, p. 271.
Norman v. Burnett, 25 Miss. 183, p. 1908.
Norman v. Cunningham, 5 Gratt. 63, p. 1849.
Norman v. Halsey, 132 N. C. 6, 43 S. E. 473, p. 1130.
Norris, Ex parte, L. R. 4 Ch. 280, p. 2068, 2090.
Norris v. Caledonian Ins. Co., L. R. 8 Eq. 127, p. 2463.
Norris v. Chambers, 29 Beav. 246, p. 2516.
Norris v. Clark, (N. H.) 57 Atl. 334, p. 1672.
Norris v. Clark, 10 N. J. Eq. 51, p. 827, 832.
Norris v. Crowe, 206 Pa. St. 438, 98 Am. St. Rep. 783, 55 Atl. 1125, p. 1482.
Norris v. Ex'rs of Thomson, 16 N. J. Eq. 222, 542, p. 2217.
Norris v. Farrell, 33 Leg. Int. 129, 2 Wkly. Notes Cas. 423, p. 2286.
Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. 942, p. 1647.
Norris v. Hartford Fire Ins. Co., 57 S. C. 358, 35 S. E. 572, p. 1159.
Norris v. Hill, 1 Mich. 202, p. 1051.
Norris v. Ile, 152 Ill. 190, 202, 203, 204, 43 Am. St. Rep. 233, 38 N. E. 762, p. 1061, 1067, 1070, 1073, 1074, 1075.
Norris v. Jackson, 1 Johns. & H. 319, 3 Giff. 396, p. 345.
Norris v. Johnston, 5 Pa. St. 287, p. 1840, 1846.
Norris v. Laberee, 58 Me. 260, p. 1486.
Norris v. Morrison, 45 N. H. 490, p. 531.
Norris v. Tayloe, 49 Ill. 17, 95 Am. Dec. 568, p. 1752, 1762.
Norris v. Thomson's Ex'rs, 19 N. J. Eq. 307, p. 1967, 1975.
Norrish v. Marshall, 5 Madd. 475, p. 1224.
Norris's Appeal, 64 Pa. St. 275, p. 1472, 2737.

Nortcliffe v. Warburton, 4 De Gex, F. & J. 449, p. 2729.
North v. Ansell, 2 P. Wms. 619, p. 1673.
North v. Belden, 13 Conn. 376, 35 Am. Dec. 83, p. 2384, 2387.
North v. Earl of Stratford, 3 P. Wms. 148, p. 2738.
North v. Huber, 7 Jur., N. S., 767, p. 284, 287.
North v. Valk, Dud. Eq. 212, 216, p. 2325, 2326.
North Adams etc. Soc. v. Fitch, 8 Gray, 421, p. 1979.
North Alabama Dev. Co. v. Orman, 55 Fed. 18, 5 C. C. A. 22, 13 U. S. App. 215, p. 2405, 2413.
North American F. Ins. Co. v. Graham, 5 Sand. 197, p. 2789.
North & West R'y Co. v. Swank, 105 Pa. St. 555, p. 1542.
North Balt. etc. Ass'n v. Caldwell, 25 Md. 420, 90 Am. Dec. 67, p. 1755.
North British & Merc. Ins. Co. v. Lathrop, 63 Fed. 508, 70 Fed. 429, 433, 25 U. S. App. 443, p. 346.
North Br. Ins. Co. v. Lloyd, 10 Ex. 523, p. 1622.
North Car. R. R. v. Drew, 3 Woods, 691, Fed. Cas, No. 17,434, p. 2043.
North Car. R. R. v. Drew, 3 Woods, 674, Fed. Cas. No. 17,433, p. 2660, 2670.
North Carolina R. R. v. Wilson, 81 N. C. 223, p. 2106.
North Central etc. Co. v. Manchester etc. R'y Co., 35 Ch. Div. 191, 32 Ch. Div. 477, p. 2373.
Northeastern R'y v. Martin, 2 Phill. Ch. 758, p. 2798.
Northen v. Carnegie, 4 Drew. 587, p. 1988.
Northen's Estate, In re, 28 Ch. Div. 153, p. 1543.
Northern Assam etc., Co., In re, L. R. 10 Eq. 458, 463, p. 1231.
Northern Cattle Co. v. Munro, 83 Minn. 37, 85 N. W. 919, 85 Am. St. Rep. 444, p. 2395.
Northern Counties etc. Co. v. Whipp, L. R. 26 Ch. Div. 482, p. 1196, 1295.
Northern Pac. R. R. Co. v. Amacker, 46 Fed. 233, 49 Fed. 529, 1 C. C. A. 345, 7 U. S. App. 33, p. 380.
Northern Pac. R. R. v. Paine, 119 U. S. 561, 563, 7 Sup. Ct. 323, p. 495.
Northern Pac. R. R. Co. v. Walker, 47 Fed. 681, p. 418, 455.
Northern Trust Co. v. Rogers, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 526, p. 2568.
Northern Trust Co. v. Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867, p. 2118, 2129.
Northey v. Northey, 2 Atk. 77, 79, p. 2164.
North Ind. R. R. v. Mich. Cent. R. R., 15 How. 233, 5 McLean, 444, p. 519, 2633.
North Jersey St. R'y Co. v. Inhabitants of Tp. of South Orange, 58 N. J. Eq. 83, 43 Atl. 53, p. 754.
Northop v. Marquam, 16 Oreg. 173, 87, 18 Pac. 449, p. 2317.
North Pennsylvania Coal Co. v. Snowden, 42 Pa. St. (6 Wright) 488, 82 Am. Dec. 530, p. 214.
North River Bank v. Aymar, 3 Hill, 262, p. 1156, 1164, 1166, 1421, 1626.
Northrop v. Boone, 66 Ill. 368, p. 2780.
Northrop v. Bushnell, 38 Conn. 498, p. 1603.
Northrop v. Graves, 19 Conn. 548, 50 Am. Dec. 264, p. 1503.
Northrop v. Hale, 72 Me. 275, p. 1866.
Northrop v. Hatch, 6 Conn. 361, p. 257, 274, 275.
Northrup v. Cross, Seld. Notes, 111, p. 2477.
Northrup v. Trask, 39 Wis. 515, p. 2681.
Northrup's Lessee v. Brehmer, 8 Ohio, 392, p. 1105.
North Western Bank, Ex parte, L. R. 15 Eq. 69, p. 2561.
Northwestern & P. Hypotheek Bank v. Rauch, (Idaho) 66 Pac. 807, p. 1229.
Northwestern Guaranty Loan Co. v. Smith, 15 Mont. 104, 48 Am. St. Rep. 662, 38 Pac. 224, p. 2619, 2620.
Northwestern Land Assn. v. Grady, 137 Ala. 219, 33 South. 874, p. 2127.
Northwestern Land Co. v. Dewey, 58 Minn. 359, 59 N. W. 1085, p. 1034, 1048.
Northwestern Mut. L. Ins. Co. v. Allis, 23 Minn. 337, p. 2194.
Northwest Fixture Co. v. Kilbourne & Clark Co., (C. C. A.) 128 Fed. 256, p. 732.

Norton, Ex parte, 8 De Gex, M. & G. 258, p. 646, 2172.
Norton, In re, [1900] 1 Ch. 101, p. 2320.
Norton v. Beaver, 5 Ohio, 178, p. 2752, 2758.
Norton v. Birge, 35 Conn. 250, 280, p. 1064, 1067, 1079.
Norton v. Boston, 119 Mass. 194, p. 544.
Norton v. Cooper, 25 L. J. Ch. 121, p. 2429.
Norton v. Foster, 12 Kan. 44, 47, 48, p. 1234.
Norton v. Lewis, 3 S. C. 25, p. 2447.
Norton v. McDevit, 122 N. C. 755, 30 S. E. 24, p. 1994.
Norton v. Mallory, 3 Thomp. & C. 640, p. 1907.
Norton v. Mascall, 2 Vern. 24, p. 2704.
Norton v. Meader, 8 Saw. 603, p. 1147.
Norton v. Metropolitan Life Ins. Co., 74 Minn. 484, 77 N. W. 298, 539, p. 1130.
Norton v. Norton, 5 Cush. 524, p. 1800, 1801.
Norton v. Phelps, 54 Miss. 467, Ames' Cas. on Trusts, 421, p. 2104.
Norton v. Piscataqua Ins. Co., 111 Mass. 532, p. 2551.
Norton v. Reid, 11 S. C. 593, p. 2793.
Norton v. Rose, 2 Wash. (Va.) 233, p. 1226.
Norton v. Sinkhorn, 61 N. J. Eq. 508, 48 Atl. 822, p. 353.
Norton v. Williams, 9 Iowa, 528, p. 1270.
Norton v. Wood, 1 Russ. & M. 178, p. 2593.
Norvell v. Hedrick, 21 W. Va. 523, p. 1705.
Norvell v. Johnson, 5 Humph. 489, p. 489, p. 2502.
Norway v. Rowe, 19 Ves. 144, 1 Mer. 346, p. 284, 1019.
Norway Savings Bank v. Merriam, 88 Me. 146, 33 Atl. 840, p. 1867, 1904.
Norwich etc. R. R. v. Storey, 17 Conn. 364, 370, 371, p. 215, 217, 565, 2799.
Norwood v. De Hart, 30 N. J. Eq. 412, p. 2414.
Norwood v. Harness, 98 Ind. 134, 49 Am. Rep. 739, p. 2058.
Norwood v. Norwood, 2 Har. & J. 238, p. 2796.
Norwood v. Norwood, 4 Har. & J. 112, p. 2741.
Norwood v. Norwood, 36 S. C. 331, 15 S. E. 382, 31 Am. St. Rep. 875, p. 1328, 2387.
Nothard v. Proctor, L. R. 1 Ch. Div. 4, p. 2658.
Nott v. Hill, 2 Cas. Ch. 120, p. 1669.
Nottage, In re, [1895] 2 Ch. 649, 657, p. 1948, 2208.
Notten v. Copeland, 7 Johns. Ch. 140, p. 2740.
Nottidge v. Prince, 2 Giff. 246, p. 1729, 1780.
Nottley v. Palmer, 2 Drew. 93, p. 817.
Nounnan v. Sutter Co. L. Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219, p. 1563.
Nourse v. Henshaw, 123 Mass. 96, p. 2193.
Nourse v. Merriam, 8 Cush. 11, p. 1979.
Nourse v. Weitz, (Iowa) 95 N. W. 251, p. 1490.
Nowlen v. Nowlen, (Iowa) 98 N. W. 383, p. 1729.
Noyes v. Anderson, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657, p. 715, 752, 754.
Noyes v. Blakeman, 3 Sand. 531, 6 N. Y. 567, p. 1897, 2088, 2102, 2180.
Noyes v. Clark, 7 Paige, 179, 32 Am. Dec. 620, p. 725.
Noyes v. Crawford, 118 Iowa, 15, 96 Am. St. Rep. 363, 91 N. W. 799, p. 1062, 1063, 1081, 1082, 1088.
Noyes v, Hall, 97 U. S. 34, 38, 24 L. ed. 909, p. 1019, 1021, 1036, 1045, 1142, 1145, 2435.
Noyes v. Inst. for Sav. etc., 164 Mass. 583, 49 Am. St. Rep. 484, 42 N. E. 103, p. 1867.
Noyes v. Landon, 59 Vt. 569, 10 Atl. 342, p. 1609, 1612, 1613.
Noyes v. Marsh, 123 Mass. 286, p. 536, 2772.
Noyes v. Mordaunt, 2 Vern. 581, Eq. Cas. Abr. 273, pl. 3, Gilb. Eq. 2, p. 775.
Noyes v. Tootle, 2 Ind. T. 144, 48 S. W. 1031, p. 1154.
Noyes v. White, 9 Kan. 640, p. 2395.
Noys v. Mordaunt, 2 Vern. 581, p. 655, 793.
Nudd v. Powers, 136 Mass. 273, p. 2486.

Nugent v. Priebatch, 61 Mass. 402, p. 1101, 1273, 1280.
Nugent v. Vetzera, L. R. 2 Eq. 704, p. 2614.
Nuneaton L. Board v. General Sewage Co., L. R. 20 Eq. 127, p. 2686.
Nunez v. Morgan, 77 Cal. 427, 19 Pac. 753, p. 566.
Nunn v. Fabian, 11 Jur., N. S., 868, p. 1451.
Nunn v. Nunn, 66 Ala. 35, p. 2070, 2089.
Nunn's Trusts, In re, L. R. 19 Eq. 331, p. 1544.
Nunsen v. Lyons, 97 Md. 31, 39 Atl. 533, p. 1836.
Nutall v. Nutall, (Ky.) 82 S. W. 377, p. 1522, 1529.
Nutbrown v. Thornton, 10 Ves. 159, 161, 163, p. 2671, 2762, 2763.
Nute v. Nute, 41 N. H. 60, p. 981.
Nutter v. Brown, 51 W. Va. 598, 42 S. E. 661, p. 1542.
Nutt v. Codington, 34 Fla. 77, 15 South. 667, p. 2191.
Nutt v. Easton, [1899] 1 Ch. 873, p.
Nutt v. Morse, 142 Mass. 1, 6 N. E. 763, p. 1867.
Nutt v. Nutt, 1 Freem. (Miss.) 123, p. 800, 1544.
Nye v. Patterson, 35 Mich. 413, p. 2735, 2443.

O.

Oak Cliff College for Young Ladies v. Armstrong, (Tex. Civ. App.) 50 S. W. 610, p. 1273.
Oakes v. Oakes, 9 Hare, 666, p. 2214.
Oakes v. Turquand, L. R. 2 H. L. 325, 346, p. 1385, 1451, 1574, 1625, 1645.
Oakland P. Co. v. Rier, 52 Cal. 270, p. 1435.
Oakley v. Hurlbut, 100 Ill. 204, p. 2748.
Oakley v. Taylor, 64 Fed. 245, 246, p. 508, 509, 510.
Oakley v. Trustees, etc., 6 Paige, 262, p. 2752.
Oaks v. West, (Tex. Civ. App.) 64 S. W. 1033, p. 1356, 1373.
Oatway, In re, [1903] 2 Ch. 356, p. 2019.
O'Bear Jewelry Co. v. Volfer, 106 Ala. 205, 17 South. 525, 54 Am. St. Rep. 31, 28 L. R. A. 707, p. 1984, 2008, 2010, 2012, 2013.
Obee v. Bishop, 1 De Gex, F. & J. 137, p. 2088, 2096.
Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829, p. 353, 2527.
Ober & Sons Co. v. Cochran, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118, p. 2022, 2023.
G. Ober & Sons v. Keating, 77 Md. 100, 26 Atl. 501, p. 1332.
Oberdorfer v. White, 25 Ky. Law Rep. 1629, 78 S. W. 436, p. 2378.
Oberlander v. Spiess, 45 N. Y. 175, p. 1560.
Oberlender v. Butcher, (Nebr.) 93 N. W. 764, p. 1999.
Obermiller v. Wylie, 36 Fed. 641, p. 1909.
Obert v. Obert, 10 N. J. Eq. 98, p. 1779, 2741.
Obert v. Obert, 5 N. J. Eq. 397, p. 2742.
O'Brien, Petition of, 11 R. I. 419, p. 2198.
O'Brien v. Creitz, 10 Kan. 202, p. 2749.
O'Brien v. Elliot, 15 Me. 125, 32 Am. Dec. 137, p. 820.
O'Brien v. Fitzgerald, 143 N. Y. 377, 38 N. E. 371, p. 377.
O'Brien v. Lewis, 4 Giff. 221, p. 1767, 1771.
O'Brien v. Miller, 117 Fed. 1000, p. 2345.
O'Brien v. O'Connell, 7 Hun, 228, p. 2125.
O'Callaghan v. O'Brien, 116 Fed. 934, p. 509.
Ocean Beach Assn. v. Trenton Trust & S. D. Co., (N. J. Eq.) 48 Atl. 559, p. 1332.
Ocean Ins. Co. v. Fields, 2 Story, 59, p. 257, 274, p. 2703, 2708.
Ocean Nat. Bank v. Olcott, 46 N. Y. 12, p. 2004.
Oceanic Steam Nav. Co. v. Sutherberry, L. R. 16 Ch. Div. 236, p. 2087.
Ochsenbein v. Papelier, L. R. 8 Ch. 695, p. 1633, 2706.
O'Connell v. Hansen, 29 Oreg. 173, 44 Pac. 387, p. 1332.
O'Conner v. O'Conner, 88 Tenn. 76, 12 S. W. 447, 7 L. R. A. 33, p. 2405.
O'Conner v. Ward, 60 Miss. 1025, p. 1718.
O'Connor v. Flynn, 57 Cal. 293, p. 1755, 1756.

O'Connor v. Henderson Bridge Co., 95 Ky. 633, 27 S. W. 251, 983, p. 237.
O'Connor v. Tack, 2 Brewst. 407, p. 275, 293.
O'Connor v. McHugh, 89 Ala. 531, 7 South. 749, p. 2418.
O'Connor v. Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816, p. 2569.
O'Connor v. O'Connor, 45 W. Va. 354, 32 S. E. 276, p. 1087.
O'Connor v. Rempt, 29 N. J. Eq. 156, p. 1733.
O'Connor v. Sheriff, 30 La. Ann., pt. 1, 441, p. 2702.
O'Connor v. Spaight, 1 Schoales & L. 305, p. 1525, 2798, 2799.
O'Connor v. Vineyard, (Tex. Civ. App.) 43 S. W. 55, p. 1051.
O'Connor v. Ward, 60 Miss. 1025, p. 672.
O'Daily v. Morris, 31 Ind. 111, p. 2191.
Odd Fellows' Sav. Bank v. Banton, 46 Cal. 603, p. 1095.
Odell v. Montross, 68 N. Y. 499, p. 2380.
Odell v. Morin, 5 Oreg. 96, p. 2769.
Odell v. Moss, 130 Cal. 352, 357, 62 Pac. 555, p. 1747, 1779.
O'Dell v. Moss, 137 Cal. 542, 70 Pac. 547, p. 2034.
Odell v. Odell, 10 Allen, 1, p. 1978.
Oden v. Lockwood, 136 Ala. 514, 33 South. 895, p. 1900.
Odenbaugh v. Bradford, 67 Pa. St. 96, p. 2380.
Odessa Tramways Co. v. Mendel, L. R. 8 Ch. Div. 235, p. 666, 672.
Odineal v. Barry, 24 Miss. 9, p. 1701.
Odle v. Odle, 73 Mo. 289, p. 2754.
Odlin v. Gove, 41 N. H. 465, 77 Am. Dec. 773, p. 696, 1438, 1450, 1788.
Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 17 Am. St. Rep. 686, 7 L. R. A. 118, p. 1344, 1725, 1726.
O'Donnell v. Barbey, 129 Mass. 453, p. 24, 92.
O'Donnell v. Harmon, 3 Daly, 424, p. 1487, 1489.
O'Donnell v. Rosenberg, 14 Abb. Pr., N. S., 59, p. 727, 739, 747.
O'Donoghue v. Boies, 159 N. Y. 87, 53 N. E. 537, p. 1774.
O'Driscoll v. Koger, 2 Desaus. Eq. 295, 299, p. 855.
Oelrichs v. Spain, 15 Wall. 211, 228, p. 162, 220, 224, 331, 337, 347, 514, 2704.
Oetgen v. Ross, 47 Ill. 142, 95 Am. Dec. 468, p. 1081.
O'Fallon v. Kennerly, 45 Mo. 124, p. 2779.
Officer v. Officer, 120 Iowa, 389, 94 N. W. 947, 98 Am. St. Rep. 365, p. 2022, 2058.
Offutt v. Divine's Ex'rs, (Ky.) 53 S. W. 816, p. 2089.
Offutt v. King, 1 MacAr. 312, p. 1801.
Ogden v. Fitzsimmons, 7 Cranch, 1, 18, p. 1218.
Ogden v. Glidden, 9 Wis. 46, p. 2448.
Ogden v. Guice, 56 Miss. 330, p. 2186, 2194.
Ogden v. Haven, 24 Ill. 57, p. 1145, 1274, 1279.
Ogden v. Kip, 6 Johns. Ch. 160, p. 2667.
Ogden v. Larrabee, 57 Ill. 389, p. 1857.
Ogden v. Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151, p. 2142.
Ogden v. Peters, 21 N. Y. 23, 78 Am. Dec. 122, p. 1858.
Ogden v. Prentice, 33 Barb. 160, p. 1233.
Ogden v. Slade, 1 Tex. 13, 15, p. 571, 588.
Ogden v. Thornton, 30 N. J. Eq. 569, p. 2501, 2511.
Ogden v. Walters, 12 Kan. 282, p. 1127.
Ogden B. & L. Ass'n v. Mensch, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049; affirmed 99 Ill. App. 67, p. 1100, 1115.
Ogden's Appeal, 70 Pa. St. 501, p. 1830, 2159.
Ogg v. Tate, 52 Ind. 159, p. 2544.
Ogilvie v. Currie, 37 L. J. Ch. 541, p. 1630.
Ogilvie v. Jeaffreson, 2 Giff. 353, 379, p. 1174, 1393, 1645, 1650.
Ogilvie v. Ogilvie, 1 Bradf. 356, p. 2233, 2234.
Ogle, Ex parte, L. R. 8 Ch. 711, p. 2056, 2057, 2058.
Ogle v. Ogle, 41 Ohio St. 359, p. 2509.
Ogle v. Tayloe, 49 Md. 158, p. 2489, 2492.
Oglesby Coal Co. v. Pasco, 79 Ill. 164, p. 1446, 1447.
O'Halloran v. Fitzgerald, 71 Ill. 53, p. 2048, 2051, 2080, 2085.

O'Hara v. Dudley, 95 N. Y. 403, 47 Am. Rep. 53, p. 2036.
O'Hara v. Haas, 46 Miss. 374, p. 2417.
O'Hara v. Strange, 11 Ir. R. Eq. 262, p. 2737.
O'Hare v. Chaine, 1 Jones & L. 662, p. 837.
O'Hare v. Downing, 130 Mass. 16, p. 2752, 2757.
O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411, p. 1242.
Ohio Life Ins. & T. Co. v. Ledyard, 8 Ala. 866, p. 1104, 1111, 1272, 1276, 1329, 1381.
Ohio Life Ins. Co. v. Ross, 2 Md. Ch. 25, 39, p. 1257, 1358, 1379, 1382.
Ohling v. Luitjans, 32 Ill. 23, p. 215.
Ohm v. City and County of San Francisco, (Cal.) 25 Pac. 155, p. 212.
Ohmer v. Boyer, 89 Ala. 273, 7 South. 663, p. 1407, 1411, 1891, 1989, 2423, 2437, 2440, 2442, 2449.
Oil Creek & A. R. R. Co. v. Pennsylvania Tran. Co., 83 Pa. St. 160, p. 1721.
Oil Creek R. R. v. Atlantic & G. W. R. R., 57 Pa. St. 65, p. 766.
Oil Run Petroleum Co. v. Gale, 6 W. Va. 525, p. 2637, 2640, 2646.
O'Kane v. Kiser, 25 Ind. 168, p. 2775.
O'Kane v. Whalen, 124 Cal. 200, 56 Pac. 880, 71 Am. St. Rep. 42, p. 2244.
O'Keefe v. Dyer, 20 Mont. 477, 52 Pac. 196, p. 738.
Okill v. Whittaker, 1 De Gex & S. 83, 2 Phill. Ch. 338, p. 1509.
Olcott v. Heermans, 3 Hun, 431, p. 2662.
Old Colony R. R. v. Evans, 6 Gray, 25, 30, 66 Am. Dec. 394, p. 535, 536, 2760.
Olden v. Sassman, (N. J. Eq.) 57 Atl. 1075, p. 765.
Oldfield, In re, [1904] 1 Ch. 549, p. 1926.
Oldham v. Broom, 28 Ohio St. 41, p. 2794.
Oldham v. Hughes, 2 Atk. 452, 453, p. 2331.
Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690, p. 1231.
Oldham v. Litchfield, 2 Vern. 506, Freem. Ch. 284, p. 1653, 2035.
Oldham v. Oldham, 5 Jones Eq. 89, p. 1728.
Old Nat. Bank v. Findley, 131 Ind. 225, 31 N. E. 62, p. 1278, 1347.
Olds v. Cummings, 31 Ill. 188, p. 1227.
Old South Soc. v. Crocker, 119 Mass. 1, 20 Am. Rep. 299, p. 1933, 1939, 1978.
Oliffe v. Wells, 130 Mass. 221, p. 1952, 1978, 1985, 1986, 2037.
Oliphant v. Burns, 146 N. Y. 218, 40 N. E. 980, p. 1072, 1095, 1135, 1363.
Oliphant v. Liversidge, 142 Ill. 160, 30 N. E. 334, p. 1779.
Olive v. Westerman, 34 Ch. Div. 70, p. 2073.
Oliveira v. University of North Car., 1 Phill. Eq. 69, 70, p. 229, 466.
Olivella v. New York & H. R. Co., 64 N. Y. Supp. 1086, 31 Misc. Rep. 203, p. 383, 451.
Oliver, In re, 132 Fed. 588, p. 2568.
Oliver v. Bank of England, [1902] 1 Ch. 610, 627, p. 1579, 1588.
Oliver v. Brickland, cited in 1 Ves. Sr. 1, 12, 3 Atk. 420, 422, p. 956.
Oliver v. Court, 8 Price, 127, p. 1771.
Oliver v. Eaton, 7 Mich. 108, p. 2586.
Oliver v. Grimball, 14 S. C. 556, p. 2154.
Oliver v. Hinton, [1899] 2 Ch. 264, 68 Law J. Ch. 583, 81 Law T. (N. S.) 212, 48 Wkly. Rep. 3, p. 1296, 1006, 1017.
Oliver v. Hunting, 44 Ch. Div. 205, p. 1903.
Oliver v. Jernigan, 46 Ala. 41, p. 2742.
Oliver v. Keightley, 24 Ind. 514, p. 408.
Oliver v. Memphis etc. R. R., 30 Ark. 128, p. 2678.
Oliver v. Mut. etc. Ins. Co., 2 Curt. 277, p. 1489, 1531.
Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232, p. 1609, 1612, 1614, 1783, 2112.
Oliver v. Oliver, L. R. 11 Eq. 506, p. 2208, 2212.
Oliver v. Oliver, 4 Rawle, 141, 26 Am. Dec. 123, p. 1507.
Oliver v. Piatt, 3 How. 333, 401, 412, p. 419, 701, 958, 1338, 2024, 2746.
Oliver v. Pray, 4 Ohio, 175, 192, 19 Am. Dec. 595, p. 570.
Olmstead v. Brush, 27 Conn. 530, p. 2488.
Olmsted v. Elder, 5 N. Y. 144, p. 2434.

Olmsted v. Loomis, 6 Barb. 152, p. 2686.
Olmsted v. Loomis, 9 N. Y. 423, p. 2685, 2687.
Olney v. Bates, 3 Drew. 319, p. 2231.
Olney v. Conanicut Land Co., 16 R. I. 597, 18 Atl. 181, 27 Am. St. Rep. 767, p. 2013.
Olney v. Eaton, 66 Mo. 563, p. 2633, 2762.
Olney v. Howe, 89 Ill. 556, 31 Am. Rep. 105, p. 1873.
Olney v. Weaver, 24 R. I. 408, 53 Atl. 287, p. 1482.
Olson v. Lamb, 56 Nebr. 104, 71 Am. St. Rep. 670, 76 N. W. 433, p. 1701, 1772, 1784.
Olson v. Lamb, 61 Nebr. 484, 85 N. W. 397, p. 353.
Olson v. Liebpke, 110 Iowa, 504, 81 N. W. 801, 80 Am. St. Rep. 327, p. 1062, 1066, 1070, 1072, 1083.
Olson v. Northwestern Guaranty Loan Co., 65 Minn. 475, 68 N. W. 100, p. 1228, 1298.
Olson v. Orton, 28 Minn. 36, 8 N. W. 878, p. 1597.
Olyphant v. Phyle, 48 App. Div. 1, 62 N. Y. Supp. 688, modifying 27 Misc. Rep. 64, 58 N. Y. Supp. 217, p. 1071, 1086.
O'Mahony v. Dickson, 2 Schoales & L. 400, p. 2798.
O'Meara v. North Am. Min. Co., 2 Nev. 112, p. 345.
Ommaney v. Butcher, 1 Turn. & R. 260, 270, p. 177, 1935, 1985.
Omohundro v. Elkins, 109 Tenn. 711, 71 S. W. 590, p. 2480.
Onasch v. Zinkel, (Ill.) 72 N. E. 716, p. 1996.
Onderdonk v. Gray, 19 N. J. Eq. 65, p. 2429.
Onderdonk v. Mott, 34 Barb. 106, 112, p. 570, 580, 2299, 2301, 2749.
O'Neal v. Seixas, 85 Ala. 80, 4 South. 745, p. 1338, 2474.
O'Neale v. Ward, 3 Har. & McH. 93, p. 1684.
O'Neil v. Cleveland, 30 N. J. Eq. 273, p. 1704.
O'Neill v. Blase, 94 Mo. App. 648, 68 S. W. 764, p. 1155.
O'Neill v. Capelle, 62 Mo. 202, p. 2381.
O'Neill v. Clark, 33 N. J. Eq. 444, p. 2410.
O'Neill v. Wilcox, 115 Iowa, 15, 87 N. W. 742, p. 1033, 1048.
Onondaga Nation v. Thatcher, 29 Misc. Rep. 428, 61 N. Y. Supp. 1027, 65 N. Y. Supp. 1014, p. 234.
Onslow v. ———, 16 Ves. 173, p. 2682.
Onslow v. Michell, 18 Ves. 490, p. 921.
Onslow v. Wallis, 1 Hall & Twells, 513, p. 1948, 1986, 2055.
Onson v. Cown, 22 Wis. 329, p. 93, 1524, 2722.
Ontario Bank v. Mumford, 2 Barb. Ch. 596, 615, p. 148, 461, 469, p. 2557.
Ontario Bank v. Root, 3 Paige, 478, p. 1904.
Opdyke v. Bartles, 11 N. J. Eq. 133, p. 2437.
Opera, Limited, In re, [1891] 2 Ch. 154, p. 1503.
Oppenheim v. Leo Wolf, 3 Sand. Ch. 571, p. 2643.
Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 889, 899, p. 1594, 1596, 1602.
Orby v. Trigg, 2 Eq. Cas. Abr. 599, pl. 24, 9 Mod. 2, p. 2371.
Ord v. Johnston, 1 Jur., N. S., 1063, 1064, 1065, p. 619, 633, 2589, 2760, 2768.
Ord v. McKee, 5 Cal. 515, p. 2418.
Ord v. Noel, 5 Madd. 438, p. 2048.
Ord v. White, 3 Beav. 357, p. 1229.
Order of United Commercial Travelers v. M'Adam, (C. C. A.) 125 Fed. 358, p. 1496, 1498.
Ordway v. Bright, 7 Heisk. 681, p. 2146.
Ordway v. Chace, 57 N. J. Eq. 478, 42 Atl. 149, p. 1340.
Ordway v. Downey, 18 Wash. 412, 51 Pac. 1047, 63 Am. St. Rep. 892, p. 2406.
Ordway v. Gardner, 107 Wis. 74, 82 N. W. 696, p. 2055.
Oregon Lumber Co. v. Jones, 36 Oreg. 80, 58 Pac. 769, p. 2000.
Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, p. 1688.
O'Reilly v. Nicholson, 45 Mo. 160, p. 786, 1064.
Orendorf v. Budlong, 12 Fed. 24, p. 499.
Organ v. Memphis etc. R. R. Co., 51 Ark. 235, 11 S. W. 96, p. 2528.

Oriental Bank v. Nicholson, 3 Jur., N. S., 857, p. 2651.
Original Hartlepool etc. Co. v. Gibb, L. R. 5 Ch. Div. 713, p. 2683.
O'Riley v. McChesney, 3 Lans. 278, p. 2687.
Orleans v. Platt, 99 U. S. 676, p. 1079.
Orme v. Roberts, 33 Tex. 768, p. 1278, 1381.
Ormes v. Beadel, 2 De Gex, F. & J. 333, p. 1788.
Ormiston v. Olcott, 84 N. Y. 339, 346, p. 2068, 2076, 2094.
Ormond v. Hutchinson, 13 Ves. 47, p. 1494, 1767.
Ormrod v. Huth, 14 Mees. & W. 650, p. 1576, 1577.
Ormsby v. Barr, 22 Mich. 80, p. 2749, 2752, 2754.
O'Rorke v. Bolinbroke, L. R. 2 App. C. 814–834, p. 1742.
O'Rourke v. O'Connor, 39 Cal. 442, 446, p. 1007, 1023, 1033, 1048, 1096, 1144, 1274, 1279, 1357.
O'Rourke v. Wahl, 109 Fed. 276, 48 C. C. A. 360, p. 1226.
Orphan Asylum v. McCartee, Hopk. Ch. 429, p. 2654.
Orr v. Johnston, L. R. 13 Ch. Div. 434, p. 1695.
Orr v. Kaines, 2 Ves. Sr. 194, p. 1471.
Orr v. Pennington, 93 Va. 268, 24 S. E. 928, p. 1779, 1787.
Orr v. Tanner, 12 R. I. 94, p. 1771.
Orr v. Ulyatt, 23 Nev. 134, 43 Pac. 916, p. 2360.
Orr v. Yates, 209 Ill. 222, 70 N. E. 731, p. 1909.
Orr v. Zimmerman, 63 Mo. 72, p. 632, 753, 1466.
Orrell v. Orrell, L. R. 6 Ch. 302, 304, 305, p. 785, 790, 791, 802, 806.
Orr Ewing v. Johnston, L. R. 13 Ch. Div. 434, p. 2690.
Orrick v. Boehm, 49 Md. 72, p. 2306, 2317.
Orrick v. Dunham, 79 Mo. 174, p. 1409, 2407, 2501, 2513, 2516.
Orr Water Ditch Co. v. Larcombe, 14 Nev. 53, p. 2636.
Orth v. Jennings, 8 Blackf. 420, p. 1271, 1276, 1381.
Orth v. Orth, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298, p. 1926, 2007.
Ortman v. Plumer, 52 Mich. 76, 17 N. W. 703, p. 2500, 2508, 2509.
Orton v. Smith, 18 How. 263, p. 364, 2754.
Orvis v. Newell, 17 Conn. 97, p. 1127, 1136.
Osbaldiston v. Simpson, 13 Sim. 513, p. 672, 675, 1709.
Osborn v. Carr, 12 Conn. 195, 198, 208, p. 1291, 1348.
Osborn v. Glasscock, 39 W. Va. 749, 20 S. E. 702, p. 1087.
Osborn v. Hall, 160 Ind. 153, 66 N. E. 457, p. 1106, 1122.
Osborn v. Heyer, 2 Paige, 342, p. 2659.
Osborn v. Lea, 9 Mod. 96, p. 1387.
Osborn v. McClelland, 43 Ohio St. 284, 298–307, 1 N. E. 644, p. 1239, 1246, 1250.
Osborn v. Morgan, 9 Hare, 432, 434, p. 645, 2167, 2171.
Osborn v. Noble, 46 Miss. 449, p. 2796.
Osborn v. Ordinary, 17 Ga. 123, 63 Am. Dec. 230, p. 462.
Osborn v. Osborn, 29 N. J. Eq. 385, p. 1989.
Osborn v. Phelps, 19 Conn. 63, 48 Am. Dec. 133, p. 1530, 1532.
Osborn v. U. S. Bank, 9 Wheat. 738, 844, 845, p. 2655, 2670.
Osborne v. Brooklyn etc. R. R., 5 Blatchf. 366, p. 2683.
Osborne v. Cabell, 77 Va. 462, p. 2414.
Osborne v. Cooper, 113 Ala. 405, 59 Am. St. Rep. 117, 21 South. 320, p. 2189.
Osborne v. Duke of Leeds, 5 Ves. 369, p. 889, 933, 937.
Osborne v. McAlpine, 4 Redf. 1, p. 2216, 2225.
Osborne v. Osborne, 41 S. C. 195, 19 S. E. 494, p. 213.
Osborne v. Royer, 1 Lea, 217, p. 2522, 2523, 2527.
Osborne v. Tunis, 25 N. J. L. 633, 651, p. 2351.
Osborne v. Williams, 18 Ves. 379, p. 671, 1697, 1711, 1718, 1719.
Osborne v. Wisconsin Cent. R. Co., 43 Fed. 824, 826, 827, p. 360, 375, 390, 396, 413, 430, 443, 445, 453.
Oscanyan v. Arms Co., 103 U. S. 261, p. 1699.
Oscanyan v. Winchester etc. Co., 15 Blatchf. 79, Fed. Cas. No. 10,600, p. 1696.

Osgood v. De Groot, 36 N. Y. 348. p. 1234.
Osgood v. Franklin, 2 Johns. Ch. 1, 23, 24, 7 Am. Dec. 513, 14 Johns. 527, p. 1665, 1667, 1671, 2770.
Osgood v. Nichols, 5 Gray, 420, p. 1562.
Osmond v. Fitzroy, 3 P. Wms. 129, 130, p. 1727, 1728.
Ostell v. Le Page, 2 De Gex, M. & G. 892, p. 2703.
Oster v. Mickley, 35 Minn. 245, 28 N. W. 710, p. 1228.
Osterman v. Baldwin, 6 Wall. 116, p. 1898.
Oswald v. Hoover, 43 Md. 360, p. 2193.
Oswald v. McGehee, 28 Misc. 340, p. 1567, 1583.
Oswego Starch Factory v. Lendrum, 57 Iowa, 573, 10 N. W. 900, 42 Am. Rep. 53, p. 1621.
Oswell v. Probert, 2 Ves. 680, 682, p. 646, 2167.
Ottaquechee Sav. Bank v. Holt, 58 Vt. 166, 1 Atl. 485, p. 1156.
Ottawa Plank Road Co. v. Murray, 15 Ill. 336, 337, p. 725, 753.
Other v. Iveson, 3 Drew. 177, p. 684, 2608.
Otis v. Beckwith, 49 Ill. 121, 128, p. 1873.
Otis v. Gardner, 105 Ill. 436, p. 1244.
Otis v. Gregory, 111 Ind. 504, 13 N. E. 39, p. 133, 602, 638, 640, 2499, 2521.
Otis v. Kennedy, 107 Mich. 312, 65 N. W. 219, p. 1127.
Otis v. Otis, 167 Mass. 245, 45 N. E. 737, p. 2018.
Otis v. Prince, 10 Gray, 581, p. 1684.
Otis v. Sill. 8 Barb. 102, p. 191, 1194, 2472, 2576.
Otley v. Haviland, 36 Miss. 19, p. 223.
O'Toole v. Omlie, 8 N. Dak. 444, 79 N. W. 849, p. 1032.
Ottenheimer v. Cook, 10 Heisk. 309, p. 1482, 2726.
Otter v. Lord Vaux, 6 De Gex, M. & G. 638, p. 1409.
Ottley v. Gilby, 8 Beav. 602, p. 2052.
Ottomeyer v. Pritchett, 178 Mo. 160, 77 S. W. 62, p. 1850.
Ottumwa Screen Co. v. Stodghill, 103 Iowa. 437, 72 N. W. 669, p. 1221.
Ould v. Washington Hospital, 95 U. S. 303, 24 L. ed. 450, p. 1933, 1943, 1954, 1960, 1967, 1978.
Oulds v. Harrison, 10 Ex. 572, p. 1246.
Ouroy v. Saunders, 77 Tex. 278, 13 S. W. 1030, p, 1995, 2503, 2521.
Ousley v. Anstruther, 10 Beav. 453, 461, p. 958, 2024.
Overall v. Taylor, 99 Ala. 12, 11 South. 738, p. 991, 1154, 1191, 1269.
Overby v. Thrasher, 47 Ga. 10, p. 2764.
Overend v. Gibb, L. R. 5 H. L. 480, 484, 494, p. 2065.
Overend etc. Co., In re, L. R. 3 Eq. 576, p. 1574, 1613.
Overend etc. Co. v. Gurney, L. R. 4 Ch. 701, p. 1613.
Overend. Gurney & Co., In re, L. R. 6 Eq. 344, p. 1246.
Overing v. Foote, 43 N. Y. 290, p. 2755, 2757.
Overman's Appeal, 88 Pa. St. 276, p. 1846.
Overton v. Banister, 3 Hare, 503, 506, p. 659, 662, 1386, 1448, 1725, 1833, 2067.
Overton v. Lacy, 6 T. B. Mon. 13, 15, 17 Am. Dec. 111, p. 680.
Overton v. McFarland, 15 Mo. 312, p. 2279.
Overstreet v. Baxter, 30 Kan. 55, 1 Pac. 825, p. 2374.
Overstreet v. Manning, 67 Tex. 657, 4 S. W. 248, p. 1329.
Ovey, In re, 29 Ch. Div. 560, p. 1965.
Ovey v. Leighton, 2 Sim. & St. 234, p. 1390.
Oviatt v. Brown, 14 Ohio, 285, 45 Am. Dec. 539, p. 1276.
Owen v. Cawley, 36 N. Y. 600, p. 2196.
Owen v. Delamere, L. R. 15 Eq. 134, p. 2103.
Owen v. Evans, 134 N. Y. 514, 31 N. E. 999, p. 1255, 1304.
Owen v. Homan, 3 Macn. & G. 378, 412; affirmed 4 H. L. Cas. 997, p. 183, 1622, 2133, 2185, 2653.
Owen v. Kilpatrick, 96 Ala. 421, 11 South. 476, p. 1065, 1076.
Owen v. McGehee, 61 Ala. 440, p. 2794.
Owen v. Monroe Co. Alliance, 77 Miss. 500, 27 South. 383, p. 2034.
Owen v. Phillips, 73 Ind. 284, p. 2687.
Owen v. Ranstead, 22 Ill. 161, p. 2709.
Owen v. State, 25 Ind. 107, p. 2608.
Owen v. State, 25 Ind. 371, p. 683.
Owen v. Wynn, L. R. 9 Ch. Div. 29, p. 270.

Owens v. Claytor, 56 Md. 129, p. 2487, 2488, 2489.
Owens v. Crow, 62 Md. 491, p. 1829.
Owens v. Dickenson, Craig & P. 48, 53, 54, p. 183, 2133, 2179, 2182, 2185.
Owens v. Heidbreder, 78 Fed. 837, 24 C. C. A. 362, p. 495.
Owens v. Johnson, 8 Baxt. 265, p. 2198.
Owens v. Miller, 29 Md. 144, p. 1106, 1358.
Owens v. Mitchell, 38 Tex. 589, p. 210.
Owens v. Roberts, 36 Wis. 258, p. 1152, 1172.
Owens v. Williams, 130 N. C. 165, 41 S. E. 93, p. 1899.
Owings v. Myers, 3 Bibb. 278, p. 1065.
Ownes v. Ownes, 23 N. J. Eq. 60, 62, p. 1712, 1872.
Oxenden v. Lord Compton, 2 Ves. 69, 71, 72, p. 2320, 2622.
Oxenden v. Oxenden, 2 Vern. 493, p. 2175.
Oxenham v. Esdaile, 2 Younge & J. 493, p. 2466.
Oxford v. Hopson, (Ark.) 83 S. W. 942, p. 1728.
Oxwith v. Plummer, 2 Vern. 636, p. 1019.
Ozark Land & Lumber Co. v. Franks, 156 Mo. 673, 57 S. W. 540, p. 1102, 1124.
Ozley v. Ikelheimer, 26 Ala. 332, p. 2144, 2153, 2190.

P.

P. & M. Bank v. Dundas, 10 Ala. 661, p. 2447.
Pace v. Bartles, 47 N. J. Eq. 170, 20 Atl. 352, p. 2377.
Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120, p. 468.
Pacific Bank v. Windram, 133 Mass. 175, p. 1845.
Pacific Exp. Co. v. Seibert, 44 Fed. 310, p. 381.
Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36, p. 728, 743.
Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. 273, p. 1167.
Pacific Postal Tel. Cable Co. v. Western Union Tel. Co., 50 Fed. 493, p. 669, 1687.
Pacific R. R. v. Ketchum, 101 U. S. 289, p. 1771.
Pacific Rolling-Mill Co. v. English, 118 Cal. 123, 50 Pac. 383, p. 1230.
Pack v. Shanklin, 43 W. Va. 304, 27 S. E. 389, p. 1972.
Packard v. Bird, 40 Cal. 378, p. 1699.
Packard v. Johnson, 51 Cal. 545, p. 1095.
Packard v. Marshall, 138 Mass. 301, p. 1989.
Packard v. Old Colony R. Co., 168 Mass. 92, 46 N. E. 433, p. 1910.
Packard v. Putnam, 57 N. H. 43, p. 1901, 1903.
Packer v. Rochester etc. R. R., 17 N. Y. 283, 295, p. 2360, 2361.
Padbury v. Clark, 2 Macn. & G. 298, 306, 307, p. 782, 785. 809, 811, 813, 853, 854, 857.
Paddock v. Fletcher, 42 Vt. 389, p. 1567.
Paddock v. Palmer, 6 How. Pr. 215, p. 2107.
Paddock v. Strowbridge, 20 Vt. 470, 477, p. 1609, 1613, 1618.
Paddon v. Richardson, 7 De Gex, M. & G. 563, p. 2061, 2069, 2070, 2071, 2072, 2094.
Paddon v. Taylor, 44 N. Y. 371, p. 1385.
Paddon v. Winch, L. R. 9 Eq. 666, p. 280.
Padfield v. Padfield, 78 Ill. 16, p. 823.
Padfield v. Pierce, 72 Ill. 500, p. 1448.
Padgett v. Lawrence, 10 Paige, 170, 40 Am. Dec. 232, p. 1326, 1327, 1331.
Padwick v. Hurst, 18 Beav. 575, p. 2798.
Padwick v. Stanley, 9 Hare, 627, p. 2793, 2800.
Page, In re, 7 Daly, 155, p. 2624.
Page v. Cranford, 43 S. C. 193, 20 S. E. 972, p. 1735.
Page v. Estes, 19 Pick. 269, 271, p. 646.
Page v. Foster, 7 N. H. 392, p. 2434.
Page v. Gardner, 20 Mo. 507, p. 2576.
Page v. Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152, p. 1540, 1542.
Page v. Holman, 82 Ky. 573, p. 2082, 2090.
Page v. Kennan, 38 Wis. 320, p. 2750.
Page v. Leapingwell, 18 Ves. 463, 466, p. 1986, 2210, 2224, 2227.
Page v. Lever, 2 Ves. 450, p. 1393.
Page v. Marston, 94 Me. 342, 47 Atl. 529, p. 2051, 2053.

Page v. Murray, 46 N. J. Eq. 325, 19 Atl. 11, p. 2596.
Page v. Naglee, 6 Cal. 241, p. 2079.
Page v. Page, 8 N. H. 187, 195, p. 290, 2000.
Page v. Pierce, 26 N. H. 317, p. 2417.
Page v. Stubbs, 39 Iowa, 537, p. 1771.
Page v. Vilhac, 42 Cal. 75, p. 2373, 2377.
Page v. Waring, 76 N. Y. 463, 467-469, p. 1069, 1088, 1095, 1132, 1134, 1147, 1363.
Page v. Way, 3 Beav. 20, p. 1841.
Page v. Young, L. R. 19 Eq. 501, p. 2208.
Page Co. v. American etc. Co., 41 Iowa, 115, p. 2762.
Page's Estate, 75 Pa. St. 87, p. 2306, 2310.
Paget, In re, [1898] 1 Ch. 290, p. 1838.
Paget v. Gee, Ambl. App. 807, 810, p. 65.
Paget v. Grenfell, L. R. 6 Eq. 7, p. 917, 920, 921.
Paget v. Huish, 1 Hem. & M. 663, 668, p. 2217, 2129, 2220.
Paget v. Stevens, 8 Misc. Rep. 236, 28 N. Y. Supp. 549, p. 2107.
Paice v. Archbishop of Canterbury, 14 Ves. 364, p. 1959, 1963.
Pain v. Coombs, 1 De Gex & J. 34, p. 2781.
Paine v. Forsaith, 86 Me. 357, 30 Atl. 11, p. 2055.
Paine v. France, 26 Md. 46, p. 667, 1708.
Paine v. French, 4 Ohio, 318, p. 1295, 2417.
Paine v. Hall, 18 Ves. 475, p. 1654.
Paine v. Irwin, 16 Hun, 390, p. 1753, 1756.
Paine v. Jones, 75 N. Y. 593, p. 2725.
Paine v. Lake Erie etc. R. R., 31 Ind. 283, p. 659, 664.
Paine v. Meller, 6 Ves. 349, p. 621, 2774.
Paine v. Mooreland, 15 Ohio, 435, 45 Am. Dec. 585, p. 1276, 1381.
Paine v. Parson, 14 Pick. 103, 313, 318, p. 896, 902, 904, 909, 935, 938, 945, 947.
Paine v. Roberts, 82 N. C. 451, p. 1728, 1739.
Paine v. Sykes, 72 Miss. 351, 16 South. 903, p. 1332.
Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371, p. 2725.
Painter v. Harding, 3 Phila. 59, p. 560.
Painter v. Polk County, 81 Iowa, 242, 47 N. W. 65, 25 Am. St. Rep. 489, p. 1503.
Paisley's Appeal, 70 Pa. St. 153, 158, p. 1919, 1927.
Palairet v. Carew, 32 Beav. 564, 567, p. 2106.
Palk v. Lord Clinton, 12 Ves. 48, p. 2436, 2437.
Pallen v. Agricultural Bank, Freem. (Miss.) 419, p. 2786.
Palmer v. Bethard, 66 Ill. 529, p. 1550.
Palmer v. De Witt, 47 N. Y. 532, 7 Am. Rep. 480, 2 Sweeny, 530, 5 Abb. Pr., N. S., 130, p. 2689.
Palmer v. Foote, 7 Paige, 437, p. 2399.
Palmer v. Ford, 70 Ill. 369, p. 632, 753, 758, 1466.
Palmer v. Fowler, L. R. 13 Eq. 250, p. 2216.
Palmer v. Harris, 60 Pa. St. 156, 100 Am. Dec. 557, p. 1695, 2690.
Palmer v. Hartford Ins. Co., 54 Conn. 488, 9 Atl. 248, p. 1510.
Palmer v. Hendrie, 27 Beav. 349, p. 2429.
Palmer v. Locke, L. R. 5 Ch. Div. 294, p. 1657.
Palmer v. Merrill, 6 Cush. 282, 287, 52 Am. Dec. 782, p. 2563.
Palmer v. Neave, 11 Ves. 165, p. 1678.
Palmer v. Newell, 20 Beav. 32, 40, 8 De Gex, M. & G. 74, p. 917, 931, 937.
Palmer v. Rich, [1897] 1 Ch. 134, 143. p. 680.
Palmer v. Rich, 12 Mich. 414, p. 2756.
Palmer v. Scott, 1 Russ. & M. 391, p. 2769, 2773.
Palmer v. Simmonds, 2 Drew. 221, 225. p. 1909, 1924, 1929.
Palmer v. Sterling, 41 Mich. 218, p. 2500, 2509.
Palmer v. Stevens, 15 Gray, 343, p. 1845.
Palmer v. Union Bank, 17 R. I. 627, 24 Atl. 109, p. 1947, 1980.
Palmer v. Wakefield, 3 Beav. 227, p. 857.
Palmer v. Wheeler, 2 Ball & B. 18, 31, p. 1657.
Palmer v. White, 65 N. J. L. 69, 46 Atl. 706, p. 2409.

Palmer v. Williams, 24 Mich. 328, 333, p. 1202, 1324, 1333, 1348.
Palmer v. Wright, 10 Beav. 234, p. 284, 287.
Palmer v. Young, 96 Ga. 246, 51 Am. St. Rep. 136, 22 S. E. 928, p. 1756.
Palmer Steel & Iron Co. v. Heat, Light & Power Co., 160 Ind. 232, 66 N. E. 690, p. 1541.
Palmour v. Roper, (Ga.) 45 S. E. 790, p. 1665.
Palys v. Jewett, 32 N. J. Eq. 302, p. 2663.
Pamplin v. Green, 3 Cas. Chan. 95, p. 180, 2203.
Panama etc. Tel. Co. v. India Rubber etc. Co., L. R. 10 Ch. 515, 526, p. 1762.
Pancake v. Cauffman, 114 Pa. St. 113, 7 Atl. 67, p. 2381.
Pancoast v. Duvall, 26 N. J. Eq. 445, p. 1330, 2451.
Pancoast v. Geishaker, 58 N. J. Eq. 537, 43 Atl. 883, p. 2018.
Pankhurst v. Howell, L. R. 6 Ch. 136, p. 910, 911.
Papillon v. Papillon, 11 Sim. 642, p. 921.
Papillon v. Voice, 2 P. Wms. 471, p. 1886.
Papineau v. Naumkeag etc. Co., 126 Mass. 372, p. 2562, 2567.
Parcher v. Savings Institution, 78 Me. 470, 7 Atl. 266, p. 2233.
Pardee v. Lindley, 31 Ill. 174, 83 Am. Dec. 219, p. 2417.
Pardee v. Treat, 82 N. Y. 385, 387, 388, p. 2375, 2412, 2415.
Pardee v. Van Anken, 3 Barb. 534, p. 2426.
Parfit v. Lawless, L. R. 2 Pro. & D. 462, p. 1751.
Parfitt v. Chambre, L. R. 15 Eq. 36, p. 721.
Parham v. Green, 64 N. C. 436, p. 2796.
Paris v. Gilham, Coop. 56, p. 2637.
Paris v. Lewis, 85 Ill. 597, p. 1344.
Paris Exch. Bank v. Beard, 49 Tex. 358, p. 2341, 2393.
Parish v. Gilmanton, 11 N. H. 293, 298, p. 2350.
Parish v. Lewis, Freem. (Miss.) 299, p. 2790.
Parish v. Scott, 10 Heisk. 438, p. 2726.
Parish v. Sloan, 3 Ired. Eq. (N. C.) 611, p. 424.
Parish v. Stone, 14 Pick. 198, 203, 204, 25 Am. Dec. 378, p. 2233.
Parish of Christ Church v. Trustees of Donations etc., 67 Conn. 554, 35 Atl. 552, p. 1940, 1955, 1965, 1973.
Parish Will Case, 25 N. Y. 9, p. 1727, 1737.
Park v. Johnson, 4 Allen, 259, p. 1518, 1665, 2777.
Park v. Matthews, 36 Pa. St. 28, p. 1846.
Park Bros. & Co. v. Blodgett & Clapp Co., 64 Conn. 28, 29 Atl. 133, p. 1490.
Parke v. Chadwick, 8 Watts & S. 96, p. 1107.
Parke v. Neeley, 90 Pa. St. 52, p. 1148.
Parken v. Whitby, Turn. & R. 366, p. 1714.
Parker v. Barker, 2 Met. 423, p. 1388.
Parker v. Barker, 42 N. H. 78, 77 Am. Dec. 789, p. 2648.
Parker v. Barnesville Sav. Bank, 107 Ga. 650, 34 S. E. 365, p. 1372, 1373.
Parker v. Bloxam, 20 Beav. 295, p. 1785.
Parker v. Blythmore, Prec. Ch. 58, p. 1315, 1367.
Parker v. Bodley, 4 Bibb, 102, p. 1900.
Parker v. Brancker, 22 Pick. 40, 46, p. 2461.
Parker v. Brooke, 9 Ves. 583, p. 2139, 2145.
Parker v. Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 678, p. 2539.
Parker v. Carter, 4 Hare, 400, 409, p. 1806.
Parker v. Carter, 4 Munf. 273, 6 Am. Dec. 513, p. 277, 282.
Parker v. Coburn, 10 Allen, 82, p. 872.
Parker v. Conner, 93 N. Y. 118, 124, 45 Am. Rep. 178, p. 983, 1095.
Parker v. Coop, 60 Tex. 111, p. 1269, 1993.
Parker v. Crittenden, 37 Conn. 148, p. 1445.
Parker v. Dee, 2 Cas. Ch. 200, 201, p. 316.
Parker v. Fairlie, 1 Sim. & St. 295, p. 284.
Parker v. Fearnley, 2 Sim. & St. 592, p. 2490.

Parker v. Foy, 43 Miss. 260, 266, 55 Am. Rep. 484, p. 978, 982, 994. 1146.
Parker v. Garrison, 61 Ill. 250, p. 2676.
Parker v. Gerard, Amb. 236, p. 2739, 2741, 2742.
Parker v. Glenn, 72 Ga. 637, p. 1672.
Parker v. Glover, 42 N. J. Eq. 559, 9 Atl. 217, p. 2305.
Parker v. Hayes, 39 N. J. Eq. 469, p. 1588.
Parker v. Hill, (Mass.) 69 N. E. 336, p. 2100.
Parker v. Housefield, 2 Mylne & K. 419. p. 192, 2538.
Parker v. Jacoby, 3 Grant Cas. 300, p. 2389.
Parker v. Jones, 57 Ga. 204, p. 1373.
Parker v. Kane, 4 Wis. 1, 65 Am. Dec. 283, p. 977.
Parker v. Kelly, 10 Smedes & M. 184, p. 224, 337, 346, 2518.
Parker v. Lechmere, L. R. 12 Ch. Div. 256, p. 2142.
Parker v. Linden, 113 N. Y. 28, 20 N. E. 858, 861, p. 2325.
Parker v. McBee, 61 Miss. 134, p. 2501, 2514, 2520.
Parker v. McKenna, L. R. 10 Ch. 96, p. 1755, 2080.
Parker v. May, 5 Cush. 336, 341, p. 535, 538, 1979.
Parker v. Mercer, 6 How. (Miss.) 320, 38 Am. Dec. 438, p. 2393.
Parker v. Meredith, (Tenn. Ch. App.) 59 S. W. 167, p. 1102.
Parker v. Moore, 25 N. J. Eq. 228, p. 2110.
Parker v. Newitt, 18 Oreg. 274, 23 Pac. 246, p. 1994, 2000.
Parker v. Nightingale, 6 Allen, 341, 344, 83 Am. Dec. 632, p. 1200, 2595.
Parker v. Osgood, 3 Allen, 487, p. 978, 1146.
Parker v. Palmer, 1 Cas. Ch. 42, p. 1501, 1508.
Parker v. Parker, 118 Mass. 110, p. 538.
Parker v. Randolph, 5 S. Dak. 549, 59 N. W. 722, 29 L. R. A. 33, p. 1338.
Parker v. Rochester, 4 Johns. Ch. 329, 332, p. 1721.
Parker v. Shannon, 114 Ill. 192, 28 N. E. 1099, p. 340.
Parker v. Simpson, 180 Mass. 334, 62 N. E. 401, p. 532.
Parker v. Sowerby, 4 De Gex, M. & G. 321, 1 Drew. 488, p. 811, 819, 837.
Parker v. Snyder, 31 N. J. Eq. 164 p. 1999.
Parker v. Syracuse, 31 N. Y. 376, p. 2561.
Parker v. Taswell, 2 De Gex & J. 559, p. 1518, 1520, 1539, 1864.
Parker v. Turner, 1 Vern. 458, p. 1396.
Parker v. Walker, 15 Tex. Civ. App. 370, 39 S. W. 611, p. 1103.
Parker v. Whythe, 1 Hem. & M. 167, p. 1041, 1047.
Parker v. Winnipiseogee etc. Co., 2 Black, 545, 550–553, p. 147, 150, 151, 308, 382, 383, 451, 514, 515, 517, 2684, 2687.
Parker's Appeal, 61 Pa. St. 478, p. 1831.
Parker's Ex'rs v. Moore, 25 N. J. Eq. 228, p. 2216.
Parker's Goods, Swab. & T. 523, p. 2229.
Parkes v. White, 11 Ves. 209, 225, p. 2147.
Parkey v. Ramsey, (Tenn.) 76 S. W. 812, p. 1434.
Parkhurst v. Cortlandt, 1 Johns. Ch. 273, 14 Johns. 15, p. 1525.
Parkhurst v. Lowton, 2 Swanst. 194, 216, p. 277.
Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273, p. 345, 2781, 2782.
Parkin v. Seddons, L. R. 16 Eq. 34, p. 2655.
Parkin v. Thorold, 2 Sim., N. S., 16 Beav. 59, p. 2778.
Parkinson v. Hanbury, L. R. 2 H. L. 1, 2 De Gex, J. & S. 450, p. 1753, 2427, 2428, 2429.
Parkinson v. Sherman, 74 N. Y. 88, 30 Am. Rep. 268, p. 2411.
Parkinson's Appeal, 32 Pa. St. 455, p. 2306, 2315.
Parkist v. Alexander, 1 Johns. Ch. 394, p. 1111, 1114, 1127, 1764.
Parkman v. Welch, 19 Pick. 231, p. 1801, 2440, 2454, 2455.
Parks v. Allen, 42 Mich. 482, 4 N. W. 227, p. 2434.
Parks v. Evansville R. R., 23 Ind. 567, p. 1451, 1453.
Parks v. Jackson, 11 Wend. 442, 444, 451, 457, 25 Am. Dec. 656, p. 1064, 1080, 1081, 1083, 1279.

Parks v. O'Connor, 70 Tex. 385, 8 S. W. 104, p. 2474.
Parks v. Parks, 66 Ala. 326, p. 2030.
Parks v. Parks, 19 Md. 323, p. 935, 938.
Parks v. Smoot's Adm'rs, 105 Ky. 63, 48 S. W. 146, p. 112, 1076, 1081, 1083.
Park's Distributees v. Park's Adm'rs, 36 Ala. 132, p. 2255.
Parlett v. Guggenheimer, 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416, p. 669, 1696.
Parlin v. Stone, 1 McCrary, 443, p. 2725, 2726.
Parmalee v. Wheeler, 32 Wis. 429, p. 1230.
Parmelee v. Cameron, 41 N. Y. 392, p. 1743.
Parmelee v. Dann, 23 Barb. 461, p. 2417.
Parmelee v. Simpson, 5 Wall. (72 U. S.) 81, p. 1114.
Parmer v. Parmer, 74 Ala. 285, p. 2370.
Parnall v. Parnall, L. R. 9 Ch. Div. 96, p. 1925.
Parnell v. Hingston, 3 Smale & G. 337, 344, p. 1872, 1988.
Parret v. Shaubhut, 5 Minn. 323, p. 1113.
Parrish v. Brooks, 4 Brewst. 154, p. 981, 1257.
Parrish v. Hastings, 102 Ala. 414, 14 South. 783, 48 Am. St. Rep. 50, p. 2498, 2508, 2510.
Parrish v. Mahany, 10 S. Dak. 276, 73 N. W. 97, 66 Am. St. Rep. 715, p. 1098, 1117, 1359.
Parrish v. Mahany, 12 S. Dak. 278, 76 Am. St. Rep. 604, 81 N. W. 295, p. 1360.
Parrish v. Parrish, 33 Oreg. 486, 54 Pac. 352, p. 2033, 2037.
Parrott v. Byers, 40 Cal. 614, p. 1219.
Parrott v. Chestertown Nat. Bank, 88 Md. 515, 41 Atl. 1067, p. 260.
Parrott v. Dyer, 105 Ga. 93, 31 S. E. 417, p. 1881.
Parrott v. Parrott, 1 Heisk. 681, p. 2729.
Parrott v. Sweetland, 3 Mylne & K. 655, p. 2512.
Parry v. Kelley, 52 Cal. 334, p. 2200.
Parry v. Wright, 1 Sim. & St. 369, 5 Russ. 142, p. 1411.
Parshall v. Eggart, 52 Barb. 367, p. 2460.
Parshall v. Tillon, 13 How. Pr. 7, p. 2789.
Parshall's Appeal, 65 Pa. St. 224, p. 1757.
Parsley's Adm'r v. Martin, 77 Va. 376, 46 Am. Rep. 733, p. 2066.
Parsons v. Bedford, 3 Pet. 447, p. 495.
Parsons v. Best, 1 Thomp. & C. 211, p. 1920, 1926.
Parsons v. Gilbert, 45 Iowa, 33, p. 2778, 2779.
Parsons v. Hoyt, 24 Iowa, 154, p. 1080, 2525.
Parsons v. Hughes, 12 Md. 1, p. 2682.
Parsons v. Hughes, 9 Paige, 591, p. 1603, 1785.
Parsons v. Lent, 34 N. J. Eq. 67, p. 1107, 1116.
Parsons v. Lyman, 32 Conn. 566, p. 2263.
Parsons v. McLane, 64 N. H. 478, 13 Atl. 588, p. 2195.
Parsons v. McKnight, 8 N. H. 35, 37, p. 1804.
Parsons v. Martin, 86 Ala. 352, 5 South. 467, p. 2394, 2397.
Parsons v. Noggle, 23 Minn. 328, p. 2359.
Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362, p. 2176.
Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702, p. 757.
Parsons v. Spencer, 83 Ky. 305, p. 1844.
Parsons v. Winslow, 6 Mass. 169, 4 Am. Dec. 107, p. 1682, 1683, 1684.
Parsons v. Woodward, 22 N. J. L. 196, p. 2552.
Partridge v. Cavender, 96 Mo. 457, 9 S. W. 785, p. 1845.
Partridge v. Chapman, 81 Ill. 137, p. 1145, 1336.
Partridge v. Harrow, 27 Iowa, 96, 99 Am. Dec. 643, p. 2727.
Partridge v. Messer, 14 Gray, 180, p. 2041.
Partridge v. Partridge, Cas. t. Talb. 226, p. 2209, 2212.
Partridge v. Partridge, 38 Pa. St. 78, p. 2417.
Partridge v. Shepard, 71 Cal. 470, 12 Pac. 480, p. 1860, 1861.

Partridge v. Smith, 2 Biss. 183, 185, 186, p. 989, 1124.
Partridge's Adm'r v. Partridge, 2 Har. & J. 63, p. 875.
Paschal v. Acklin, 27 Tex. 173, p. 1977.
Paschall v. Hinderer, 28 Ohio St. 568, p. 697.
Pasley v. Freeman, 3 Term Rep. 51, p. 1577, 1630.
Pasman v. Montague, 30 N. J. Eq. 385, p. 2726.
Pass v. Lynch, 117 N. C. 453, 23 S. E. 357, p. 2403.
Passumpsic Sav. Bank v. Buck, 71 Vt. 190, 44 Atl. 93, p. 1058, 1299.
Passyunk Building Ass'n's Appeal, 83 Pa. St. 441, p. 217, 2798.
Pastor v. Solomon, 54 N. Y. Supp. 575, 25 Misc. Rep. 322, p. 730, 737.
Patch v. Ward, L. R. 3 Ch. 203, 207, p. 1580.
Patch v. Ward, L. R. 1 Eq. 436, 439, p. 288, 289.
Patchin v. Pierce, 12 Wend. 61, p. 2461.
Pate v. Oliver, 104 N. C. 466, 10 S. E. 709, p. 2066.
Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890, p. 740.
Patent Carriage Co., In re, L. R. 2 Eq. 349, p. 2528.
Patent Type Founding Co. v. Walter, Johns. 727, p. 260, 285.
Paterson v. Murphy, 11 Hare, 88, p. 1872, 1879.
Paterson v. Paterson, 5 N. J. Eq. 389, p. 2176.
Paterson etc. R. R. v. Jersey City, 9 N. J. Eq. 434, p. 364, 386, 452, 2705.
Patman v. Harland, L. R. 17 Ch. Div. 353, p. 1050, 1059.
Paton v. Lancaster, 38 Iowa, 494, p. 2749.
Paton v. Majors, 46 Fed. 210, p. 217, 252, 1637, 1643.
Patrick v. Harrison, 3 Brown Ch. 476, p. 2669.
Patrick v. Littell, 36 Ohio St. 79, 38 Am. Rep. 552, p. 2197.
Patrick v. Smith, 165 Pa. St. 526, 30 Atl. 1044, 36 Wkly Notes Cas. 10, p. 2197.
Patten v. Corn etc. Co., 3 Colo. 265, p. 2585.
Patten v. Herring, 9 Tex. Civ. App 640, 29 S. W. 388, p. 1847.
Patten v. Merchants & F. M. F. Ins. Co., 40 N. H. 375, p. 1168.
Patten v. Moore, 32 N. H. 382, 384, p. 1037, 1098, 1147, 1202, 1323, 1336.
Patten v. Patten, 75 Ill. 446, p. 2191.
Patten v. Wilson, 34 Pa. St. 299, p. 2561.
Patterson, In re, 10 Jur., N. S., 578, p. 2237.
Patterson's Estate, In re, 4 De Gex, J. & S. 422, p. 1872, 1874.
Patterson v. Allen, 50 Tex. 23, p. 2289.
Patterson v. Bloomer, 35 Conn. 57, 95 Am. Dec. 218, p. 1478, 1506, 1513, 1520.
Patterson v. Boehm, 4 Pa. St. 507, p. 1791.
Patterson v. Brown, 32 N. Y. 81, p. 1064.
Patterson v. De La Ronde, 75 U. S. (8 Wall.) 292, p. 1108.
Patterson v. Donner, 48 Cal. 369, 379, p. 1095, 1701.
Patterson v. Edwards, 29 Miss. 67, p. 2509.
Patterson v. Gibson, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356, p. 1734.
Patterson v. Lane, 35 Pa. St. 275, p. 218, 229, 560.
Patterson v. Lawrence, 90 Ill. 174, 32 Am. Rep. 22, p. 2191.
Patterson v. Linder, 14 Iowa, 414, p. 1270, 2499.
Patterson v. McCamant, 28 Mo. 210, p. 364, 385, 452.
Patterson v. Mills, 121 N. C. 258, 28 S. E. 368, p. 1037.
Patterson v. Patterson, 13 Johns. 379, p. 878.
Patterson v. Patterson, 45 N. H. 164, p. 2195.
Patterson v. Perry, 14 How. Pr. 505, p. 2642.
Patterson v. Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831, p. 1237, 1256, 1304.
Patterson v. Schoyer, 10 Watts, 333, p. 559.

Patterson v. Tuttle, (Tex. Civ. App.) 27 S. W. 758, p. 1103.
Patterson v. Yeaton, 47 Me. 308, 315, p. 551.
Patteson v. Horsley, 29 Gratt. 263, p. 2077.
Pattison v. Gilford, L. R. 18 Eq. 259, 262, 263, p. 2676.
Pattison v. Horn, 1 Grant Cas. 301, p. 2040.
Pattison v. Hull, 9 Cow. 747, p. 2397, 2417, 2558.
Patton, Estate of, In re, Myrick's Prob. Rep. 243, p. 844.
Patton v. Beecher, 62 Ala. 579, p. 1901.
Patton v. Campbell, 70 Ill. 72, p. 464, 1463.
Patton v. Chamberlain, 44 Mich. 5, p. 1894, 1904.
Patton v. Coen etc. Co., 3 Colo. 265, p. 2574.
Patton v. Hoge, 22 Gratt. 443, p. 2523.
Patton v. Merchants' Bank, 12 W. Va. 587, p. 2153.
Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789, p. 2682, 2695.
Patton v. Rankin, 68 Ind. 245, 34 Am. Rep. 254, p. 2192.
Patty v. Middleton, 82 Tex. 586, 17 S. W. 909, p. 168, 1371, 1373.
Patty v. Pease, 8 Paige, 277, 35 Am. Dec. 683, p. 2447, 2453, 2455, 2456.
Paul v. Compton, 8 Ves. 375, 380, p. 1924, 1925.
Paul v. Connersville etc. R. R., 51 Ind. 527, 530, p. 987, 1014, 1145.
Paul v. Fulton, 25 Mo. 156, p. 1334.
Paul v. Kerswell, 60 N. J. Law, 273, 37 Atl. 1102, p. 1052, 1347.
Paul v. Leavitt, 53 Mo. 595, p. 2146.
Paulison v. Van Iderstine, 28 N. J. Eq. 306, p. 1509.
Paulk v. Wolfe, 34 Ala. 541, p. 2189.
Paulling v. Barron, 32 Ala. 9, p. 2345.
Paulsen v. Koon, 85 Minn. 240, 88 N. W. 760, p. 1228.
Paulus v. Reed, (Iowa) 96 N. W. 757, p. 1729, 1781.
Pawlet v. Ingres, 1 Vern. 308, p. 362, 455.
Pawson v. Brown, L. R. 13 Ch. Div. 202, p. 1985, 1986.
Paxson v. Brown, (C. C. A.) 61 Fed. 874, p. 1119.
Paxton v. Harrier, 11 Pa. St. 312, p. 2454, 2455.
Paxton v. Meyer, 67 Tex. 96, 27 S. W. 817, p. 1066.
Paxton v. Newton, 2 Smale & G. 437, p. 2765.
Payne v. Abercrombie, 10 Heisk. 161, p. 1051.
Payne v. Avery, 21 Mich. 524, p. 1769, 2500, 2509.
Payne v. Becker, 87 N. Y. 153, p. 2736.
Payne v. Bullard, 23 Miss. 88, 90, 55 Am. Dec. 74, p. 229, 462, 465.
Payne v. Compton, 2 Younge & C. 457, 461, p. 267, 695, 1369.
Payne v. Dudley, 1 Wash. (Va.) 196, p. 2710.
Payne v. Evens, L. R. 18 Eq. 356, p. 1451.
Payne v. Hook, 7 Wall. 425, 430, 19 L. ed. 262, p. 507, 509, 510, 511.
Payne v. Hutcheson, 32 Gratt. 812. p. 2142.
Payne v. Kansas & A. Val. R. R. Co., 46 Fed. 546, p. 513.
Payne v. Little, 26 Beav. 1, p. 2147.
Payne v. Mortimer, 1 Giff. 118, 4 De Gex & J. 447, p. 1561, 2592.
Payne v. Patterson, 77 Pa. St. 134, p. 2040.
Payne v. Payne, 18 Cal. 291, 292, 301, p. 841, 2252, 2260.
Payne v. Sheldon, 63 Barb. 169, p. 2790.
Payne v. Twyman, 68 Mo. 339, p. 2139.
Payne v. Wilson, 74 N. Y. 348, p. 2470, 2471, 2475.
Paynter v. Evans, 7 B. Mon. 420, p. 2710, 2703.
Payton v. Bower, 14 R. I. 375, p. 849, 855.
Peabody, In re, 118 Fed. 266, 55 C. C. A. 360, p. 1998.
Peabody v. City of Lewiston, 83 Me. 286, 22 Atl. 171, p. 1208.
Peabody v. Fenton, 3 Barb. Ch. 451, 464, 465, p. 986, 1319, 1348, 1350.
Peabody v. Flint, 6 Allen, 52, 57, p. 696, 1450, 1788, 2125.
Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664, p. 1691, 2670.
Peabody v. Tarbell, 2 Cush. 226, p. 345.
Peace v. First Christian Church, 20 Tex. Civ. App. 85, 48 S. W. 534, p. 1977.

Peace v. Nailing, 1 Dev. Eq. 289, p. 2702.
Peachy v. Duke of Somerset, 1 Strange, 447, 452–456, Prec. Ch. 568, 2 Eq. Cas. Abr. 227, 228, p. 627, 631, 716, 764.
Peacock v. Evans, 16 Ves. 512, p. 644, 1667, 1742, 1743.
Peacock v. Monk, 2 Ves. Sr. 190, p. 2148, 2163.
Peacock, Hunt & West Co. v. Thaggard, 128 Fed. 1005, p. 2387.
Peacock, Hunt & West Co. v. Williams, 110 Fed. 917, p. 505.
Peacock's Trusts, In re, L. R. 10 Ch. Div. 490, 495, 496, p. 2143.
Peak v. Hayden, 3 Bush, 125, p. 2681.
Peake, Ex parte, 1 Madd. 346, 355, p. 1508.
Peake v. La Barr, 21 N. J. Eq. 269, 282, p. 2153.
Peaks v. Blethen, 77 Me. 510, 1 Atl. 451, p. 1341.
Peake's Settled Estates, In re, [1894] 3 Ch. 520, p. 2050.
Pearce v. Billings, 10 R. I. 102, p. 2216.
Pearce v. Buell, 22 Oreg. 29, 29 Pac. 78, p. 1265.
Pearce v. Calhoun, 59 Mo. 271, p. 2278.
Pearce v. Creswick, 2 Hare, 286, 293, 296, p. 224, 317.
Pearce v. Crutchfield, 14 Ves. 206, p. 2621.
Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414, p. 1708.
Pearce v. Jackson, 61 Tex. 642, p. 1323.
Pearce v. Morris, L. R. 5 Ch. 227, p. 2434, 2437.
Pearce v. Olney, 20 Conn. 544, p. 2709.
Pearce v. Pearce, 132 Ala. 221, 31 South. 85, 90 Am. St. Rep. 901, p. 2176.
Pearce v. Pearce, 22 Beav. 248, p. 2087.
Pearce v. Smith, 126 Ala. 116, 28 South. 37, p. 1163.
Pearce v. Suggs, 85 Tenn. 724, 4 S. W. 526, p. 1509, 1510, 1511.
Pearce v. Ware, 94 Mich. 321, 53 N. W. 1106, p. 664.
Pearce v. Watts, L. R. 20 Eq. 492, p. 2769.
Pearce v. Wilson, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep. 243, p. 2374.
Pearl v. Deacon, 24 Beav. 186, 1 De Gex & J. 461, p. 2796.
Pearl v. Harris, 121 Mass. 390, p. 536.
Pearl v. Hervey, 70 Mo. 160, p. 2501, 2520.
Pearmain v. Twiss, 2 Giff. 130, p. 2222.
Pearne v. Lisle, Amb. 75, 71, p. 2763.
Pearse v. Green, 1 Jacob & W. 135, p. 2052.
Pearse v. Pearse, 1 De Gex & S. 12, p. 281.
Pearse v. Pettis, 47 Barb. 276, p. 1385.
Pearsoll v. Chapin, 44 Pa. St. 9, p. 1645, 1784.
Pearson v. Amicable Ass. Co., 27 Beav. 229, p. 1878, 1879.
Pearson v. Benson, 28 Beav. 598, p. 1769.
Pearson v. Cardon, 2 Russ. & M. 606, 609, 610, 612, 4 Sim. 218, p. 2640, 2645, 2646.
Pearson v. Creed, 78 Cal. 144, 20 Pac. 302, p. 1086.
Pearson v. Darrington, 21 Ala. 169, 176, p. 334, 335, 579, 2258.
Pearson v. Darrington, 18 Ala. 348, p. 2257.
Pearson v. Gillenwaters, 99 Tenn. 446, 63 Am. St. Rep. 844, 42 S. W. 9, 2065.
Pearson v. Helliwell, L. R. 18 Eq. 411, p. 2486.
Pearson v. Jamison, 1 McLean 197, p. 2059.
Pearson v. Keedy, 6 B. Mon. (45 Ky.) 128, 43 Am. Dec. 160, p. 1068.
Pearson v. Lane, 17 Ves. 101, p. 2334.
Pearson v. Morgan, 2 Brown Ch. 384, 388, p. 992, 1194, 1294, 1388, 1605.
Pearson v. Pearson, 1 Brown Ch. 291, 292, p. 819, 835.
Pearson v. Rockhill, 4 B. Mon. 296, p. 1856.
Pearson v. Seay, 35 Ala. 612, 38 Ala. 643, p. 2372.
Pearson v. Ward, 1 Cox, 177, p. 297.
Pearson v. Williams, 24 Wend. 244, 246, 26 Wend. 630, p. 740, 747.
Pearson's Ex'rs v. Luecht, 199 Ill. 475, 65 N. E. 363, p. 1237.

Pease v. Benson, 28 Me. 336, p. 650.
Pease v. Fletcher, L R. 1 Ch. Div. 273, p. 2658.
Pease v. Gloahec, L. R. 1 P. C. 219, p. 1385.
Pease v. Jackson, L. R. 3 Ch. 576, p. 1261, 1375.
Pease v. Kelly, 3 Oreg. 417, p. 2502, 2513.
Pease v. Landauer, 63 Wis. 20, 22 N. W. 847, 53 Am. Rep. 247, p. 2570.
Pease v. Pattinson, 32 Ch. Div. 154, p. 1936, 1963.
Pease v. Pease, 8 Met. 395, p. 317, 319.
Pease v. Pilot Knob Iron Co., 49 Mo. 124, p. 2350.
Pease v. Warren, 29 Mich. 9, 18 Am. Rep. 58, p. 2418.
Peasley v. McFadden, 68 Cal. 611, 10 Pac. 179, p. 1024.
Peay v. Capps, 27 Ark. 160, p. 1342, 1380.
Peay v. Morrison's Ex'rs, 10 Gratt. 149, p. 2790.
Peay v. Seigler, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885, p. 621, 612, 1197, 1333.
Peck v. Ashley, 12 Met. 478, 481, p. 245, 259, 263, 284.
Peck v. Ayers & Lord Tie Co., 53 C. C. A. 551, 116 Fed. 273, p. 340, 504.
Peck v. Braman, 2 Blackf. 141, p. 2268.
Peck v. Brighton Co., 69 Ill. 200, p. 2778, 2779.
Peck v. Brummagim, 31 Cal. 440, 447, 89 Am. Dec. 195, p. 809.
Peck v. Bullard, 2 Humph. 41, p. 1648.
Peck v. Conway, 119 Mass. 546, p. 2595.
Peck v. Culberson, 104 N. C. 425, 10 S. E. 511, p. 2504.
Peck v. Elder, 3 Sand. 126, p. 2683, 2684.
Peck v. Girard F. & M. Ins. Co., 16 Utah, 121, 51 Pac. 255, 67 Am. St. Rep. 600, p. 2380, 2381.
Peck v. Jenness, 7 How. 612, 620, 12 L. ed. 841, p. 189, 2466.
Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398, p. 1694.
Peck v. Mallams, 10 N. Y. 509, p. 1122.
Peck v. Matthews, L. R. 3 Eq. 515, p. 2673, 2676.
Peck v. Newton, 46 Barb. 173, 174, p. 586.
Peck v. Peck, 110 N. Y. 64, 74, 17 N. E. 383, p. 2437, 2440.
Peck v. Scofield, (Mass.) 71 N. E. 109, p. 1906, 2232.
Peck v. Sexton, 41 Iowa, 566, p. 2756.
Peck v. Walton, 26 Vt. 82, p. 2199.
Peck v. Ward. 18 Pa. St. 506, p. 2197.
Peck v. Williams, 113 Ind. 256, 15 N. E. 270, p. 1026, 1268, 1278.
Pecker v. Cannon, 11 Iowa, 20, p. 683, 2607.
Peckham v. Barker, 8 R. I. 17, p. 2782.
Peckham v. Millikan, 99 Ind. 352, p. 652.
Peckham v. Haddock, 36 Ill. 38, p. 2475.
Peckham v. Newton, 15 R. I. 321, 4 Atl. 758, p. 2078.
Pedder, In re, 5 De Gex, M. & G. 890, p. 185, 621, 2333, 2334.
Pedder v. Mosely, 31 Beav. 159, p. 1878.
Pedley v. Dodds, L. R. 2 Eq. 819, p. 1548.
Peebles v. Reading, 8 Serg. & R. 484, p. 994.
Peek v. Gurney, L. R. 13 Eq. 79, 113, 6 H. L. 377, p. 1451, 1567, 1573, 1574, 1583, 1613, 2116.
Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 11 Am. St. Rep. 214, 1 L. R. A. 185, p. 1324.
Peek v. Trinsmaran Iron Co., L. R. 2 Ch. Div. 115, p. 2658.
Peekskill S. C. & M. R. Co. v. Village of Peekskill, 47 N. Y. Supp. 305, 21 App. Div. 94, affirming 59 N. E. 1128, 165 N. Y. 628, p. 728, 735.
Peel v. ——, 16 Ves. 157, p. 1734.
Peeples v. Warren, 51 S. C. 560, 29 S. E. 659, p. 1155.
Peer v. Wadsworth, (N. J. Eq.) 58 Atl. 379, p. 1053.
Peers v. Lambert, 7 Beav. 546, p. 2775.
Peers v. McLaughlin, 88 Cal. 294, 22 Am. St. Rep. 306, 26 Pac. 119, p. 2476.
Peery v. Elliott, (Va.) 44 S. E. 919, p. 1022.
Pegge v. Skynner, 1 Cox Eq. Cas. 23, Ames' Cas. on Trusts, 218, p. 1833.

Pegram v. Armstrong, 82 N. C. 326, p. 2284.
Peine v. Weber, 47 Ill. 41, p. 727, 732, 738.
Peirsoll v. Elliott, 6 Pet. 95, 98, p. 312, 364, 516, 2728, 2752, 2755, 2756.
Peirson v. David, 1 Iowa, 23, p. 2499.
Pelham v. Anderson, 2 Eden, 296, p. 1942.
Pelham v. Moreland, 11 Ark. 442, p. 2708.
Pell v. Lander, 8 B. Mon. 554, 558, p. 212.
Pell v. McElroy, 36 Cal. 268, 278, p. 1007, 1023, 1032.
Pell v. Mercer, 14 R. I. 412, 425, p. 1944, 1957, 1977, 1980.
Pell v. Northampton etc. R'y, L. R. 2 Ch. 100, p. 2659.
Pell v. Ulmar, 18 N. Y. 139, p. 2434.
Pellicatt v. Angell, 2 Cromp. M. & R. 311, p. 1720.
Pellier v. Gillespie, 67 Cal. 582, 8 Pac. 185, p. 2407.
Peltier v. Peltier, Har. (Mich.) 19, 29, p. 2176.
Pelton v. Place, 71 Vt. 430, 46 Atl. 63, p. 240.
Pelton v. Westchester Fire Ins. Co., 77 N. Y. 605, 607, p. 1046, 2774.
Pembers v. Mathers, 1 Brown Ch. 52, p. 1521.
Pemberton v. Johnson, 46 Mo. 342, p. 2194.
Pemberton v. McGill, 1 Drew. & Sm. 266, 268, p. 2150, 2159.
Pemberton v. Pemberton, 29 Mo. 408, 413, p. 821, 827.
Pence v. Croan, 51 Ind. 336, p. 1806.
Pencille v. State F. M. H. Ins. Co., 74 Minn. 67, 76 N. W. 1026, 73 Am. St. Rep. 326, p. 2128.
Pendergast v. Turton, 1 Younge & C. Ch. 98, 110–112, p. 764.
Pendlebury v. Walker, 4 Younge & C. 424, 434, p. 1790.
Pendleton v. Asbury, (Mo. App.) 78 S. W. 651, p. 1692.
Pendleton v. Bower, 49 W. Va. 146, 38 S. E. 487, p. 2292.
Pendleton v. Electric Light Co., (N. C.) 27 S. E. 1003, p. 730, 735.
Pendleton v. Fay, 2 Paige, 202, 205, p. 981, 1007.
Pendleton v. Patrick, 22 Ky. L. Rep. 378, 57 S. W. 464, p. 1903.
Pendleton v. Perkins, 49 Mo. 565, p. 2790.
Penfield v. Dunbar, 64 Barb. 239, p. 1202, 1323, 1331, 1333, 1348.
Penfield v. Skinner, 11 Vt. 296, p. 1978.
Penfield v. Thayer, 2 E. D. Smith, 305, p. 2237, 2243.
Penfield v. Tower, 1 N. Dak. 216, 46 N. W. 413, p. 2310.
Penfold v. Mould, L. R. 4 Eq. 562, p. 2173.
Penfold v. Nunn, 5 Sim. 405, p. 261.
Penhallow v. Kimball, 61 N. H. 596, p. 847.
Penick v. Thorn, 90 Ky. 668, 14 S. W. 830, p. 1980.
Peninsula Const. Co. v. Merritt, 90 Md. 589, 45 Atl. 172, p. 427.
Penn v. Fogler, 182 Ill. 76, 55 N. E. 192, p. 2078.
Penn v. Guggenheimer, 76 Va. 839, 846, 847, 850, 851, p. 777, 778, 785, 812, 813, 814, 855, 856.
Penn v. Hayward, 14 Ohio St. 302, p. 2631, 2633.
Penn v. Lord Baltimore, 1 Ves. Sr. 444, 2 Lead. Cas. Eq., 4th Am. ed., 1806 and notes, p. 155, 709, 2629, 2632, 2761.
Penn v. Whitehead, 17 Gratt. 503, 94 Am. Dec. 478, p. 2153, 2199.
Penn v. Young, 10 Bush 626, p. 2192.
Pennefeather v. Baltimore Steam Packet Co., 58 Fed. 481, p. 360, 415.
Pennell v. Deffell, 4 De Gex, M. & G. 372, 388, p. 2016, 2029, 2057, 2082.
Pennell v. Millar, 23 Beav. 172, p. 1745.
Pennell's Appeal, 20 Pa. St. 515, p. 2325.
Penney v. Goode, 1 Drew. 474, p. 287.
Penney v. Miller, 134 Ala. 593, 33 South. 668, p. 2431.
Penniman v. N. Y. Balance etc. Co., 13 How. Pr. 40, p. 2698.
Pennington v. Berchy, 2 Sim. & St. 282, p. 271.
Pennington v. Brinsopp etc. Co., L. R. 5 Ch. Div. 769, p. 2686.
Pennington v. Gittings, 2 Gill & J. 208, p. 2233, 2237.
Pennington v. Martin, 146 Ind. 635, 45 N. E. 1111, p. 1087, 1088.

Pennington v. Metropolitan Museum of Arts, (N. J. Eq.) 55 Atl. 468, p. 846, 2051.
Pennington v. Thompson, 5 Del. Ch. 328, p. 1725.
Pennock v. Coe, 23 How. 117, 16 L. ed. 436, p. 2583.
Pennock v. Lyons, 118 Mass. 92, p. 2054.
Pennoyer v. Allen, 51 Wis. 360, 50 Wis. 308, p. 2715, 2722.
Pennoyer v. Wadhams, 20 Oreg. 274, 25 Pac. 720, 11 L. R. A. 211, p. 1931, 1941, 1956, 1967, 1976.
Pennoyer v. Willis, 26 Oreg. 1, 36 Pac. 568, 46 Am. St. Rep. 594, p. 1161, 1170.
Pennock's Estate, 20 Pa. St. 268, 59 Am. Dec. 718, p. 1927.
Pennsylvania v. Wheeling Bridge Co., 13 How. 518, 519, 18 How. 460, 15 L. ed. 449, p. 494, 495, 2683.
Penn. Coal Co. v. Delaware etc. Co., 31 N. Y. 91, p. 2704.
Penn. Co. for Ins. v. Foster, 35 Pa. St. 134, p. 2154.
Pennsylvania Life Ins. Co. v. Stokes, 61 Pa. St. 136, 2 Brewst. 590, p. 786.
Pennsylvania R. R. Co.'s Appeal, 86 Pa. St. 81, p. 1244.
Penny v. Cook, 19 Iowa, 538, p. 2048.
Penny v. Martin, 4 Johns. Ch. 566, 569, p. 1461, 1509.
Penny v. Miller, 134 Ala. 593, 33 South. 668, p. 2429.
Penny v. Turner, 2 Phil. Ch. 493, p. 1889.
Penny v. Watts, 2 De Gex & S. 501, 1 Macn. & G. 150, 165, 167, p. 1005, 1010, 1018, 1045, 1292, 1315, 1383.
Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39, p. 1666, 1670, 1686, 1687.
Penny's Appeal, 109 Pa. St. 323, p. 2488.
Penrose v. Doherty, 10 Ark. 256, 67 S. W. 398, p. 1099.
Pensacola v. Lehman, 57 Fed. 324, 330, 13 U. S. App. 411, 6 C. C. A. 349, p. 115, 117.
Pensonneau v. Bleakley, 14 Ill. 15, p. 1188, 1190.
Penzel v. Brookmire, 51 Ark. 105, 10 S. W. 15, 14 Am. St. Rep. 23, p. 2393.
People v. Bk. of Dansville, 39 Hun, 187, p. 1913, 1914.
People v. Brown, 67 Ill. 435, p. 1435.
People v. Canal Board, 55 N. Y. 390, p. 2678.
People v. Chicago, 53 Ill. 424, 428, p. 225, 338, 2678.
People v. City Bk. of Rochester, 96 N. Y. 35, p. 1912.
People v. Cogswell, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269, p. 1946, 1955, 1972.
People v. Crockett, 9 Cal. 112, p. 1219.
People v. Davidson, 30 Cal. 379, 380, 390, p. 566, 2251.
People v. Dayton, 50 How. Pr. 143, p. 2585.
People v. Elmore, 35 Cal. 653, 655, p. 1219, 1221, 1222, 1253, 1382.
People v. El Paso Co. Dist. Ct., 19 Colo. 343, 35 Pac. 731, p. 1086.
People v. Faulkner, 107 N. Y. 477, 14 N. E. 415, p. 2058.
People v. Houghtaling, 7 Cal. 348, 351, p. 228, 460, 566, 1458, 1644.
People v. Jenkins, 17 Cal. 500, p. 683, 2607.
People v. Meighan, 1 Hill, 298, p. 1701.
People v. Mercein, 8 Paige, 47, 25 Wend. 64, p. 2616.
People v. Merchants' and Mechanics' Bank, 78 N. Y. 269, 34 Am. Rep. 532, p. 1912.
People v. Norton, 9 N. Y. 176, p. 2106.
People v. Open Board etc. Co., 92 N. Y. 98, p. 1755.
People v. Powers, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502, p. 1956, 1957, 1969.
People v. San Francisco, 27 Cal. 655, p. 1561.
People v. Security Ins. Co., 78 N. Y. 114, 34 Am. Rep. 522, 79 N. Y. 267, p. 2660, 2662.
People v. Stephens, 71 N. Y. 527, p. 1692.
People v. Superior Court of New York, 19 Wend. 104, p. 724.
People v. Third Ave. R. R., 45 Barb. 63, p. 2683.
People v. Webster, 10 Wend. 554, p. 1833.
People v. Wilcox, 22 Barb. 178, p. 2612.

People v. Williams, 8 Daly, 264, p. 2201.
People's Bank's Appeal, 93 Pa. St. 107, 39 Am. Rep. 728, p. 1616.
People's Bank v. Bogart, 81 N. Y. 101, 108, 37 Am. Rep. 481, p. 1, 1609, 1616, 1618.
People's Bank v. Exchange Bank, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144, p. 1163.
Peoples Bank, Receivers of, v. Paterson Gas Light Co., 23 N. J. L. 283, p. 2662.
People's Bldg., L. & S. Ass'n v. Dailey, (Tex. Civ. App.) 42 S. W. 364, p. 1175.
People's Ins. Co. v. Spencer, 53 Pa. St. (3 P. F. Smith) 353, 91 Am. Dec. 217, p. 1159.
People's Loan & Ex. Bk. v. Garlington, 54 S. C. 413, 71 Am. St. Rep. 800, 32 S. E. 513, p. 1824.
People's Nat. Bank v. Kern, 193 Pa. St. 59, 44 Atl. 331, p. 320, 321.
People's Nat. Bank v. Marye, 191 U. S. 272, 24 Sup. Ct. 68, 107 Fed. 570, p. 433, 651.
People's Sav. Bank v. Batts, 120 U. S. 556, 7 Sup. Ct. 679, p. 1328.
People's Savings Bank v. Finney, 63 Ind. 460, p. 2392, 2393.
People's Sav. Bank v. Hine, 131 Mich. 181, 9 Detroit Leg. N. 283, 91 N. W. 130, p. 1160.
People's Sav. Bank v. Webb, 21 R. I. 218, 42 Atl. 874, p. 1868.
Pepper v. Dixon, 17 Sim. 200, p. 819, 837.
Pepper v. George, 51 Ala. 190, p. 1163.
Pepper v. Lee, 53 Ala. 33, p. 2139, 2143, 2145.
Pepper's Appeal, 77 Pa. St. 373, p. 1108, 1113, 1300.
Pepper's Will, 1 Pars. Cas. 436, 446, p. 1468.
Perceval, Lord, v. Phipps, 2 Ves. & B. 19, 24, p. 2689.
Percifield v. Aumick, 116 Iowa, 383, 89 N. W. 1101, p. 829.
Percival v. Dunn, 29 Ch. Div. 128, p. 2562.
Percival v. Harger, 40 Iowa, 286, p. 1588.
Percival v. Wright, [1902] 2 Ch. 421, p. 2114.
Perdue v. Bell, 83 Ala. 396, 3 South. 698, p. 2377.
Pere Marquette R. Co. v. Graham, (Mich.) 99 N. W. 408, p. 2473.
Perens v. Johnson, 3 Smale & G. 419, p. 1782, 2028.
Perfect v. Lane, 3 De Gex, F. & J. 369, p. 1742.
Perkins, In re, [1893] 1 Ch. 283, p. 1656.
Perkins v. Adams, 17 Tex. Civ. App. 331, 43 S. W. 529, p. 1735.
Perkins v. Bradley, 1 Hare, 219, p. 1168.
Perkins v. Brinkley, 133 N. C. 154, 45 S. E. 541, p. 1836.
Perkins v. Bullinger, 1 Hayw. (N. C.) 367, p. 570.
Perkins v. Burlington Land and Imp. Co., 112 Wis. 509, 88 N. W. 648, p. 1838.
Perkins v. Caldwell, 77 N. C. 433, p. 181.
Perkins v. Clay, 54 N. H. 518, p. 1690.
Perkins v. Coughlan, 148 Mass. 30, 18 N. E. 600, p. 2305.
Perkins v. Elliott, 23 N. J. Eq. 526, p. 2153, 2195.
Perkins v. Emory, 55 Md. 27, p. 2486, 2489.
Perkins v. Gibson, 51 Miss. 699, 24 Am. Rep. 644, p. 2501, 2509, 2520, 2521.
Perkins v. Hayes, 3 Gray, 405, p. 1845, 2158.
Perkins v. Lewis, 24 Ill. 208, p. 407.
Perkins v. Little, 1 Greenl. 148, p. 820.
Perkins v. Lyman, 11 Mass. 76, 6 Am. Dec. 158, p. 732, 746.
Perkins v. Lyons, 111 Iowa, 192, 82 N. W. 486, p. 1221.
Perkins v. McCullough, 31 Oreg. 69, 49 Pac. 861, p. 1329.
Perkins v. Partridge, 30 N. J. Eq. 82, p. 1559, 1566.
Perkins v. Perkins, 21 Ga. 13, p. 2264, 2265.
Perkins v. Perkins, 181 Mass. 401, 63 N. E. 926, p. 2040.
Perkins v. Perkins, 16 Mich. 162, 167, p. 148, 215, 219.
Perkins v. Perkins, 1 Tenn. Ch. 537, p. 2142.
Perkins v. Sterne, 23 Tex. 561, 76 Am. Dec. 72, p. 241.

Perkins v. Swank, 43 Miss. 349, 361, p. 1019, 1023, 1024, 1147.
Perkins v. Trippe, 40 Ga. 225, p. 2646.
Perkins' Appeal, 108 Pa. St. 314, 56 Am. Rep. 208, p. 2099.
Perot v. Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258, p. 2379.
Perot v. Levasseur, 21 La. Ann. 529, p. 2417.
Perot's Appeal, 102 Pa. St. 235, p. 2309.
Perpetual Ex. & F. Ass'n of Australia, Lim. v. Swan, [1898] A. C. 763, p. 2070.
Perrin v. Lepper, 72 Mich. 454, 40 N. W. 859, p. 2090.
Perrin v. Reed, 35 Vt. 2, p. 1120.
Perrine v. Striker, 7 Paige, 598, p. 307, 2703.
Perring v. Trail, L. R. 18 Eq. 88, p. 1942.
Perrot v. Perrot, 3 Atk. 94, p. 2681.
Perry v. Board of Missions, 102 N. Y. 99, 6 N. E. 116, p. 2088, 2474.
Perry v. Boileau, 10 Serg. & R. 208, p. 2145.
Perry v. Fisher, 130 Ind. App. 261, 65 N. E. 935, p. 2418.
Perry v. Grant, 10 R. I. 334, p. 2504, 2513.
Perry v. Holl, 2 De Gex, F. & J. 38–53, 54, p. 1005, 1011, 1016, 1160.
Perry v. Knott, 4 Beav. 79, 180, p. 2092.
Perry v. McHenry, 13 Ill. 227, p. 2038.
Perry v. Maxwell, 2 Dev. Eq. 488, 499, p. 872, 874.
Perry v. Meadowcroft, 10 Beav. 122, p. 1651, 2372.
Perry v. Oriental Hotels Co., L. R. 5 Ch. 420, p. 2661.
Perry v. Parker, 1 Wood. & M. 280, 282, p. 2685.
Perry v. Pearson, 1 Humph. 431, p. 1513.
Perry v. Perry, 65 Me. 399, p. 1833.
Perry v. Phelips. 4 Ves. 107, 108, 17 Ves. 173, p. 701, 958, 2024.
Perry v. Pratt, 31 Conn. 433, p. 1472, 2737.
Perry v. Shipway, 4 De Gex & J. 353, p. 2677.
Perry v. Siter, 37 Mo. 273, p. 2709.
Perry v. Truefitt, 6 Beav. 66, p. 1695, 2690.
Perry v. Whitehead, 6 Ves. 546, p. 900.
Perry Herrick v. Attwood, 2 De Gex & J. 21, 37, p. 1016, 1195, 1296, 1805, 2539.
Person v. Oberteuffer, 59 How. Pr. 339, p. 2472, 2586.
Pertuit v. Damare, 50 La. Ann. 893, 24 South. 681, p. 1228.
Peruvian R'y Co., In re, L. R. 2 Ch. 617, 626, p. 1163.
Peter v. Beverly, 10 Pet. 532, 533, 534, 562, 563, 1 How. 134, 9 L. ed. 422, p. 185, 604, 615, 621, 1854, 1905, 2094.
Peterborough Sav. Bank v. Hartshorn, 67 N. H. 156, 33 Atl. 729, p. 1332.
Peters v. Bain, 133 U. S. 693, 10 Sup. Ct. Rep. 354, 33 L. ed. 696, p. 2019.
Peters v. Cartier, 80 Mich. 124, 45 N. W. 73, 20 Am. St. Rep. 508, p. 1338, 1339.
Peters v. Clements, 46 Tex. 114, p. 2524, 2525.
Peters v. Florence, 38 Pa. St. 194, p. 1483.
Peters v. Goodrich, 3 Conn. 146, p. 981, 1127.
Peters v. Grote, 7 Sim. 238, p. 2175.
Peters v. Jamestown B. Co., 5 Cal. 334, 63 Am. Dec. 134, p. 2419.
Peters v. Jones, 35 Iowa, 512, p. 1435, 1445.
Peters v. Mortimer, 4 Edw. Ch. 279, p. 1704.
Peters v. Newkirk, 6 Cow. 103, p. 1653.
Peters v. Prevost, 1 Paine C. C. 64, Fed. Cas. No. 11,032, p. 388.
Peters v. Turrell, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252, p. 2501, 2508, 2509.
Peterson v. Ball. 121 Iowa, 544, 97 N. W. 79, p. 2584.
Peterson v. Chemical Bank, 32 N. Y. 21. 45, 88 Am. Dec. 298, p. 158, 590.
Peterson v. Clark, 15 Johns. 205, p. 2373.
Peterson v. Fleming, 63 Ill. App. 357, p. 385, 451.
Peterson v. Grover, 20 Me. 363, p. 1513, 1515.
Peterson v. Philadelphia Mort. & T. Co., (Wash.) 74 Pac. 585, p. 1024.
Peterson v. McCauley, (Tex. Civ. App.) 25 S. W. 826, p. 1346, 1355.

Peterson v. Vanderburgh, 77 Minn. 218. 77 Am. St. Rep. 671, 79 N. W. 828, p. 53, 2276.
Peterson's Appeal, 88 Pa. St. 397, p. 2309.
Petesch v. Hambach, 48 Wis. 443, p. 2726.
Petit v. Smith, 5 Mod. 247, p. 180, 2203.
Peto v. Hammond, 30 Beav. 495, p. 692, 1017.
Petrain v. Kiernan, 23 Oreg. 455, 32 Pac. 158, p. 1017, 1023.
Petree v. Bell, 2 Bush, 58, p. 1069.
Petrie v. Badenoch, 102 Mich. 45, 47 Am. St. Rep. 503, 60 N. W. 449, p. 2079.
Petrie v. Feeter, 21 Wend. 172, p. 1232.
Petrie v. Wright, 6 Smedes & M. 647, p. 2470.
Petry v. Ambrosher, 100 Ind. 510, p. 1323, 1327, 1329, 1391, 2499, 2516.
Pettee v. Peppard, 120 Mass. 522, p. 2413.
Pettes v. Bank of Whitehall, 17 Vt. 435, p. 1486.
Pettibone v. Griswold, 4 Conn. 158, 10 Am. Dec. 106, p. 1126, 2387, 2383.
Pettibone v. Hamilton, 40 Wis. 402, p. 2683, 2687.
Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50, p. 2693.
Pettis v. Kellogg, 7 Cush. 456, p. 2576.
Pettit v. Shepherd, 5 Paige, 493, 501, 28 Am. Dec. 437, p. 2752.
Pettiward v. Prescott, 7 Ves. 541, p. 807.
Petty v. Grisard, 45 Ark. 117, p. 2153.
Petty v. Malier, 15 B. Mon. 591, 604, p. 93, 1524, 2722.
Petty v. Petty, 4 B. Mon. 215, 39 Am. Dec. 501, p. 2736.
Petty v. Styward, 1 Ch. Rep. 3, 1 Eq. Cas. Abr. 290, p. 681.
Peugh v. Davis, 96 U. S. 332, 24 L. ed. 775, p. 2380.
Peugh v. Porter, 112 U. S. 737, 5 Sup. Ct. 361, 28 L. ed. 859, p. 2584.
Peychaud v. Citizens' Bank, 21 La. Ann. 262, p. 1111.
Peynado v. Peynado, 82 Ky. 5, p. 1961, 1979.
Peyser v. Wendt, 87 N. Y. 322, p. 2283, 2783.
Peyton, In re, L. R. 7 Eq. 463, p. 2070.
Peyton v. Bladwell, 1 Vern. 240, p. 1678, 1679.
Peyton v. Bury, 2 P. Wms. 626, p. 1686.
Peyton v. Rose, 41 Mo. 257, 262, p. 355, 586.
Peyton's Trust, In re, L. R. 7 Eq. 463, p. 2049.
Pfeifer v. Snyder, 72 Ind. 78, p. 1640.
Pfister v. Wade, 56 Cal. 43, p. 2636, 2638, 2640, 2643, 2648, 2651.
Pfister v. Writes, 33 Misc. Rep. 701, 68 N. Y. Supp. 976, p. 2284.
Pfleger, In re, L. R. 6 Eq. 426, p. 2322.
Pfohl v. Simpson, 74 N. Y. 137, p. 415.
Pforr's Estate, In re, 144 Cal. 121, 77 Pac. 825, p. 2310.
Pfund v. Valley Loan & Tr. Co., 52 Nebr. 473, 72 N. W. 480, p. 1355.
Phalen v. Clark, 19 Conn. 421, 50 Am. Dec. 253, p. 1648, 1719.
Pharis v. Leachman, 20 Ala. 662, p. 2255.
Phayre v. Peree, 3 Dow. 116, 129, p. 1198.
Phelan v. Boylan, 25 Wis. 679, p. 350, 2670.
Phelan v. Brady, 119 N. Y. 587, 23 N. E. 1109, 8 L. R. A. 211, p. 1025, 1026, 1047.
Phelan v. Olney, 6 Cal. 478, p. 2392, 2396.
Phelps v. City of Watertown, 61 Barb. 121, 123, p. 440.
Phelps v. Comber, 29 Ch. Div. 813, p. 2478.
Phelps v. Elliott, 23 Blatchf. 473, 26 Fed. 881, 883, p. 494.
Phelps v. Fockler, 61 Iowa, 340, 14 N. W. 729, p. 1328.
Phelps v. Green, 3 Johns. Ch. 302, p. 2741.
Phelps v. Harris, 51 Miss. 789, 794, p. 212, 331, 332, 2049.
Phelps v. Illinois Cent. R. R., 63 Ill. 468, p. 2776, 2779.
Phelps v. Jackson, 31 Ark. 272, p. 2017, 2034.
Phelps v. Morrison, 24 N. J. Eq. 195, p. 1349, 1384.

Phelps v. Peabody, 7 Cal. 50, p. 697, 1450, 1788.
Phelps v. Platt, 54 Barb. 557, p. 293.
Phelps v. Seely, 22 Gratt. 573, p. 1903.
Phelps v. Wait, 30 N. Y. 78, p. 1567.
Phelps v. Watertown, 61 Barb. 121, 123, p. 434.
Phené v. Gillan, 5 Hare, 1, 9, p. 2101.
Philadelphia v. Collins, 68 Pa. St. 106, p. 2683.
Philadelphia v. Davis, 1 Whart. 490, 502, 503, 510, p. 782, 789, 804, 805, 807, 857.
Philadelphia v. Elliott, 3 Rawle, 170, p. 1977.
Philadelphia v. Fox, 64 Pa. St. 169, p. 1834, 1954, 1961, 1976.
Philadelphia v. Lockhardt, 73 Pa. St. 211, p. 2252, 2553.
Philadelphia v. Williamson, 10 Phila. 176, p. 1445.
Philadelphia Trust Co.'s Appeal, 93 Pa. St. 209, p. 1831.
Philadelphia, Wilmington & B. R. R. Co. v. Dubois, 12 Wall. 47, p. 1435, 1444.
Phila., Wilmington & B. R. R. Co. v. Woelpper, 64 Pa. St. 366, 371, 372, 3 Am. Rep. 596, p. 2472, 2476, 2583.
Philbrook v. Delano, 29 Me. 410, 415, p. 549, 1989, 2503.
Philips v. Bank of Lewiston, 18 Pa. St. 394, 401, 404, p. 980, 998, 1108, 1300.
Philips v. James, 3 De Gex, J. & S. 72, p. 1886.
Philips v. Philips, 3 Hare, 281, p. 2229.
Philips's Appeal, 80 Pa. St. 472, p. 1830.
Philling v. Armitage, 12 Ves. 78, 84, p. 1430.
Phillips, Ex parte, 19 Ves. 118, 122, p. 2320, 2612, 2619, 2622.
Phillips, In re, L. R. 6 Eq. 250, p. 2322.
Phillips v. Ash's Heirs, 63 Ala. 414, p. 469.
Phillips v. Blair, 38 Iowa, 649, p. 1145.
Phillips v. Belding, 2 Edw. Ch. 15, p. 1647, 1772.
Phillips v. Berger, 2 Barb. 608, 8 Barb. 527, p. 2762, 2765.
Phillips v. Bordman, 4 Allen, 147, p. 2693.
Phillips v. Burton, 21 Ky. Law Rep. 720, 52 S. W. 1064, p. 2065.
Phillips v. Carew, 1 P. Wms. 117, p. 297.
Phillips v. Croft, 42 Ala. 477, p. 2380.
Phillips v. Costley, 40 Ala. 486, p. 1019.
Phillips v. Edsall, 127 Ill. 535, 20 N. E. 801, p. 2564, 2585.
Phillips v. Eiland, 52 Miss. 721, p. 2659.
Phillips v. Ferguson, 85 Va. 509, 8 S. E. 241, 17 Am. St. Rep. 78, 1 L. R. A. 837, p. 1685, 2328.
Phillips v. Gilbert, 101 U. S. 721, 25 L. ed. 833, p. 2544.
Phillips v. Gorham, 17 N. Y. 270, 273, 275, p. 94, 231, 355, 586, 592, 1524.
Phillips v. Graves, 20 Ohio St. 371, 5 Am. Rep. 675, p. 2197.
Phillips v. Great West. R'y, L. R. 7 Ch. 409, p. 2676.
Phillips v. Gutteridge, 3 De Gex, J. & S. 332, p. 2488.
Phillips v. Hardenburg, (Mo.) 80 S. W. 891, p. 2046.
Phillips v. Harrow, 93 Iowa, 92, 61 N. W. 434, p. 1943, 1946, 1949, 1958, 1961, 1974.
Phillips v. Hassell, 10 Humph. 197, p. 2169.
Phillips v. Hollister, 2 Cold. 269, p. 1494.
Phillips v. Homfray, L. R. 6 Ch. 770, p. 1609, 1616.
Phillips v. Hudson, L. R. 2 Ch. 243, 246, p. 363, 394, 395, 453.
Phillips v. Hulsizer, 20 N. J. Eq. 308, p. 2376.
Phillips v. Leavitt, 54 Me. 405, p. 550.
Phillips v. Medbury, 7 Conn. 568, p. 1678.
Phillips v. Moore, 11 Mo. 600, p. 1733.
Phillips v. Overfield, 100 Mo. 466, 13 S. W. 705, p. 2025.
Phillips v. Parry, 22 Beav. 279, p. 2222.
Phillips v. Phillips, 34 Beav. 19, p. 902, 903.
Phillips v. Phillips, 4 De Gex, F. & J. 208, 215, 216, 218, p. 691, 695, 1188, 1189, 1261, 1317, 1318, 1350, 1382, 1390.

Phillips v. Phillips, 9 Hare, 471, p. 211, 2796, 2798.
Phillips v. Phillips, 50 Mo. 603, p. 653.
Phillips v. Phillips, 112 N. Y. 197, 8 Am. St. Rep. 737, 19 N. E. 411, p. 1929.
Phillips v. Prevost, 4 Johns. Ch. 205, p. 270, 283, 697.
Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9, affirmed, 45 N. J. Eq. 830, 18 Atl. 849, p. 1664, 1665, 1667.
Phillips v. Reeder, 18 N. J. Eq. 95, p. 2028.
Phillips v. Sarjent, 7 Hare, 33, p. 2322.
Phillips v. Sherman, (Tex. Civ. App.) 39 S. W. 187, p. 1372.
Phillips v. Skinner, 6 Bush, 662, p. 2500.
Phillips v. Soule, 9 Gray, 233, p. 2765.
Phillips v. South Park Com., 119 Ill. 626, 10 N. E. 230, p. 1901, 1902.
Phillips v. Stagg, 2 Edw. Ch. 108, p. 2561, 2568.
Phillips v. Stauch, 20 Mich. 369, p. 662, 2768, 2772.
Phillips v. Stone Mountain, 61 Ga. 386, p. 2667, 2680, 2703.
Phillips v. Sylvester, L. R. 8 Ch. 173, 176, p. 615.
Phillips v. Thompson, 1 Johns. Ch. 131, p. 345, 2601, 2767.
Phillips v. Thompson, 2 Johns. Ch. 418, 421, p. 2796.
Phillips v. Truby, 8 Jur., N. S., 999, p. 2694.
Phillips v. Winslow, 18 B. Mon. 431, 68 Am. Dec. 729, p. 2583.
Phillips v. Wooster, 36 N. Y. 412, p. 1799, 1800, 1803.
Phillips' Estate, In re, 205 Pa. St. 515, 55 Atl. 213, 97 Am. St. Rep. 746, p. 1209, 1212, 1253.
Phillipson v. Gatty, 7 Hare, 516, p. 2068, 2071.
Phillips' Trusts, In re, [1903] 1 Ch. 183, p. 1214.
Philly v. Sanders, 11 Ohio St. 490, 78 Am. Dec. 316, p. 1134.
Philpott v. Elliott, 4 Md. Ch. 273, p. 1517, 1524, 1528.
Philson v. Moore, 23 Hun, 152, p. 2211, 2212.
Phinney v. State, (Wash.) 78 Pac. 927, p. 2238.
Phippen v. Stickney, 3 Met. 384, 387, p. 1692.
Phipps v. Ackers, 9 Clark & F. 583, 594, 599, 601, 604, p. 1885, 1886.
Phipps v. Annesley, 2 Atk. 57, 58, p. 2204.
Phipps v. Hope, 16 Ohio St. 586, p. 2237.
Phipps v. Kelly, 12 Oreg. 213, 6 Pac. 707, p. 215, 229, 465.
Phipps v. Lovegrove, L. R. 16 Eq. 80, p. 2097.
Phœnix v. Clark, 6 N. J. Eq. 447, p. 2682.
Phœnix v. Gardner, 13 Minn. 430, p. 2376.
Phœnix Ins. Co. v. Continental Ins. Co., 14 Abb. Pr., N. S., 266, p. 1200.
Phœnix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400, p. 751, 2596.
Phœnix Ins. Co. v. Copeland, 90 Ala. 386, 8 South. 48, p. 1158.
Phœnix Ins. Co. v. Ryland, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548, p. 1542.
Phœnix Ins. Co. v. Ward, 7 Tex. Civ. App. 13, 26 S. W. 763, p. 1158.
Phœnix Mut. Life Ins. Co. v. Bailey, 13 Wall. 616, 620, 621, 623, 20 L. ed. 501, p. 151, 210, 220, 221, 514, 516, 1637, 1640, 2706, 2707, 2730.
Phœnix Mut. Life Ins. Co. v. Beaman, 5 Kan. App. 772, 48 Pac. 1007, p. 1020.
Phœnix Mut. Life Ins. Co. v. Brown, 37 Nebr. 705, 56 N. W. 488, p. 1355.
Phœnix Mut. L. Ins. Co. v. Grant, 3 McAr. 220, p. 2659.
Phyfe v. Riley, 15 Wend. 248, 30 Am. Dec. 55, p. 2360.
Phyfe v. Wardell, 2 Edw. Ch. 47, p. 1528, 1659, 2761.
Phyfe v. Wardell, 5 Paige, 268, 28 Am. Dec. 430, p. 2026, 2028.
Piatt v. Longworth's Devisees, 27 Ohio St. 159, 186, p. 577, 2285.
Piatt v. McCullough, 1 McLean, 69, p. 1468.
Piatt v. Oliver, 2 McLean, 267, p. 1692.
Picard v. Hine, L. R. 5 Ch. 274, 276, 277, p. 2133, 2185.

Pichoir's Estate, In re, 139 Cal. 682, 73 Pac. 606, p. 1895.
Pickard, Ex parte, 3 Ves. & B. 127, p. 2622.
Pickard v. Anderson, L. R. 13 Eq. 608, p. 2068, 2070.
Pickard v. Sears, 6 Ad. & E. 469, 474, p. 1422, 1424, 1425.
Pickens v. Oliver, 29 Ala. 528, p. 2189.
Pickerell v. Morss, 97 Ill. 220, p. 1728, 2729.
Pickering v. Cape Town R'y, L. R. 1 Eq. 84, p. 2679.
Pickering v. Coates, 10 Phila. 65, p. 1830, 1909, 2159.
Pickering v. Ilfracombe R'y, L. R. 3 Com. P. 235, p. 1207.
Pickering v. Kempton, Toth. 39, p. 2737.
Pickering v. Pickering, 2 Beav. 31, 56, p. 1501, 1508.
Pickering v. Pickering, 4 Mylne & C. 289, p. 2322.
Pickering v. Pickering, 38 N. H. 400, 407, p. 524, 525.
Pickering v. Shotwell, 10 Pa. St. 23, p. 1977.
Pickering v. Stanford, 2 Ves. 272, 581, 3 Ves. 332, 492, p. 827.
Pickering v. Stephenson, L. R. 14 Eq. 322, p. 2677.
Pickering v. Vowles, 1 Brown Ch. 197, p. 2027.
Pickersgill v. Lahens, 15 Wall. 140, p. 684, 2608, 2726.
Pickersgill v. Rodger, 5 Ch. Div. 163, 170, 173, p. 781, 785, 789, 857.
Pickett v. Barron, 29 Barb. 505, p. 1305, 1323, 1324.
Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545, p. 1065.
Pickett v. Jones, 63 Mo. 195, 199, p. 1861.
Pickett v. Loggon, 14 Ves. 215, 234, p. 1655, 1671, 1734.
Pickett v. Merchants' Nat. Bank, 32 Ark. 346, p. 1445, 1705, 1706.
Pickett v. Peay, 3 Brev. 545, 6 Am. Dec. 594, p. 821, 824.
Pickler v. Pickler, 180 Ill. 168, 54 N. E. 311, p. 1995, 1996, 2000.
Pickman v. Trinity Church, 123 Mass. 1, 25 Am. Rep. 1, p. 543.
Pico v. Columbet, 12 Cal. 414, 73 Am. Dec. 550, p. 2800.
Pidcock v. Bishop, 3 Barn. & C. 605, p. 1622.
Pidding v. How, 8 Sim. 477, p. 1695.
Pidgeon v. Trustees etc., 44 Ill. 501, p. 2411.
Pier v. Fond du Lac, 38 Wis. 470, p. 2750, 2752, 2754.
Pier v. Kean, 14 Mich. 354, p. 2763.
Pierce v. Andrews, 6 Cush. 4, 52 Am. Dec. 748, p. 1440.
Pierce v. Boston Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371, p. 2232, 2237, 2239, 2247.
Pierce v. Emery, 32 N. H. 484, p. 2583.
Pierce v. Faunce, 53 Me. 351, p. 550.
Pierce v. Faunce, 47 Me. 507, p. 1227, 2419, 2752.
Pierce v. Felter, 53 Cal. 18, p. 2748, 2751.
Pierce v. Fuller, 8 Mass. 223, 5 Am. Dec. 102, p. 727.
Pierce v. Kittredge, 115 Mass. 374, p. 2193.
Pierce v. McKeehan, 3 Pa. St. (3 Barr) 136, 45 Am. Dec. 635, p. 1332.
Pierce v. Pierce, 64 Wis. 73, 54 Am. Rep. 581, 24 N. W. 498, p. 2619.
Pierce v. Plumb, 74 Ill. 326, p. 2762.
Pierce v. Robinson, 13 Cal. 116, p. 2370, 2381, 2428, 2432.
Pierce v. Shaw, 51 Wis. 316, 8 N. W. 209, p. 2394.
Pierce v. Taylor, 23 Me. 246, p. 1101, 1134.
Pierce v. Thompson, 26 Kan. 714, p. 2749.
Pierce v. Traver, 13 Nev. 526, p.
Pierce v. Waring, 1 P. Wms. 121, p. 1774.
Pierce v. Weaver, 65 Tex. 44, p. 1977.
Pierce v. Webb, 3 Belt's Brown Ch. 16, p. 2728.
Pierce's Heirs v. Catron's Heirs, 23 Gratt. 483, 588, p. 2769, 2780, 3781.
Piercy, In re, [1895] 1 Ch. 83, p. 83, p. 1835.
Pierpoint v. Lord Cheney, 1 P. Wms. 488, p. 2618.
Pierpont v. Fowle, 2 Wood. & M. 23, p. 514.
Pierpont v. Harrisville, 9 W. Va. 215, p. 2695.

Pierrepont v. Edwards, 25 N. Y. 128, 2 Lead. Cas. Eq., 4th Am. ed., 613-619, p. 2218, 2219, 2220.
Pierson v. Catlin, 18 Vt. 77, p. 2796.
Pierson v. Garnet, 2 Brown Ch. 38, 226, p. 1461, 1925.
Pierson v. Lum, 25 N. J. Eq. 390, p. 2195.
Pierson v. McClintock, (Tex. Civ. App.) 78 S. W. 706, p. 1103, 1124.
Pierson v. Pierson, 5 Del. Ch. 11, p. 1899.
Pierstoff v. Joyes, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881, p. 1717.
Pieschel v. Paris, 2 Sim. & St. 384, p. 1962.
Piggott v. Stratton, 1 De Gex, F. & J. 33, 49, p. 1562, 2673.
Pike v. Fay, 101 Mass. 134, 137, p. 1560, 1563.
Pike v. Fitzgibbon, L. R. 17 Ch. Div. 454, 459, 462, 463, overruling L. R. 14 Ch. Div. 837, p. 2132, 2158, 2179, 2183, 2185.
Pike v. Galvin, 29 Me. 183, p. 1134.
Pike v. Goodnow, 12 Allen, 472, 474, p. 1054, 1410.
Pike's Peak Power Co. v. City of Colorado, 105 Fed. 1, 44 C. C. A. 33, p. 765.
Pilcher v. McHenry, 14 Lea, 77, p. 1920.
Pilcher v. Rawlins, L. R. 7 Ch. 259, L. R. 11 Eq. 53, p. 695, 1050, 1288, 1352, 1371, 1375.
Pilkington v. Boughey, 12 Sim. 114, p. 1986.
Pilkington's Ex'x v. Gaunt's Adm'x, 5 Dana, 410, p. 2271.
Pilling v. Armitage, 12 Ves. 78, 84, 85, p. 304, 1195, 1434.
Pillot v. Landon, 46 N. J. Eq. 310, 19 Atl. 125, p. 1886.
Pillow v. Brown, 20 Ark. 240, p. 179, 2008.
Pillow v. Helm, 7 Baxt. 545, p. 2523, 2527.
Pillow v. Shannon, 3 Yerg. 508, p. 1348.
Pillow v. Thompson, 20 Tex. 206, p. 697, 1450, 1788.
Pillsbury v. Pillsbury, 17 Me. 107, p. 1764.
Pillsbury-Washburne Flour-Mills Co. v. Kistler, 53 Minn. 123, 54 N. W. 1063, p. 1902.
Pim v. Downing, 11 Serg. & R. 66, p. 2061, 2095, 2096.
Pinch v. Anthony, 8 Allen, 536, 539, p. 191, 954, 2470, 2471, 2472.
Pinch v. McCulloch, 72 Minn. 71, 74 N. W. 897, p. 2405.
Pinchain v. Collard, 13 Tex. 333, p. 2502.
Pinchin v. Simms, 30 Beav. 119, p. 876, 877.
Pinckard v. Pinckard, 23 Ala. 649, p. 1872.
Pinckard v. Pinckard, 24 Ala. 250, p. 2099.
Pinckney v. Pinckney, 2 Rich. Eq. 219, 237, 114 Iowa, 441, 87 N. W. 406, p. 848, 1100.
Pinckston v. Brown, 3 Jones Eq. 494, p. 1719.
Pindall v. Trevor, 30 Ark. 249, p. 1198, 1257, 2030, 2032.
Pindell v. Pindell, 40 Md. 537, p. 824.
Pindell v. Quinn, 7 Ill. App. 605, p. 2704.
Pine Mt. Iron & Coal Co. v. Bailey, 94 Fed. 258, 36 C. C. A. 229, p. 1159, 1176.
Pineville Land & Lumber Co. v. Hollingsworth, 21 Ky. L. Rep. 899, 53 S. W. 279, p. 657.
Pingree v. Coffin, 12 Gray, 288, 304, 305, p. 155, 345, 1146, 2633.
Pingree v. Comstock, 18 Pick. 46, 50, p. 1856.
Pinkerton v. Manchester etc. R. R., 42 N. H. 424, p. 1218, 1220.
Pinkum v. City of Eau Claire, 81 Wis. 301, 51 N. W. 550, p. 353.
Pinnell v. Hallett, Amb. 106, p. 953.
Pinneo v. Goodspeed, 120 Ill. 524, 533, 12 N. E. 196, p. 2428.
Pinney v. Fellows, 15 Vt. 525, p. 1148, 1901.
Pinney v. Russell, 52 Minn. 447, 54 N. W. 484, p. 1097, 1121.
Pinson v. Gilbert, 57 Ala. 35, p. 2059.
Pioneer Sav. & Loan Co. v. Peck, 20 Tex. Civ. App. 111, 49 S. W. 160, p. 350.
Pipe v. Jordan, 22 Colo. 392, 45 Pac. 371, 55 Am. St. Rep. 138, p. 1069.

Piper v. Hoard, 107 N. Y. 73, 13 N. S. 626, 1 Am. St. Rep. 785, 789, p. 1605, 2034.
Piper v. Moulton, 72 Me. 155, p. 1934, 1946, 1974.
Piper v. Sawyer, 73 Minn. 332, 76 N. W. 57, p. 2470.
Pippen v. Wesson, 74 N. C. 437, p. 2196.
Pironi v. Corrigan, 47 N. J. Eq. 135, 20 Atl. 218, p. 1780.
Piscataqua Ins. Co. v. Hill, 60 Me. 178, 183, p. 551, 556, 1637.
Pitcairn v. Brase, Finch, 403, p. 1548.
Pitcairn v. Ogbourne, 2 Ves. Sr. 375, 379, p. 1506, 1515, 1525.
Pitcher v. Barrows, 17 Pick. 361, 28 Am. Dec. 306, p. 1113.
Pitcher v. Dove, 99 Ind. 175, p. 1434.
Pitcher v. Hennessey, 48 N. Y. 415, p. 93, 1486, 1489, 2722.
Pitcher v. Rawlins, L. R. 11 Eq. 53, p. 1010.
Pitcher v. Turin Plank Road Co., 10 Barb. 436, p. 1478.
Pitkin v. Pitkin, 7 Conn. 315, p. 2263.
Pitman v. Thornton, 65 Me. 469, p. 548, 550.
Pitt v. Bonner, 1 Younge & C. Ch. 670, p. 2092.
Pitt v. Jackson, 2 Brown Ch. 51, p. 2162.
Pitt v. Pelham, 1 Cas. Ch. 176, p. 1836.
Pitt v. Pelham, 2 Freem. 134, 1 Ch. Rep. 283, p. 1921.
Pitt v. Pidgeon, 1 Ch. Cas. 301, p. 885.
Pitt v. Pitt, 22 Beav. 294, p. 1407, 1411.
Pittenger v. Pittenger, 3 N. J. Eq. 156, p. 1733.
Pittman v. Burr, 79 Mich. 539, 44 N. W. 951, p. 212.
Pittman v. Gaty, 5 Gilm. 186, p. 1048.
Pittman v. Pittman, 107 N. C. 159, 12 S. E. 61, 11 L. R. A. 456, p. 1899.
Pitt Rivers, In re, [1902] 1 Ch. 403, p. 2037.
Pitts v. Aldrich, 11 Allen, 39, p. 1407.
Pitts v. Bullard, 3 Ga. 5, 46 Am. Dec. 405, p. 2005.
Pitts v. Cable, 44 Ill. 103, p. 2373.
Pitts v. Parker, 44 Miss. 247, p. 2501, 2520, 2530.
Pitts v. Rhode Island Hospital Trust Co., 21 R. I. 544, 79 Am. St. Rep. 821, 45 Atl. 553, 48 L. R. A. 783, p. 2618.
Pitts v. Snowden, 1 Brown Ch. 292, note, p. 819, 835.
Pittsburgh & Connellsville R. R. Co. v. Mt. Pleasant R. R., 76 Pa. St. 481, 490, p. 717.
Pittsburgh & C. R. R. Co. v. Barker, 29 Pa. St. 160, p. 1330.
Pittsburgh & Connellsville R. R. Co.'s Appeal, 99 Pa. St. 177, p. 217.
Pittsburg, C. C. & St. L. R'y Co. v. Keokuk & H. Bridge Co., 68 Fed. 19, 15 C. C. A. 184, 46 U. S. App. 530, p. 237, 499.
Pittsburgh, C., C. & St. L. R. Co. v. Lynde, 55 Ohio St. 23, 44 N. E. 590, p. 1079.
Pittsburgh, C., C. & St. L. R'y Co. v. Town of Crothersville, 159 Ind. 330, 64 N. E. 914, p. 659.
Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259, p. 2086.
Pixley v. Huggins, 15 Cal. 127, 134, p. 458, 1270, 2757.
Place v. Hayward, 117 N. Y. 487, 23 N. E. 25, p. 2017.
Plankington Bank, In re, 87 Wis. 378, 58 N. W. 784, p. 1177.
Plant v. Barclay, 56 Ala. 561, p. 2753, 2754, 2756.
Plant v. Gunn, 2 Woods, 372, p. 1735.
Plant v. Shryock, 62 Miss. 821, p. 1101.
Plant v. Smythe, 45 Cal. 161, p. 1270, 1354.
Planters' Bank v. Prater, 64 Ga. 609, p. 2017.
Planters' Loan & Sav. Bank v. Johnson, 70 Ga. 302, p. 1083.
Plass v. Plass, 122 Cal. 3, 54 Pac. 372, p. 1996.
Plaster v. Burger, 5 Ind. 232, p. 1692.
Plaster v. Throne-Franklin Shoe Co., 123 Ala. 360, 26 South. 225, p. 271.
Platner v. Platner, 66 Iowa, 378, 23 N. W. 764, p. 2177.
Plato v. Roe, 14 Wis. 453, p. 2376.

Platt v. Platt, 11 Abb. Pr., N. S., 110, 3 Sim. 503, p. 293, 902.
Platt v. Sleap, Cro. Jac. 275, p. 1395.
Platt v. Squire, 12 Met. 494, p. 1294, 2437.
Platteville v. Galena etc. R. R., 43 Wis. 493, p. 2677.
Platto v. Deuster, 22 Wis. 482, p. 592, 2716, 2719.
Playford v. Playford, 4 Hare, 546, p. 2436.
Pleasanton's Appeal, 99 Pa. St. 362, p. 2066.
Pleasants v. Blodgett, 39 Nebr. 741, 58 N. W. 423, 42 Am. St. Rep. 624, p. 1020.
Pleasants's Appeal, 77 Pa. St. 356, p. 2306, 2319.
Plenderleith, In re, [1893] 3 Ch. 332, p. 2622.
Plomley v. Richardson & Wrench, [1894] A. C. 632, p. 2109.
Plowden v. Hyde, 2 De Gex, M. & G. 684, 687, p. 806.
Plumb v. Fluitt, 2 Anstr. 432, 438, p. 999, 1001, 1016, 1194.
Plume v. Beale, 1 P. Wms. 388, p. 1635.
Plumer v. Guthrie, 76 Pa. St. 441, 455, p. 2380.
Plumer v. Lord, 9 Allen, 455, 85 Am. Dec. 773, p. 1562.
Plumer v. Robertson, 6 Serg. & R. 179, 184, p. 1027, 1107.
Plummer v. Jarman, 44 Md. 632, p. 2193.
Plummer v. Keppler, 26 N. J. Eq. 481, p. 662, 2768.
Plummer v. May, 1 Ves. Sr. 426, p. 264, 265.
Plummer v. Mold, 22 Minn. 15, p. 1438.
Plunkett v. Lewis, 3 Hare, 316, 330, 361, p. 876, 880, 939.
Pocahontas Light & Water Co. v. Browning, 53 W. Va. 436, 44 S. E. 267, p. 1424, 1432, 1434, 1437, 1438, 1440, 1444.
Pocock v. Att'y-Gen., L. R. 3 Ch. Div. 342, p. 1933, 1943, 1951.
Pocock v. Reddington, 5 Ves. 794, p. 2070.
Podmore v. Gunning, 7 Sim. 644, 660, 5 Sim. 485, p. 1653, 1654, 2035, 2037.
Poe v. Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713, p. 2405, 2407, 2408.
Poe v. Paxton, 26 W. Va. 607, p. 1198, 1292, 2504, 2509, 2530.
Pogue v. Kaweah Power & Water Co., (Cal.) 72 Pac. 144, p. 728.
Poillon v. Martin, 1 Sand. Ch. 569, p. 1237, 1257, 1773.
Poindexter v. Davis, 6 Gratt. 481, p. 257, 274.
Poindexter v. Jeffries, 15 Gratt. 363, p. 2167, 2169.
Poindexter v. Rawlings, 106 Tenn. 97, 82 Am. St. Rep. 869, 59 S. W. 766, p. 2515.
Pokegama S. P. L. Co. v. Klamath R. L. & I. Co., 96 Fed. 34, 55, p. 497, 756.
Poland v. O'Conner, 1 Nebr. 50, 93 Am. Dec. 327, p. 2782.
Pole v. Pietsch, 61 Md. 570, p. 2051.
Poler v. Dubuque, 20 Iowa, 440, p. 2500.
Polden v. Bastard, L. R. 1 Q. B. 156, p. 1547.
Pole v. Lord Somers, 6 Ves. 309, 321, 323, p. 882, 917, 922, 933, 937.
Polhemus v. Holland Trust Co., 59 N. J. Eq. 93, 45 Atl. 534, p. 217.
Polhemus v. Trainer, 30 Cal. 685, p. 2374, 2376.
Polhill v. Walter, 3 Barn. & Ald. 114, p. 1603.
Policy No. 6402 of the Scottish Eq. Life Assur. Soc., In re, [1902] 1 Ch. 282, p. 1996.
Poling v. Condon-Lane Boom & Lumber Co., (W. Va.) 47 S. E. 279, p. 2551.
Polis v. Tice, 28 N. J. Eq. 432, p. 2130.
Polk v. Gallant, 2 Dev. & B. Eq. (N. C.) 395, 34 Am. Dec. 410, p. 1191.
Polk v. Pendleton, 31 Md. 118, p. 2753, 2756.
Polk v. Reynolds, 31 Md. 106, p. 1403, 2756.
Polk v. Rose, 25 Md. 153, 89 Am. Dec. 773, p. 2756.
Pollak v. H. B. Claflin Co., (Ala.) 35 South. 645, p. 323.
Pollak v. Muscogee Mfg. Co., 108 Ala. 467, 18 South. 611, 54 Am. St. Rep. 165, p. 2013.
Pollard, Ex parte, 17 Bank. Reg. 228, p. 746.

Pollard v. American Freehold Land Mortgage Co., (Ala.) 35 South. 767, p. 2429.
Pollard v. Cocke, 19 Ala. 188, p. 1272, 1280.
Pollard v. Clayton, 1 Kay & J. 462, p. 2765.
Pollard v. Greenvil, 1 Cas. Ch. 10, p. 1468.
Pollard v. Lathrop, 12 Colo. 171, 20 Pac. 251, p. 2099.
Pollard v. McKenney, (Nebr.) 96 N. W. 679, p. 1900, 2037.
Pollard v. Pollard, 68 N. H. 356, 39 Atl. 329, p. 1207.
Pollard v. Reardon, 65 Fed. 848, 13 C. C. A. 171, 21 U. S. App. 639, p. 234.
Pollard v. Shaffer, 1 Dall. 210, 211, 1 Am. Dec. 239, p. 558.
Pollard v. Vinton, 105 U. S. 7, p. 1226, 1229.
Pollexfen v. Moore, 3 Atk. 272, 273, p. 615, 2311.
Polley v. Seymour, 2 Younge & C. 708, p. 2309, 2312.
Pollitt v. Long, 58 Barb. 20, p. 2686.
Pollock, In re, L. R. 28 Ch. Div. 552, 556, p. 896, 898, 910, 911, 943.
Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732, p. 2704.
Pollock v. Maison, 41 Ill. 516, p. 2347.
Pollock v. National Bank, 7 N. Y. 274, 57 Am. Dec. 520, p. 1252, 2784.
Pollock v. Okolona Sav. Inst., 61 Miss. 293, p. 357, 419, 430, 455.
Pollock v. Pollock, L. R. 18 Eq. 329, p. 2208.
Polson v. Young, 37 Iowa, 196, p. 1769.
Polt v. Polt, 205 Pa. St. 139, 54 Atl. 577, p. 1730.
Pomeroy v. Bailey, 43 N. H. 118, p. 1801.
Pomeroy v. Latting, 15 Gray, 435, p. 1263.
Pomeroy v. Wells, 8 Paige, 406, p. 2176.
Pomroy v. Stevens, 11 Met. 244, p. 1101.
Ponce v. McElvy, 47 Cal. 154, 159, p. 1989, 2461.
Ponce v. Underwood, 55 Ga. 601, p. 2265.
Pond v. Allen, 15 R. I. 171, 2 Atl. 302, p. 2492.
Pond v. Carpenter, 12 Minn. 430, p. 2154.
Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668, p. 2662.
Pond v. Vermont Valley R. R., 2 Blatch. 280, 287, p. 517, 2677.
Pond v. Pond, 10 Cal. 495, p. 2262.
Pond v. Skeen, 2 Lea, 126, p. 2168, 2172.
Ponder v. Scott, 44 Ala. 241, 244, 245, p. 984, 985, 991, 1144.
Ponton v. Ballard, 24 Tex. 619, p. 1148.
Pool v. Dial, 10 S. C. 440, p. 2056, 2057, 2066.
Pool v. Docker, 92 Ill. 501, p. 1550, 2267.
Pool v. Hathaway, 22 Me. 85, p. 1411.
Poole v. Att'y-Gen., 22 Ala. 190, p. 1144.
Poole v. Bott, 11 Hare, 33, p. 1682, 1683.
Pooley v. Budd, 14 Beav. 34, p. 2763.
Pooley v. Quilter, 2 De Gex & J. 327, 4 Drew. 184, p. 2028, 2032, 2079.
Pooley v. Ray, 1 P. Wms. 355, p. 1471.
Poor v. Carleton, 3 Sum. 70, p. 312, 2707.
Poor v. Clarke, 2 Atk. 515, p. 362, 455.
Poor v. Hazleton, 15 N. H. 564, p. 1742.
Poor v. Woodburn, 25 Vt. 234, p. 1327, 1384, 1385.
Pope v. Allen, 90 N. Y. 298, p. 1037.
Pope v. Burlington Sav. Bk., 56 Vt. 284, 48 Am. Rep. 781, p. 1867.
Pope v. Chafee, 14 Rich. Eq. 69, p. 1707, 1708.
Pope v. Cole, 55 N. Y. 124, 14 Am. Rep. 198, p. 683, 2607.
Pope v. Curl, 2 Atk. 342, p. 279, 2688, 2689.
Pope v. Dafray, 176 Ill. 478, 52 N. E. 58, p. 2038.
Pope v. Durant, 26 Iowa, 233, p. 1861.
Pope v. Farnsworth, 146 Mass. 339, 16 N. E. 262, p. 2097.
Pope v. Garland, 4 Younge & C. 394, 401, p. 1015, 1053, 1596, 1599.
Pope v. Hooper, 6 Nebr. 178, p. 725.
Pope v. Jacobus, 10 Iowa, 262, p. 2419.
Pope v. Marshall, 78 Ga. 635, 4 S. E. 116, p. 2379.

Pope v. Mathews, 18 S. C. 444, p. 2066.
Pope v. Mead, 99 N. Y. 201, 1 N. E. 671, p. 1281.
Pope v. Melone, 2 A. K. Marsh. 239, p. 2738.
Pope v. Nichols, 61 Kan. 230, 59 Pac. 257, p. 1100, 1145.
Pope v. Pope, 10 Sim. 1, p. 1929.
Pope v. Solomons, 36 Ga. 541, 545, p. 222, 224, 2790.
Popejoy, In re, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. Rep. 222, p. 2176.
Popers v. Meagher, 184 Ill. 192, 35 N. E. 805, p. 738.
Pope's Ex'rs v. Elliott, 8 B. Mon. 56, p. 1841.
Popham v. Bampfield, 1 Vern. 83, p. 766.
Popplein v. Foley, 61 Md. 381, p. 1522.
Porch v. Fries, 18 N. J. Eq. 204, p. 2195.
Porcher v. Daniel, 12 Rich. Eq. 349, p. 2154.
Port v. Embree, 54 Iowa, 14, 6 N. W. 33, p. 1323.
Portarlington, Lord, v. Soulby, 3 Mylne & K. 104, p. 1709, 2761.
Port Clinton R. R. v. Cleveland etc. R. R., 13 Ohio St. 544, 549, p. 2765, 2767.
Porter v. Allen, 54 Ga. 623, p. 2762.
Porter v. Bagby, 50 Kan. 412, 31 Pac. 1058, p. 1230.
Porter v. Bank of Rutland, 19 Vt. 410, p. 1169, 1908, 1909, 2139.
Porter v. Doby, 2 Rich. Eq. 49, p. 1886.
Porter v. Dubuque, 20 Iowa, 440, p. 2518.
Porter v. Green, 4 Iowa, 571, p. 1373.
Porter v. Jones, 6 Cold. 313, 317, p. 571.
Porter v. Kingman, 126 Mass. 141, p. 2662.
Porter v. Lee, 88 Tenn. 782, 14 S. W. 218, p. 1847.
Porter v. Liscom, 22 Cal. 430, 83 Am. Dec. 76, p. 1229.
Porter v. Lopes, L. R. 7 Ch. Div. 358, p. 2657.
Porter v. Moore, [1904] 2 Ch. 367, p. 1437, 1444, 1445.
Porter v. Ourada, 51 Nebr. 510, 71 N. W. 52, p. 1227, 1300, 1301.
Porter v. Parmly, 43 How. Pr. 445, p. 2461, 2462.
Porter v. Parmly, 39 N. Y. Sup. Ct. 219, p. 1770.
Porter v. Peckham, 44 Cal. 204, p. 1771.
Porter v. Porter, 37 Ch. Div. 429, p. 2626.
Porter v. Reed, 123 Mo. 587, 27 S. W. 351, p. 386.
Porter v. Sevey, 43 Me. 519, p. 1101, 1146.
Porter v. Spencer, 2 Johns. Ch. 169, p. 2798.
Porter v. Turner, 3 Serg. & R. 108, 111, 114, p. 960, 962, 1468, 1469.
Porter v. Wakefield, 146 Mass. 25, 14 N. E. 792, p. 2193.
Porter v. Williams, 9 N. Y. 142, 59 Am. Dec. 519, p. 2662.
Porter v. Witham, 17 Me. 292, p. 554, 555.
Porter v. Woodruff, 36 N. J. Eq. 174, 185, p. 1761, 2078, 2501.
Porterfield v. Taylor, 60 Tex. 264, p. 2503.
Port Huron & G. R. W. R'y v. Judge of St. Clair Circuit, 31 Mich. 456, p. 2660.
Pt. Huron & N. W. R'y v. Callanan, 61 Mich. 22, 34 N. W. 678, p. 1653.
Portis v. Full, 34 Ark. 375, p. 2703.
Portis v. Hill, 30 Tex. 529, 98 Am. Dec. 481, p. 1066.
Portland etc. R. R. v. Grand Trunk R. R. Co., 63 Me. 90, 99, p. 551.
Portmore, Lord, v. Morris, 2 Brown Ch. 219, p. 1506.
Portsea Building Soc. v. Barclay, [1895] 2 Ch. 298, p. 2606.
Portsmouth Ins. Co. v. Reynolds's Adm'x, 32 Gratt. 613, p. 2292.
Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co., 6 Wash. 597, 34 Pac. 155, p. 1223.
Portwood v. Huntress. 113 Ga. 815, 39 S. E. 299, p. 379.
Posey v. Cenaway, 10 Ala. 811, p. 2755, 2756.
Post v. Campbell, 110 Wis. 378, 85 N. W. 1032, p. 660.
Post v. Dart, 8 Paige, 639, 641, p. 1706.
Post v. First National Bank, 138 Ill. 559, 28 N. E. 978, p. 1735, 2191.

Post v. Hover, 33 N. Y. 593, 602, 30 Barb. 312, 324, p. 580, 1895, 2300.
Post v. Leet, 8 Paige, 337, p. 1518, 1539.
Post v. Mason, 91 N. Y. 539, 43 Am. Rep. 689, p. 1768.
Post v. Toledo, C. & St. L. R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86, p. 250, 256, 260, 264.
Postel v. Palmer, 71 Iowa, 157, 32 N. W. 257, p. 1338.
Posten v. Miller, 60 Wis. 494, 19 N. W. 540, p. 2432.
Posten v. Posten, 4 Whart. 26, p. 1800.
Postlethwaite v. Rickman, L. R. 35 Ch. Div. 744, p. 275, 276, 278.
Poston v. Balch, 69 Mo. 115, p. 1640, 1646, 1719, 1729.
Poston v. Eubank, 3 J. J. Marsh. 42, p. 2448.
Post's Estate, In re, 30 Misc. Rep. 551, 64 N. Y. Supp. 369, p. 1834.
Poth v. Anstatt, 4 Watts & S. 307, p. 1107.
Potter, In re, L. R. 7 Eq. 484, p. 2612.
Potter v. Ahrens, 110 Cal 674, 43 Pac. 388, p. 737.
Potter v. Brown, 11 R. I. 232, p. 2227.
Potter v. Bunnell, 20 Ohio St. 150, p. 2663.
Potter v. Chapman, Amb. 98, p. 2051.
Potter v. Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322, p. 1900.
Potter v. Everitt, 7 Ir. R. Eq. 152, p. 2736.
Potter v. Fidelity Ins. T. & S. D. Co., 199 Pa. St. 360, 49 Atl. 85, p. 1864.
Potter v. Jacobs, 111 Mass. 32, p. 2781.
Potter v. McDowell, 43 Mo. 93, p. 1270, 1279.
Potter v. Potter, 27 Ohio St. 84, p. 1517, 2727.
Potter v. Richards, 1 Jur., N. S., 462, p. 1684.
Potter v. Sanders, 6 Hare, 1, p. 1198, 1261.
Potter v. Stevens, 40 Mo. 229, p. 2417.
Potter v. Taggart, 59 Wis. 1, 16 N. W. 553, 632, p. 1627.
Potter v. Thornton, 7 R. I. 252, p. 1977.
Potter v. Titcomb, 22 Me. 300, p. 1646.
Potter v. Waller, 2 De Gex & S. 470, p. 2741.
Potter v. Workey, 57 Iowa, 66, 7 N. W. 685, 10 N. W. 298, p. 821, 852.
Potter's Appeal, 56 Conn. 1, 12 Atl. 513, 7 Am. St. Rep. 272, p. 1579, 1582, 1612, 1613.
Potts v. Blackwell, 4 Jones Eq. 58, p. 1227.
Potts v. Fitch, 47 W. Va. 63, 34 S. E. 959, p. 2039.
Potts v. Surr., 34 Beav. 543, p. 1776, 1778, 1784.
Potts v. Whitehead, 20 N. J. Eq. 55, p. 2769, 2779.
Potts's Estate, In re, L. R. 16 Eq. 631, p. 2053.
Poulet v. Johnson, 25 Ga. 403, p. 1144.
Poulter v. Shackel, 39 Ch. Div. 471, 476, p. 2169.
Powdrell v. Jones, 2 Smale & G. 335, p. 952.
Powe v. Cleaver, 2 Brown Ch. 499, p. 943.
Powell v. Adams, 98 Mo. 598, 12 S. W. 295, p. 1588.
Powell v. Aiken, 4 Kay & J. 343, 355, p. 2694.
Powell v. Att'y-Gen., 3 Mer. 48, p. 1941.
Powell v. Bell's Adm'r, 81 Va. 222, p. 1269.
Powell v. Burroughs, 54 Pa. St. 329, 336, p. 740, 747.
Powell v. Campbell, 20 Nev. 232, 19 Am. St. Rep. 350, 28 L. R. A. 615, 20 Pac. 156, p. 1066, 1076.
Powell v. Cleaver, 2 Brown Ch. 499, 517, p. 900.
Powell v. Conant, 33 Mich. 396, p. 2771.
Powell v. Demming, 22 Hun, 235, p. 2300, 2302.
Powell v. Dillon, 2 Ball & B. 416, p. 1025, 1047.
Powell v. Elliot, L. R. 10 Ch. 424, p. 1585, 1607.
Powell v. Evans, 5 Ves. 839, p. 2072.
Powell v. Foster, 59 Ga. 790, p. 2667.
Powell v. Galveston, H. & S. A. R'y Co., (Tex. Civ. App.) 78 S. W. 975, p. 1231.
Powell v. Glover, 3 P. Wms. 252, p. 182, 2032.
Powell v. Hankey, 2 P. Wms. 82, p. 2147.
Powell v. Hargreaves, 3 De Gex, M. & G. 430, p. 2478.

Powell v. Heisler, 16 Oreg. 412, 19 Pac. 109, p. 1510, 1511.
Powell v. Hellicar, 26 Beav. 261, p. 2232, 2243.
Powell v. Howell, 63 N. C. 283, p. 570.
Powell v. Knowler, 2 Atk. 224, p. 675, 1702, 2555.
Powell v. London & Provincial Bank, [1893] 1 Ch. 610, p. 1256.
Powell v. Maguire, 43 Cal. 11, p. 1699.
Powell v. Mayo, 24 N. J. Eq. 178, p. 2749.
Powell v. Monson etc. Mfg. Co., 3 Mason, 347, p. 2017, 2734.
Powell v. Morisey, 98 N. C. 426, 2 Am. St. Rep. 343, 4 S. E. 185, p. 959.
Powell v. Murray, 2 Edw. Ch. 636, 643, p. 2152.
Powell v. National Bank of Commerce, (Colo. App.) 74 Pac. 536, p. 1078.
Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389, p. 2467.
Powell v. Powell, 80 Ala. 11, p. 1754, 2032, 2079, 2080.
Powell v. Powell, 48 Cal. 234, p. 2794.
Powell v. Powell, [1900] 1 Ch. 243, p. 1759, 1778.
Powell v. Powell, Prec. Ch. 278, p. 1461.
Powell v. Powis, 1 Younge & J, 159, p. 362, 453.
Powell v. Quinn, 49 Ga. 523, p. 2658.
Powell v. Redfield, 4 Blatchf. 45, p. 764.
Powell v. Riley, L. R. 12 Eq. 175, p. 2208, 2224.
Powell v. Robins, 7 Ves. 209, p. 2490.
Powell v. Smith, 30 Mich. 451, p. 1405, 1411.
Powell v. Stewart, 17 Ala. 719, p. 2703.
Powell v. Thomas, 6 Hare, 300, p. 648.
Powell v. Trotter, 1 Drew. & S. 388, p. 2430.
Powell v. Tuttle, 3 N. Y. 396, p. 2059.
Powell v. Watson, 6 Ired. Eq. 94, p. 307, 2703.
Powell v. Williams, 14 Ala. 476, 48 Am. Dec. 105, p. 2345, 2399.
Power v. Cassidy, 79 N. Y. 602, 35 Am. Rep. 550, p. 1910, 1934, 1952, 1953, 1968, 1969, 1986, 2305, 2309, 2310.
Power v. Davis, 3 McAr. 153, p. 2494.
Power v. Lester, 23 N. Y. 527, p. 1404, 2360.
Power v. Monitor Ins. Co., 112 Mich. 364, 80 N. W. 111, p. 1158.
Powers, Matter of, 124 N. Y. 361, 26 N. E. 940, p. 2487.
Powers v. Bergen, 6 N. Y. 358, p. 1897.
Powers v. Chaplain, 30 N. J. Eq. 17, p. 1704.
Powers v. Cray, 7 Ga. 206, p. 2799.
Powers v. Hale, 25 N. H. 145, p. 524, 525, 1671.
Powers v. Mayo, 97 Mass. 180, p. 1668.
Powers v. Smith, (Tex. Civ. App.) 29 S. W. 416, p. 1051.
Powers v. State, 129 Ala. 126, 29 South. 784, p. 1034, 1049.
Power's Appeal, 63 Pa. St. 443, p. 1742.
Powerscourt v. Powerscourt, 1 Molloy, 616, p. 1940.
Powers's Appeal, 125 Pa. St. 175, 17 Atl. 254, 11 Am. St. Rep. 882, p. 1449.
Powers's Ex'rs v. Butler's Adm'r, 4 N. J. Eq. 465, p. 2709.
Powys v. Blagrave, 4 De Gex, M. & G. 448, p. 2681.
Powys v. Mansfield, 3 Mylne & C. 359, 374, 376, 6 Sim. 544, p. 897, 899, 902, 909, 934, 937, 947.
Poyer v. Village of Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494, p. 389, 452.
Pralus v. Jefferson etc. Min. Co., 34 Cal. 558, p. 2748, 2750.
Pralus v. Pacific etc. Min. Co., 35 Cal. 30, p. 2748, 2751.
Prather v. Prather, 4 Desaus. Eq. 33, p. 2176.
Prather v. Prather's Adm'r, 11 Gill & J. 170, p. 2703.
Pratt, In re, [1894] 1 Ch. 491, p. 2208.
Pratt v. Bank of Bennington, 10 Vt. 293, 33 Am. Dec. 201, p. 2417.
Pratt v. Barker, 1 Sim. 1, 4 Russ. 507, p. 1728, 1732.
Pratt v. Boody, 55 N. J. Eq. 175, 35 Atl. 1113, p. 353.
Pratt v. Boston etc. R. R., 126 Mass. 443, p. 543, 546, 1253, 1382, 2784.
Pratt v. Brett, 2 Madd. 62, p. 2676, 2682.
Pratt v. Bryant, 20 Vt. 333, p. 2737.
Pratt v. Carroll, 8 Cranch, 47, p. 1603, 1607.

Pratt v. Clark, 57 Mo. 189, p. 2501, 2509.
Pratt v. Colt, 2 Freem. Ch. 139, p. 1839.
Pratt v. Coman, 37 N. Y. 440, p. 1330.
Pratt v. Conway, 148 Mo. 291, 49 S. W. 1078, 71 Am. St. Rep. 602, p. 2408.
Pratt v. Douglas, 38 N. J. Eq. 516, 535, 536, 538, 539, p. 808, 809, 812, 839, 840, 841, 849, 855.
Pratt v. Eaton, 65 Mo. 157, p. 2194.
Pratt v. Eby, 67 Pa. St. 396, p. 2771.
Pratt v. Felton, 4 Cush. 174, p. 824.
Pratt v. Frear, 13 Wis. 462, p. 2435.
Pratt v. Hargreaves, 76 Miss. 955, 71 Am. St. Rep. 551, 25 South. 658, p. 2277, 2304.
Pratt v. Hoag, 5 Duer, 631, p. 1064.
Pratt v. Kendig, 128 Ill. 293, 21 N. E. 495, p. 385, 452.
Pratt v. Northam, 5 Mason, 95, 104, 105, Fed. Cas. No. 11,376, p. 148, 331, 334, 497. 507, 515, 516, 2203, 2204, 2206, 2287, 2294.
Pratt v. Philbrook, 33 Me. 17, p. 1567, 1591, 1594.
Pratt v. Pond, 5 Allen, 59, p. 67.
Pratt v. Short, 79 N. Y. 437, 445-448, 35 Am. Rep. 531, p. 1721.
Pratt v. Sladden, 14 Ves. 193, 198, p. 1986.
Pratt v. Taliaferro, 3 Leigh, 419, 421, 423, 427, 428, p. 185, 604, 621, 2309, 2325.
Pratt v. Taunton Copper Co., 123 Mass. 110, 25 Am. Rep. 37, p. 543, 1252, 1382, 2784.
Pratt v. Thornton, 28 Me. 355, 366, 48 Am. Dec. 492, p. 548, 552, 1856.
Pratt v. Topeka Bank, 12 Kan. 570, p. 1284.
Pratt v. Tuttle, 136 Mass. 233, Ames' Cas. on Trusts, 32, p. 1881.
Pratt v. Vanwyck's Ex'rs, 6 Gill & J. 495, p. 2500.
Pratt Land & Imp. Co. v. McClain, 135 Ala. 452, 33 South. 185, 93 Am. St. Rep. 35, p. 1614.
Pratt's Appeal, 77 Pa. St. 378, 381, p. 1254.
Pratt's Ex'r v. Nixon, 91 Ala. 192, 8 South. 751, p. 2402.
Pray v. Hegeman, 92 N. Y. 508, p. 1896.
Pray v. Mitchell, 60 Me. 430, p. 554.
Preachers' Aid Society v. England, 106 Ill. 125, p. 1853.
Preachers' Aid Soc. v. Rich, 45 Me. 552, 559, p. 550, 1961, 1974.
Prebble v. Boghurst, 1 Swanst. 309, p. 749.
Preddy v. Rose, 3 Mer. 86, 102, p. 195.
Premier Steel Co. v. Yandes, 139 Ind. 307, 38 N. E. 849, p. 2100.
Prendergast v. Prendergast, 3 H. L. Cas. 195, p. 2051.
Prendergast v. Turton, 1 Younge & C. Ch. 98, p. 1788.
Prentice v. Achorn, 2 Paige, 30, p. 1732, 1733.
Prentice v. Duluth etc. Co., 58 Fed. 437, 442, 448, 7 C. C. A. 293, 19 U. S. App. 100, p. 416, 503, 1114, 1342.
Prentice v. Janssen, 79 N. Y. 478, p. 2305, 2309, 2331, 2332, 2333.
Prentice v. Nutter, 25 Minn. 484, p. 2529.
Prentice v. Zane, 2 Gratt. 262, p. 1327.
Presbyterian Board of Foreign Missions v. Culp, 151 Pa. St. 467, 25 Atl. 117, 31 Wkly. Notes Cas. 135, p. 1977.
Prescott v. Heard, 10 Mass. 60, p. 1279.
Prescott v. Johnson, (Minn.) 97 N. W. 891, p. 1779.
Prescott v. Morse, 62 Me. 447, p. 2203, 2204.
Prescott v. Norris, 32 N. H. 101, p. 671, 1719.
Prescott v. Wright, 4 Gray, 461, p. 1588, 1601.
Preservaline Mfg. Co. v. Heller Chem. Co., 118 Fed. 103, p. 669, 1695.
President and Fellows of Yale College, In re, 67 Conn. 257, 34 Atl. 1036, p. 1973.
President etc. v. Cornen, 37 N. Y. 320, p. 1164.
President etc. of Bowdoin College v. Merritt, 75 Fed. 480, p. 1728, 1739.
President of the United States v. Drummond, 7 H. L. Cas. 155, p. 1933, 1945.
Press v. Coke, L. R. 6 Ch. 645, p. 1769.
Press v. Parker, 2 Bing. 456, p. 1547.
Pressed Steel Car Co. v. Eastern R'y Co., 121 Fed. 609, p. 730.

Prest v. Black, 63 Kan. 682, 66 Pac. 1017, p. 1133.
Prestidge v. Cooper, 54 Miss. 74, p. 1806.
Preston v. Brown, 35 Ohio St. 18, p. 2481, 2482.
Preston v. Carr, 1 Younge & J. 179, p. 280.
Preston v. Cole, 64 N. H. 460, 13 Atl. 788, p. 2280.
Preston v. Ellington, 74 Ala. 133, p. 2397, 2498, 2520.
Preston v. Jones, 9 Pa. St. 456, 460, p. 787, 820.
Preston v. Mann, 25 Conn. 118, p. 1438.
Preston v. Morris, 42 Iowa, 549, p. 2417.
Preston v. Preston, 2 Jur., N. S., 1040, p. 2489.
Preston v. Preston, 95 U. S. 200, p. 697.
Preston v. Russell, 71 Vt. 151, 44 Atl. 115, p. 603, 622, 1225, 2560, 2567.
Preston v. Smith, 26 Fed. 884, p. 252.
Preston v. Spaulding, 120 Ill. 209, 10 N. E. 903, p. 1856, 1858.
Preston v. Tubbin, 1 Vern. 286, p. 1065.
Preston v. Whitcomb, 17 Vt. 183, p. 1516.
Preston v. Wilcox, 38 Mich. 578, p. 2106.
Preteca v. Maxwell Land Grant Co., (C. C. A.) 50 Fed. 674, 1 C. C. A. 607, p. 356, 359, 381, 421, 450, 455.
Prettyman v. Baker, 91 Md. 539, 46 Atl. 1020, p. 1971.
Prettyman v. Supervisors, 19 Ill. 406, 71 Am. Dec. 230, p. 409.
Prevost v. Clarke, 2 Madd. 458, p. 1924.
Prewitt v. Coopwood, 30 Miss. 369, p. 1728.
Prewitt v. Trimble, 92 Ky. 176, 36 Am. St. Rep. 586, 17 S. W. 356, p. 1584.
Pribble v. Hall, 13 Bush, 61, p. 2139, 2143, 2147.
Price v. Bassett, 168 Mass. 598, 47 N. E. 243, p. 1155.
Price v. Berrington, 7 Hare, 394, 3 Macn. & G. 486, p. 1725, 1726, 2033.
Price v. Blakemore, 6 Beav. 569, p. 2017.
Price v. Corpor. of Penzance, 4 Hare, 506, 509, p. 2766.
Price v. Dawson, 111 Mich. 279, 69 N. W. 650, p. 1911.
Price v. Dewhurst, 4 Mylne & C. 76, 80, p. 1635.
Price v. Dowdy, 34 Ark. 285, p. 2658.
Price v. Dyer, 17 Ves. 356, p. 1487, 1525.
Price v. Gray, (N. J. Eq.) 34 Atl. 678, p. 1330.
Price v. Johnson Co., 15 Mo. 433, p. 2703.
Price v. Junkin, 4 Watts, 85, 28 Am. Dec. 685, p. 1384.
Price v. Karnes, 59 Ill. 276, p. 2373, 2377.
Price v. Krasuoff, 60 S. C. 172, 38 S. E. 413, p. 1838.
Price v. Lauve, 49 Tex. 74, p. 2526.
Price v. Ley, 4 Giff. 235, 32 L. J. Ch., N. S., 530, p. 1520, 1579.
Price v. Macauley, 2 De Gex, M. & G. 339, 346, p. 1440, 1539, 1584, 1585, 1586, 1590, 1597, 1598.
Price v. McCulloch, 3 Watts & S. (Pa.) 429, 39 Am. Dec. 35, p. 1036.
Price v. McDonald, 1 Md. 403, 412, 54 Am. Dec. 657, p. 985, 991, 997, 1055, 1069, 1146.
Price v. Martin, 46 Miss. 489, p. 1344.
Price v. Maxwell, 28 Pa. St. 23, 35, p. 1933, 1976.
Price v. Methodist Episcopal Church, 4 Ohio, 515, p. 1105.
Price v. Peterson, 38 Ark. 494, p. 2090.
Price v. Planters' Nat. Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214, p. 2183, 2199.
Price v. Price, 1 De Gex, M. & G. 308, p. 1732.
Price v. Reeves, 38 Cal. 457, p. 1897, 2016.
Price v. Sisson, 13 N. J. Eq. 168, 173, 174, p. 1829, 1848, 1884, 1885, 1886, 2631.
Price v. Stratton, (Fla.) 33 South. 644, p. 644.
Price v. Taylor, 28 Pa. St. 95, 70 Am. Dec. 105, p. 1831.
Price v. Trusdell, 28 N. J. Eq. 200, p. 2796.
Price v. Wall's Ex'r, 97 Va. 334, 75 Am. St. Rep. 788, 33 S. E. 599, p. 1105, 1273.

Price v. Williams, 6 Ves. 818, p. 2772.
Price v. Winston, 4 Munf. 63, p. 2601.
Price's Adm'r v. Thompson, 84 Ky. 219, 228, 1 S. W. 408, p. 1750, 1751, 1754.
Price's Estate, In re, (Pa.) 58 Atl. 280, p. 2107.
Price's Trust, In re, L. R. 6 Eq. 460, p. 2109.
Prichard v. Gee, 5 Madd. 364, p. 297.
Prichard v. Sharp, 51 Mich. 432, 16 N. W. 798, p. 1735.
Prickett v. Prickett's Adm'rs, 20 N. J. Eq. 478, p. 2233, 2234, 2241, 2248.
Prickett v. Sibert, 71 Ala. 194, p. 2475, 2498, 2520.
Priddy v. Hartsook, 81 Va. 67, p. 2353.
Priddy v. Rose, 3 Mer. 86, 102, p. 1226, 2097, 2554, 2561.
Pride, In re, [1891] 2 Ch. 135, p. 1411.
Pride v. Andrews, 51 Ohio St. 405, 38 N. E. 84, p. 664.
Pride v. Bubb, L. R. 7 Ch. 64, p. 2142, 2149.
Pride v. Whitfield, (Tex. Civ. App.) 51 S. W. 1100, p. 1328.
Prideaux v. Lonsdale, 1 De Gex, J. & S. 433, p. 1671, 1728, 1738, 1751, 2165.
Priest v. Chouteau, 85 Mo. 398, 55 Am. Rep. 373, p. 1198.
Priest v. Cone, 51 Vt. 495, 31 Am. Rep. 695, p. 2198.
Priest v. Parrot, 2 Ves. Sr. 160, p. 667.
Priest v. Rice, 18 Mass. (1 Pick.) 164, 11 Am. Dec. 156, p. 1274.
Priestly v. Ellis, [1897] 1 Ch. 489, p. 1855.
Priestman v. Tindall, 24 Beav. 244, p. 2092.
Primmer v. Patten, 32 Ill. 528, p. 263.
Primrose v. Bromley, 1 Atk. 89, p. 2794, 2795.
Prince v. Griffin, 27 Iowa, 514, p. 2778.
Prince Albert v. Strange, 1 Macn. & G. 25, 1 Hall & T. 1, 2 De Gex & S. 652, p. 2689.
Princess of Wales v. Lord Liverpool, 1 Swanst. 114, p. 261.
Prindle v. Holcomb, 45 Conn. 111, p. 2263.
Pringle v. Dunkley, 14 Smedes & M. 16, p. 1684.
Pringle v. Dunn, 37 Wis. 449, 460, 461, 464, 465–467, 19 Am. Rep. 772, p. 977, 982, 989, 990, 992, 997, 1050, 1114, 1116, 1119, 1149, 1157, 1166, 1163, 1171, 1344, 1346.
Pringle v. Pringle, 59 Pa. St. 281, p. 1872.
Printers etc. Trades Protection Society, In re, [1899] 2 Ch. 184, p. 1987.
Printup v. Fort, 40 Ga. 276, p. 1560.
Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258, p. 2799.
Prioleau v. United States and Andrew Johnson, L. R. 2 Eq. 659, p. 244, 255, 266.
Prior v. Moore, [1901] 1 Ch. 936, p. 1934.
Prison Charities, In re, L. R. 16 Eq. 129, p. 1942, 1963.
Pritchard v. Ames, Turn. & R. 222, p. 2145.
Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431, p. 1022.
Pritchard v. Elton, 38 Conn. 434, p. 2370.
Pritchard v. Fleetwood, 1 Mer. 54, p. 2658.
Pritchard v. Thompson, 95 N. Y. 76, 47 Am. Rep. 9, p. 1969.
Pritchard v. Todd, 38 Conn. 413, p. 2778.
Pritchett v. Sessions, 10 Rich. L. 293, p. 1168.
Probasco v. Johnson, 2 Disn. 96, 98, p. 2539.
Probasco v. Probasco, 30 N. J. Eq. 108, p. 2659.
Probert v. Clifford, Amb. 6, p. 2164.
Probert v. McDonald, 2 S. Dak. 495, 51 N. W. 212, 39 Am. St. Rep. 796, p. 337.
Proby v. Landor, 28 Beav. 504, p. 1468.
Procter v. Cooper, 2 Drew. 1, 18 Jur. 444, 1 Jur., N. S., 149, p. 1089.
Proctor, Estate of, 103 Iowa, 232, 72 N. W. 516, p. 829.
Proctor v. Ferebee, 1 Ired. Eq. 143, 36 Am. Dec. 34, p. 2325, 2629.
Proctor v. Keith, 12 B. Mon. 252, p. 1440.
Proctor v. Robinson, 35 Beav. 329, 335, p. 1771.

Proctor v. Thrall, 22 Vt. 262, p. 1482.
Produce Exch. Tr. Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162, p. 1175.
Prole v. Soady, 2 Giff. 1, p. 2592.
Proseus v. Porter, 20 App. Div. 44, 46 N. Y. Supp. 656, p. 1866.
Prosser v. Edmonds, 1 Younge & C. 481, p. 2555.
Prosser v. Rice, 28 Beav. 68, 74, p. 972, 1292, 1375.
Protection B. & L. Ass'n v. Chickering, 54 N. J. Eq. 519, 34 Atl. 1083, affirmed on appeal, 55 N. J. Eq. 822, 41 Atl. 1116, p. 1106, 1107, 1135, 1283, 1328.
Protestant Epis. E. Society v. Churchman's Rep's, 80 Va. 718, p. 1971.
Prot. Ref. Dutch Church v. Bogardus, 5 Hun, 304, p. 2695.
Protheroe v. Forman, 2 Swanst. 227, 233, p. 307, 2701.
Proudley v. Fielder, 2 Mylne & K. 57, p. 2162.
Prout v. Cook, [1896] 2 Ch. 808, p. 2436.
Prout v. Hoge, 57 Ala. 28, p. 2417.
Prout v. Lomer, 79 Ill. 331, p. 2796.
Prout v. Roby, 15 Wall. 471, 21 L. ed. 58, p. 2143, 2144.
Prouty v. Clark, 73 Iowa, 55, 34 N. W. 614, p. 2500.
Prouty v. Edgar, 6 Iowa, 353, p. 1833.
Prouty v. Devlin, 118 Cal. 258, 50 Pac. 380, p. 1096, 1144.
Providence Bank v. Wilkinson, 4 R. I. 507, 70 Am. Dec. 160, p. 2637, 2647.
Providence Inst. for Savings v. Taft, 14 R. I. 502, p. 2237, 2240.
Providence Rubber Co. v. Goodyear, 9 Wall. 788, p. 1436.
Providence Tool Co. v. Norris, 2 Wall. 45, p. 1699.
Provident Life & Trust Co. v. Mills, 91 Fed. 435, p. 502.
Provident Loan Trust Co. v. McIntosh, (Kan.) 75 Pac. 498, p. 1587.
Provincial Municipality of Pensacola v. Lehman, 57 Fed. 324, 331, 13 U. S. App. 411, p. 498.
Provost v. Provost, 70 N. Y. 141, p. 1896.
Provost v. Rebman, 21 Iowa, 419, p. 1529.
Prudential Ass. Co. v. Knott, L. R. 10 Ch. 142, p. 2696.
Prudential Ass. Co. v. Thomas, L. R. 3 Ch. 74, p. 2635, 2637, 2703.
Pry v. Pry, 109 Ill. 466, p. 1099, 1113, 1145.
Pryce v. Bury, 2 Drew. 41, 42, p. 2538.
Pryce v. Bury, L. R. 16 Eq. 153, note, p. 2542.
Pryor v. Adams, 1 Coll. 382, 1 Am. Dec. 533, p. 324.
Pryor v. Hill, 4 Brown Ch. 139, p. 646, 2171.
Pryor v. Pryor, 2 De Gex, J. & S. 205, p. 1657.
Public Clearing House v. Coyne, 121 Fed. 927, p. 670.
Public School Trustees v. Anderson, 30 N. J. Eq. 366, p. 2410.
Puckett v. Puckett, 21 Oreg. 370, 28 Pac. 65, p. 1066.
Puckett v. Reed, (Tex. Civ. App.) 22 S. W. 515, p. 1038.
Pudsey Gas Co. v. Corporation of Bradford, L. R. 15 Eq. 167, p. 2677.
Pugh, Ex parte, 1 Drew. 202, 203, p. 646, 2174.
Pugh v. Golden V. R'y, L. R. 15 Ch. Div. 330, p. 2686.
Pugh v. Highley, 152 Ind. 252, 53 N. E. 171, 71 Am. St. Rep. 327, 44 L. R. A. 392, p. 1277.
Pugh v. Holt, 27 Miss. 461, p. 2393, 2522.
Pugh v. Smith, 2 Atk. 43, p. 783.
Pughe v. Coleman, (Tex. Civ. App.) 44 S. W. 576, p. 1161.
Pulford v. Morton, 62 Mich. 25, 28 N. W. 716, p. 2004.
Pullan v. Cincinnati etc. R. R., 4 Biss. 35, p. 2659.
Pullen v. Monk, 82 Me. 412, 19 Atl. 909, p. 1208.
Pullen v. Placer County Bank, 138 Cal. 169, 71 Pac. 83, 94 Am. St. Rep. 19, p. 2283, 2569.
Pullen v. Ready, 2 Atk. 587, 591, p. 1487, 1682.
Pulliam v. Newberry, 41 Ala. 168, p. 1793, 1796.
Pulliam v. Pulliam, 10 Fed. 23, 30, p. 508.
Pulliam v. Taylor, 50 Miss. 551, p. 2788.
Pullin v. Pullin, 3 Bing. 47, p. 1547.
Pullman Palace Car Co. v. Central Transportation Co., 65 Fed. 158, p. 1721.

Pulpress v. African Ch., 48 Pa. St. 204, p. 2051.
Pulsford v. Richards, 17 Beav. 87, 94, 95, 96, p. 1435, 1437, 1583, 1584, 1589, 1605.
Pulteney v. Earl of Darlington, 1 Brown Ch. 223, 236, 237, p. 2329, 2332, 2334.
Pulteney v. Shelton, 5 Ves. 260, p. 268.
Pulteney v. Warren, 6 Ves. 73, 89, p. 2734.
Pulver v. Richardson, 3 Thomp. & C. 436, p. 2462.
Pulvertoft v. Pulvertoft, 18 Ves. 84, 86, p. 1186, 1204, 1805, 1864, 1871.
Pumfrey, In re, 22 Ch. Div. 255, p. 2103.
Pumilia v. De George, (Tex. Civ. App.) 74 S. W. 813, p. 2381.
Pundmann v. Schoeneich, 144 Mo. 149, 45 S. W. 1112, p. 2023.
Purcell, In re, (R. I.) 57 Atl. 377, p. 837.
Purcell v. Goshorn, 17 Ohio, 105, 49 Am. Dec. 448, p. 2726.
Purcell v. McNamara, 14 Ves. 91, p. 1773, 1784.
Purcell v. Purcell, 4 Hen. & M. 507, p. 2176.
Purchase v. N. Y. Exch. Bank, 3 Rob. (N. Y.) 164, p. 2784.
Purdew v. Jackson, 1 Russ. 1, p. 2172.
Purdie v. Whitney, 20 Pick. 25, p. 2050.
Purdy v. Bullard, 41 Cal. 444, p. 2477, 2534.
Purdy v. Huntington, 42 N. Y. 334, 1 Am. Rep. 532, overruling 46 Barb. 389, p. 1303, 1305, 1402, 1404.
Purdy v. Manhattan El. R. R. Co., 13 N. Y. Supp. 295, p. 366.
Purnell v. Vaughan, 82 N. C. 134, p. 1705.
Purnell v. Vaughan, 77 N. C. 268, p. 2677.
Purviance v. Edwards, 17 Fla. 140, p. 2709.
Purvis v. Sherrod, 12 Tex. 140, 159, 160, p. 571, 589, 2302.
Pusey v. Desbouverie, 3 P. Wms. 315, 320, p. 848, 849, 859, 1494, 1499, 1502, 1503, 1785.
Pusey v. Pusey, 1 Vern. 273, 1 Lead. Cas. Eq. 1109, 1114, 1117, p. 234, 2580, 2763.
Pusey v. Gardner, 21 W. Va. 469, p. 1779.
Putman v. New Albany, 4 Biss. 365, p. 494, 495, 497, 517.
Putnam v. Hubbell, 42 N. Y. 106, 1 Am. Lead. Cas. 56–75, p. 1858.
Putnam v. Putnam, 4 Pick. 139–141, p. 534, 539.
Putnam v. Reynolds, 44 Mich. 113, p. 2462.
Putnam v. Ritchie, 6 Paige, 390, 403, p. 2430, 2482.
Putnam v. Tennyson, 50 Ind. 456, p. 2192.
Putnam v. Tyler, 117 Pa. St. 570, 12 Atl. 43, p. 2481.
Putnam Free School v. Fisher, 30 Me. 523, p. 2046.
Putney v. Fletcher, 148 Mass. 247, 19 N. E. 370, p. 2274.
Pybus v. Smith, 3 Brown Ch. 340, note 1, p. 1824, 2156, 2157.
Pye, Ex parte, 18 Ves. 140, 151, 152, 154, 2 Lead. Cas. Eq., 4th Am. ed., 741, p. 868, 893, 894, 896, 897, 899, 900, 901, 910, 1864, 1871.
Pye v. Butterfield, 5 Best & S. 829, 836, p. 258.
Pye v. Daubuz, 2 Dick. 759, p. 2538.
Pyer v. Carter, 1 Hurl. & N. 916, p. 1014.
Pyke, Ex parte, L. R. 8 Ch. Div. 754, 756, 757, p. 667, 672, 675, 1708.
Pyke v. Northwood, 1 Beav. 152, p. 304.
Pylant v. Reeves, 53 Ala. 132, 25 Am. Rep. 605, p. 2498, 2509, 2516.
Pyle, In re, [1895] 1 Ch. 725, p. 2314.
Pyle v. Brenneman, 122 Fed. 787, p. 418, 456.
Pyles v. Brown, 189 Pa. St. 164, 42 Atl. 11, 29 Pittsb. Leg. J., N. S., 311, 43 Wkly. Notes Cas. 433, 69 Am. St. Rep. 794, p. 1108, 1133.
Pyles v. Riverside Furniture Co., 30 W. Va. 123, 2 S. E. 909, p. 1857.
Pym v. Blackburn, 3 Ves. 34, 38, p. 1460, 1518.
Pym v. Bowremare, 3 Swanst. 241, note, p. 2436.

Pym v. Lockyer, 5 Mylne & C. 29, 34, 46, 48, p. 894, 896, 899, 908.
Pym v. Pym, 118 Wis. 662, 96 N. W. 429, p. 2294.
Pyne, In re, [1903] 1 Ch. 83, p. 1959, 1963.
Pyrke v. Waddingham, 10 Hare, 1, p. 2771.

Q.

Quackenboss v. Southwick, 41 N. Y. 117, p. 2107, 2108.
Quan Wye v. Chin Lin Hee, 123 Cal. 185, 55 Pac. 783, p. 1230.
Quarrell v. Beckford, 1 Madd. 369, p. 2432.
Quartz Hill etc. Co. v. Beall, L. R. 20 Ch. Div. 501, 507, p. 2695.
Quebec Bank v. Weyand, 30 Ohio St. 126, p. 2715, 2722.
Queen v. Saddlers' Co., 10 H. L. Cas. 431, p. 1651.
Queen Ins. Co. v. May, (Tex. Civ. App.) 35 S. W. 829, p. 1167.
Quimby v. Wood, 19 R. I. 571, 35 Atl. 149, p. 407, 454.
Quin v. Brittain, Hoff. Ch. 353, p. 2429, 2430.
Quin v. Brittain, 3 Edw. Ch. 314, p. 2428.
Quincy v. Ginsbach, 92 Iowa, 144, 60 N. W. 511, p. 1300.
Quinn v. Green, 1 Ired. Eq. 229, 36 Am. Dec. 46, p. 2648.
Quinn v. Patton, 2 Ired. Eq. 48, p. 2648.
Quinn v. Roath, 37 Conn. 16, 24, p. 662, 1507, 1513, 1517, 1520, 1523, 2767, 2778, 2779.
Quinn v. Shields, 62 Iowa, 129, 49 Am. Rep. 141, 17 N. W. 437, p. 1909.
Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99, p. 1097, 1147.
Quinn's Estate, In re, 144 Pa. St. 444, 22 Atl. 965, p. 2154.
Quisenberry v. Thompson, 19 Ky. L. Rep. 723, 43 S. W. 723, p. 2192.
Quivèy v. Baker, 37 Cal. 465, p. 2726.

R.

Raasch v. Raasch, 100 Wis. 400, 76 N. W. 591, p. 663.
Rabb v. Flenniken, 32 S. C. 189, 10 S. E. 943, p. 2018.
Rabb v. Griffin, 26 Miss. 579, p. 2278.
Raby v. Ridehalgh, 7 De Gex, M. & G. 104, p. 2073.
Race v. Weston, 86 Ill. 91, p. 2770.
Racey v. Racey, (Okl.) 73 Pac. 305, p. 1680, 1700.
Rachel Colvin's Case, 3 Md. Ch. 278, p. 2655.
Rackham v. Siddall, 1 Macn. & G. 607, p. 2046, 2087.
Rackleff v. Norton, 19 Me. 274, p. 1101.
Racouillat v. Sansevain, 32 Cal. 376, p. 2474.
Radburn v. Jervis, 3 Beav. 450, p. 885.
Radcliff v. Rowley, 2 Barb. Ch. 23, p. 2754, 2757.
Radcliffe, In re, [1892] 1 Ch. 227, p. 2054.
Radcliffe v. Fursman, 2 Brown Parl. C. 514, p. 280, 281.
Radcliffe v. Varner, 56 Ga. 222, p. 2707.
Radcliffe v. Warrington, 12 Ves. 326, 332, p. 2767.
Radde v. Norman, L. R. 14 Eq. 348, p. 2690.
Rader v. Neal, 13 W. Va. 373, p. 2771, 2775.
Radford v. Carwile, 13 W. Va. 572, p. 2141, 2152, 2153, 2157, 2184, 2199.
Radford v. Radford, 1 Keen, 486, p. 1545.
Radford v. Willis, L. R. 7 Ch. 7, p. 2143, 2144, 2771.
Radloff v. Haase, 196 Ill. 365, 63 N. E. 729, p. 737.
Raesser v. National Exchange Bank, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979, p. 2570.
Raffensberger v. Callison, 28 Pa. St. 246, p. 1528.
Rafferty v. King, 1 Keen, 601, 617, p. 2436.
Rafferty v. Mallory, 3 Biss. 362, 368, 369, p. 1050, 1057.
Ragan v. Allen, 7 Hun, 537, p. 2493, 2494.
Ragan v. Simpson, 27 Wis. 355, p. 2376.
Ragland v. Green, 14 Smedes & M. 194, p. 2277.
Ragland v. Justices etc., 10 Ga. 65, p. 2358.
Ragsdale v. Hagy, 9 Gratt. 409, p. 1226, 2705.

Ragsdale v. Holmes, 1 S. C. 91, p. 2287.
Ragsdale v. Ragsdale, 68 Minn. 92, 24 Am. St. Rep. 256, 8 South. 315, p. 2036.
Raht v. Sevier Mining & Milling Co., 18 Utah, 290. 54 Pac. 889, p. 1787.
Raikes v. Boulton, 29 Beav. 41, p. 2223.
Raikes v. Ward, 1 Hare, 445, 447, 454, p. 175, 1909, 1919.
Railroad Co. v. Barker, 29 Pa. St. 160, 162, p. 1330.
Railroad Co. v. Dubois, 12 Wall. 47, p. 1444, 1435.
Railroad Co. v. Soutter, 13 Wall. 517, 524. p. 1503.
Railton v. Matthews, 10 Clark & F. 934, p. 1622.
Raines v. Corbin, 24 Ga. 185, p. 826.
Raines v. United States, 11 Ct. of Cl. 648, p. 2563.
Rajah of Coorg v. East India Co., 25 L. J. Ch. 345, 365, p. 282.
Rakestraw v. Brewer, 2 P. Wms. 511, p. 2027.
Rakestraw v. Hamilton, 14 Iowa, 147, p. 2499.
Rakestraw v. Lanier, 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154, p. 1690. 1691.
Ralston v. Turpin, 25 Fed. 7, 18, affirmed, 129 U. S. 663, 9 Sup. Ct. 420, p. 1736, 1765, 1775.
Ramey v. Allison, 64 Tex. 697, p. 1494.
Ramirez v. Smith, 94 Tex. 184, 59 S. W. 258, reversing 56 S. W. 254, p. 1022, 1028, 1031, 1039, 1052.
Rammelsberg v. Mitchell, 29 Ohio St. 22, p. 2049.
Ramsay v. Joyce, 1 McMull. Eq. 236, 249, 37 Am. Dec. 550, p. 2166.
Ramsbottom v. Gosdon, 1 Ves. & B. 165, p. 1519.
Ramsbottom v. Parker, 6 Madd. 6, p. 1732, 1734.
Ramsdell v. Edgarton, 8 Met. 227, 41 Am. Dec. 503, p. 1790.
Ramsdell v. Fuller, 28 Cal. 37, 87 Am. Dec. 103, p. 2757.
Ramsden v. Dyson, L. R. 1 H. L. Cas. 129, p. 648. 2482.
Ramsden v. Hylton, 2 Ves. Sr. 304, p. 1494, 1499.
Ramsey v. Bader, 67 Mo. 476, p. 454.
Ramsey v. Fouts, 67 Ind. 78, p. 2268.
Ramsey v. Hanlon, 33 Fed. 425, p. 2310, 2312.
Ramsey v. Ramsey, 123 N. C. 685, 31 S. E. 835, p. 1910.
Ramsey v. Smith, 32 N. J. Eq. 28. p. 2725.
Ramsey's Appeal. 2 Watts, 228, 27 Am. Dec. 301, p. 2787.
Ramshire v. Bolton, L. R. 8 Eq. 294, p. 1630.
Ramuz v. Crowe, 1 Ex. 167, p. 1463.
Rancliffe v. Lady Parkyns, 6 Dow. 149, 179, p. 782, 785, 788, 794, 809, 812, 815, 857, 1390.
Rand v. Redington, 13 N. H. 72, 76, 77, 38 Am. Dec. 475, p. 527, 528, 1653.
Randal v. Sackett, 77 N. Y. 480, p. 2608, 2609.
Randall v. Bradley, 65 Me. 43, 48, p. 550, 2434.
Randall v. Constans, 33 Minn. 329, 23 N. W. 530, p. 1890.
Randall v. Dusenbury, 63 N. Y. 645, 7 Jones & S. 174, p. 2102.
Randall v. Errington, 10 Ves. 423, 426, 428, p. 1753, 1757, 1758, 1787.
Randall v. Ghent, 19 Ind. 271, p. 2726.
Randall v. Howard, 67 U. S. (2 Black) 585, p. 664.
Randall v. Latham, 36 Conn. 48, p. 2773.
Randall v. Lingwall. 43 Oreg. 383, 73 Pac. 1, p. 1030, 1034, 1048.
Randall v. Mallett, 14 Me. 51, p. 2447.
Randall v. Morgan, 12 Ves. 67, p. 2592.
Randall v. Morrell, 17 N. J. Eq. 343, 346, p. 2656.
Randall v. Payne, 1 Brown Ch. 55, p. 1681.
Randall v. Phillips, 3 Mason, 378, 384, p. 681.
Randall v. Pryor, 4 Ohio, 424, p. 2631.
Randall v. Randall, 135 Ill. 398, 20 Am. St. Rep. 373, 25 N. E. 780, p. 1926.
Randall v. Russell, 3 Mer. 190, 193, p. 2205.
Randall v. Sanders, 87 N. Y. 578, p. 2376, 2379.
Randall v. Silverthorn, 4 Pa. St. 173, p. 981, 987, 1009, 1014, 1108, 1148.

Randall v. Snyder, 64 Tex. 350, p. 1066, 1071.
Randall v. Willis, 5 Ves. 261, p. 1679.
Randle v. Carter, 62 Ala. 95, p. 2216, 2255, 2256, 2658.
Randolph v. East Birmingham Land Co., 104 Ala. 355, 53 Am. St. Rep. 64, 16 South. 126, p. 1198, 2078.
Randolph v. Webb, 116 Ala. 135, 22 South. 550, p. 1328, 1330.
Rands v. Kendall, 15 Ohio St. 671, p. 2351.
Ranger v. Great Western R'y Co., 5 H. L. Cas. 72, 73, p. 748, 750, 1524.
Ranken v. Alfaro, L. R. 5 Ch. Div. 786, p. 2478, 2569.
Ranken v. Patton, 65 Mo. 378, p. 1738, 1775.
Rankin v. Anderson, 8 Baxt. 240, p. 2288.
Rankin v. Coar, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661, p. 1030, 1031, 1037.
Rankin v. Huskisson, 4 Sim. 13, p. 2675, 2698.
Rankin v. Major, 9 Iowa, 297, p. 2392.
Rankin v. Maxwell, 2 A. K. Marsh. 488, 12 Am. Dec. 431, p. 345.
Rankin v. Metzger, 69 App. Div. 264, 74 N. Y. Supp. 649, p. 1834.
Rankin v. Mortimere, 7 Watts, 372, p. 1487, 2370, 2373.
Rankin v. Porter, 7 Watts, 387, p. 1108.
Rankin v. Weguelin, 27 Beav. 308, 309, p. 2236.
Rankin Manuf. Co. v. Bishop, 137 Ala. 271, 34 South. 991, p. 1021.
Rannels v. Isgrigg, 99 Mo. 19, 12 S. W. 343, p. 2024.
Ranney v. Bader, 67 Mo. 476, 480, p. 407, 408.
Ranney v. Hardy, 43 Ohio St. 157, 1 N. E. 523, p. 1022, 2351.
Ranney v. McMullen, 5 Abb. N. C. 246, p. 2409.
Ransdel v. Moore, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753, p. 1903.
Ransom, In re, 17 Fed. 331, p. 1849.
Ransom v. Brown, 63 Tex. 188, p. 2522.
Ransome v. Burgess, L. R. 3 Eq. 773, p. 2618, 2619.
Ranson v. Brinkerhoff, (N. J.) 38 Atl. 919, p. 1157.
Ransone v. Frayser's Ex'rs, 10 Leigh, 592, p. 2372.
Rapalee v. Stewart, 27 N. Y. 310, p. 1438, 1858.
Rapalje v. Norsworthy, 1 Sand. Ch. 399, p. 1775.
Raphael's Trust, In re, L. R. 9 Eq. 233, p. 2109.
Rapier v. Gulf City Paper Co., 77 Ala. 126, p. 2377.
Rapps v. Gottlieb, 142 N. Y. 164, 36 N. E. 1052, affirming 67 Hun, 115, 22 N. Y. Supp. 52, p. 1231, 1297.
Rardin v. Walpole, 38 Ind. 146, p. 2796.
Rarick v. Vandevier, 11 Colo. App. 116, 52 Pac. 743, p. 1994.
Raritan Waters Co. v. Veghte, 21 N. J. Eq. 463, 478, 19 N. J. Eq. 142, p. 981, 987, 1014, 1147, 1452.
Rashdall v. Ford, L. R. 2 Eq. 750, 754, p. 1560.
Ratcliff v. Sangston, 18 Md. 383, p. 2046.
Ratcliffe v. Barnard, L. R. 6 Ch. 652, 654, p. 1005, 1011, 1016, 1287, 1295, 1296, 2539.
Rath v. Vanderlyn, 44 Mich. 597, p. 2729.
Rathbone, In re, L. R. 2 Ch. Div. 483, p. 2109.
Rathbone v. Clark, 9 Paige, 648, p. 2447.
Rathbone v. Parkersburg Gas Co., 31 W. Va. 798, 8 S. E. 570, p. 2121.
Rathbone v. Warren, 10 Johns. 587, 595, 596, p. 211, 224, 227, 302, 321, 326, 331, 460, 461.
Rathbun v. Rathbun, 6 Barb. 98, 105, p. 1894, 1989.
Rathburn v. Colton, 15 Pick. 471, p. 2480, 2481.
Ratliff v. Davis, 38 Miss. 107, p. 2277.
Ratterman v. Campbell, (Ky.) 80 S. W. 1155, p. 1672.
Rau v. Von Zedlitz, 132 Mass. 164, p. 1738.
Rauer v. Fay, 110 Cal. 361, 42 Pac. 902, p. 1226.
Rauh v. Waterman, 29 Ind. App. 344, 61 N. E. 743, 63 N. E. 42, p. 1645.
Ravenscroft v. Jones, 32 Beav. 669, 4 De Gex, J. & S. 224, p. 904, 905, 909.
Ravenshaw v. Hollier, 7 Sim. 3, p. 2471.

Rovenswood, S. & G. R'y Co. v. Woodyard, 46 W. Va. 558, 33 S. E. 285, p. 2032, 2042.
Rawden v. Shadwell, Amb. 268, 269, p. 276, 1676, 1705, 1708, 1709, 1711.
Rawdon v. Blatchford, 1 Sand. Ch. 344, p. 1609, 1618.
Rawiszer v. Hamilton, 51 How. Pr. 297, p. 1411.
Rawley v. Ginnever, [1897] 2 Ch. 503, p. 2101.
Rawlings v. Adams, 7 Md. 26, p. 1849.
Rawlings's Ex'r v. Landes, 2 Bush, 158, p. 2315.
Rawlins v. Burgis, 2 Ves. & B. 387, p. 621.
Rawlins v. Powel, 1 P. Wms. 297, p. 876.
Rawlins v. Wickham, 3 De Gex & J. 304, 312, 313, 316, 318, 320, 321, 322, 1 Giff. 355, p. 1565, 1566, 1568, 1580, 1581, 1583, 1584, 1587, 1590, 1598, 1605, 1633, 1781.
Rawlinson v. Clarke, 14 Mees. & W. 187, p. 737, 747.
Raworth v. Marriott, 1 Mylne & K. 643, p. 1768.
Raworth v. Parker, 2 Kay & J. 163, p. 1856.
Rawson v. Harger, 48 Iowa 269, p. 1640.
Rawson v. Lampman, 5 N. Y. 456, p. 1894.
Rawzee v. Pierce, 75 Miss. 846, 23 South. 307, 40 L. R. A. 402, p. 1966.
Ray, Ex parte, 1 Madd. 199, p. 2145.
Ray v. Bush, 1 Root, 81, p. 1098.
Ray v. Roe, 2 Blackf. 258, 18 Am. Dec. 159, p. 1077.
Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447, p. 1872, 1876, 1906, 1912.
Ray v. Stanhope, 2 Ch. Rep. 159, p. 920.
Ray v. Tatum, 72 Fed. 112, 30 U. S. App. 635, p. 499.
Raybold v. Raybold, 20 Pa. St. 308, p. 1902.
Raybould, In re, [1900] 1 Ch. 199, p. 2066.
Rayburn v. Davisson, 22 Oreg. 242, 29 Pac. 738, p. 1023, 1155.
Rayburn v. Hurd, 20 Oreg. 229, 25 Pac. 635, p. 1229.
Rayl v. Rayl, 58 Kan. 585, 50 Pac. 501, p. 1907.
Rayley v. Best, 1 Russ. & M. 659, p. 2738.
Raymond v. Flavel, 27 Oreg. 219, 40 Pac. 158, p. 980, 993, 994, 1338, 1339.
Raymond v. Morrison, 59 Iowa, 371, 13 N. W. 332, p. 1338.
Raymond v. Post, 25 N. J. Eq. 447, p. 2749.
Raymond v. Sellick, 10 Conn. 480, p. 2233, 2238.
Raymond v. Squire, 11 Johns. 47, p. 157, 2549.
Raymond v. Whitehouse, 119 Iowa, 132, 93 N. W. 292, p. 1406.
Raymond's Case, Lord, Cas. t. Talb. 58, p. 2621.
Raynard v. Spence, 4 Beav. 103, p. 837.
Rayne v. Baker, 1 Giff. 241, p. 1201, 1202, 1293, 1347, 2519.
Rayner v. Julian, 2 Dick. 677, p. 379.
Raynett v. Balus, 54 Mich. 469, 20 N. W. 533, p. 1725.
Raynor v. Drew, 72 Cal. 307, 13 Pac. 866, p. 2381, 2429, 2430.
Raynor v. Lyons, 37 Cal. 452, p. 2381.
Raynor v. Raynor, 21 Hun, 36, p. 2443.
Raynor v. Timerson, 51 Barb. 517, p. 1437.
Rea v. Copelin, 47 Mo. 76, p. 2032.
Rea v. Crossman, 95 Ill. App. 70, p. 1032, 1033, 1048.
Rea v. Haffenden, 116 Cal. 596, 48 Pac. 716, p. 1096, 1125.
Rea v. Longstreet, 54 Ala. 291, p. 2757.
Rea v. Wilson, 112 Iowa, 517, 84 N. W. 539, p. 1268, 1271, 1272.
Read v. Cather's Adm'rs, 18 W. Va. 263, p. 2494.
Read v. Citizens' St. R. Co., 110 Tenn. 316, 75 S. W. 1056, p. 2054.
Read v. Gaillard, 2 Desaus. Eq. 552, 2 Am. Dec. 696, p. 2475.
Read v. Huff, 40 N. J. Eq. 229, p. 2001.
Read v. Mosby, 87 Tenn. 759, 11 S. W. 940, 5 L. R. A. 122, p. 1742, 2572, 2574, 2575, 2586.
Read v. Patterson, 44 N. J. Eq. 211, 6 Am. St. Rep. 877, 14 Atl. 490, p. 1890, 2051.
Read v. Robinson, 6 Watts & S. 329, p. 1856.

Read v. Stedman, 26 Beav. 495, p. 1989.
Read v. Williams, 125 N. Y. 560, 21 Am. St. Rep. 748, 26 N. E. 730, p. 1890, 1952, 1969, 2301, 2325.
Reade v. Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520, p. 1800, 2141.
Reade v. Woodruffe, 24 Beav. 421, p. 283.
Ready v. Huebner, 46 Wis. 692, 32 Am. Rep. 749, p. 1707.
Ready v. Noakes, 29 N. J. Eq. 497, p. 1665, 1666, 2770.
Reagan v. First Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701, p. 983. 1156.
Real Del Monte etc. Co. v. Pond etc. Co., 23 Cal. 82, p. 2694.
Real Estate Sav. Inst. v. Collonious, 63 Mo. 290, 294, p. 1064, 1075, 1147.
Real Estate Trust Co. v. Balch, 13 Jones & S. 528, p. 2725.
Rearich v. Swinehart, 11 Pa. St. 233, 51 Am. Dec. 540, p. 1507.
Reasoner v. Edmundson, 5 Ind. 393, p. 1106, 2358.
Reaves v. Garrett, 34 Ala. 563, p. 848, 855.
Reay v. Butler, 69 Cal. 572, 579, 580, 11 Pac. 463, p. 566, 1603.
Receivers of N. J. etc. R'y v. Wortendyke, 27 N. J. Eq. 658, p. 2796.
Receivers of People's Bank v. Paterson Gas Light Co., 23 N. J. L. 283, p. 2662.
Rector v. Collins, 46 Ark. 167, 55 Am. Rep. 571, p. 1486, 1487.
Rector v. Fitzgerald, 59 Fed. 808, 811, 812, 19 U. S App. 423, 8 C. C. A. 277, p. 1072.
Rector etc. of Univ. of Virginia v. Snyder, 100 Va. 567, 42 S. E. 337, p. 1602.
Redd v. Davis, 59 Ga. 823. p. 2266.
Redd v. Jones, 30 Gratt. 123, p. 1774.
Reddel v. Dobree, 10 Sim. 244, p. 2242, 2243.
Redden v. Miller, 95 Ill. 336, p. 1145.
Reddick v. Gressman, 49 Mo. 389, p. 2350.
Reddington v. Lanahan, 59 Md. 429, p. 252.
Rede v. Oakes, 4 De Gex, J. & S. 505, p. 2771.
Redfearn v. Craig. 57 S. C. 534, 35 S. E. 1024, p. 2406.
Redfield v. Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889, p. 1519.
Redfield v. Supervisors, Clarke Ch. 42, p. 2639.
Redford v. Gibson, 12 Leigh, 332, p. 2504.
Redgrave v. Hurd, L. R. 20 Ch. Div. 1, 13, 14, p. 1590, 1597, 1599.
Redin v. Branhan, 43 Minn. 283, 45 N. W. 445, p. 1297.
Redman v. Redman, 1 Vern. 348, p. 1678.
Redman v. Sanders, 2 Dana, 68, p. 2347.
Redmond v. Endfield Mfg. Co., 13 Abb. Pr., N. S., 332, p. 2660.
Redmond v. Excelsior Sav. etc. Assn., 194 Pa. St. 643, 45 Atl. 422, 75 Am. St. Rep. 714, p. 1452.
Redmond v. Packenham, 66 Ill. 434, p. 2753, 2754, 2756.
Red River Val. L. & I. Co. v. Smith, 7 N. Dak. 236, 74 N. W. 194, p. 1027, 1028, 1047, 1170.
Reece v. Trye, 1 De Gex & S. 273, p. 2763.
Reech v. Kennigate, Amb. 67, 1 Ves. Sr. 123, p. 1653, 2035.
Reed v. Aubrey, 91 Ga. 435, 44 Am. St. Rep. 49, 17 S. E. 1022, p. 1761.
Reed v. Austin's Heirs, 9 Mo. 722, 45 Am. Dec. 336, p. 1273, 1280.
Reed v. Breeden, 61 Pa. St. 460, p. 2779.
Reed v. Calderwood, 32 Cal. 109, p. 2748, 2752.
Reed v. Coale, 4 Ind. 283, p. 1113.
Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663, p. 1220.
Reed v. Crapo, 127 Mass. 39, p. 1435.
Reed v. Dickerman, 12 Pick. 145, 146, 149, p. 809, 820, 824.
Reed v. Eastman, 50 Vt. 67, p. 1706.
Reed v. Equitable F. & M. Ins. Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496, p. 1159, 1161.
Reed v. Exum, 84 N. C. 430, p. 1734.
Reed v. Gannon, 3 Daly, 414, p. 1324, 1326, 1373.
Reed v. Gannon, 50 N. Y. 345, 349, 350, p. 1004, 1007, 1031.
Reed v. Harris, 7 Sim. 639, p. 2655.
Reed v. Johnson, 24 Me. 322, 325, p. 554.
Reed v. Kemp, 16 Ill. 445, p. 1115.

Reed v. McCourt, 41 N. Y. 435, p. 1437.
Reed v. Minell, 30 Ala. 61, p. 1648.
Reed v. Newton, 22 Minn. 541, p. 2722.
Reed v. Norris, 2 Mylne & C. 361, 375, p. 1761, 2793.
Reed v. Ownby, 44 Mo. 204, p. 1101.
Reed v. Peper etc. Co., 2 Mo. App. 82, p. 1698, 1700.
Reed v. Reber, 69 Ill. 240, p. 2756.
Reed v. Reed, 31 Fed. 49, 53, p. 510.
Reed v. Reed, 75 Me. 264, p. 2370.
Reed v. Reed, 12 Pa. St. 117, p. 2781.
Reed v. Reed, 10 Pick. 398, p. 2432.
Reed v. Reed, 9 Watts, 263, p. 825.
Reed v. Robertson, 45 Mo. 580, p. 586.
Reed v. Rochford, 62 N. J. Eq. 186, 50 Atl. 70, p. 2383.
Reed v. Sidener, 32 Ind. 373, p. 1561.
Reed v. Smith, 14 Ala. 380, p. 1384.
Reed v. Spaulding, 42 N. H. 114, p. 2237.
Reed v. Stouffer, 56 Md. 236, p. 2043.
Reed v. Timmins, 52 Tex. 84, p. 2090, 2130.
Reed v. Tyler, 56 Ill. 288, p. 651, 2756.
Reed v. Vannorsdale, 2 Leigh, 569, p. 1872.
Reed v. Vidal, 5 Rich. Eq. 289, p. 2772.
Reed v. Warble, 10 Paige, 409, p. 1224.
Reed v. Warner, 5 Paige, 650, p. 1764, 1772.
Reed v. Whitney, 7 Gray, 533, p. 536, 1849.
Reeder v. Nay, 95 Ind. 164, p. 2499, 2512.
Reed or Harmon's Estate, In re, 45 App. Div. 196, 61 N. Y. Supp. 50, p. 2072.
Reel v. Wilson, 64 Iowa, 13, 19 N. W. 814, p. 2435.
Rees v. Berrington, 2 Ves. 540, 2 Lead. Cas. Eq., 4th Am. ed., 1867, 1870, 1896, p. 77, 304, 635.
Rees v. City of Watertown, 19 Wall. 121, p. 703.
Rees v. Livingston, 41 Pa. St. 113, p. 1846.
Rees v. Ludington, 13 Wis. 276, 80 Am. Dec. 741, p. 1281, 1284.
Rees v. Smith, 1 Ohio, 124, 13 Am. Dec. 599, p. 345.
Rees v. Waters, 9 Watts, 90, p. 2176.
Rees v. Watertown, 19 Wall. 121, p. 703.
Reese v. Bank of Commerce, 14 Md. 271, 74 Am. Dec. 536, p. 1228, 1229.
Reese v. Board of Police etc., 49 Miss. 639, p. 2762.
Reese v. Bradford, 13 Ala. 837, p. 148, 215, 219.
Reese v. Burts, 39 Ga. 565, p. 2530.
Reese v. Reese, 41 Md. 554, p. 2769.
Reese v. Wyman, 9 Ga. 430, 439, p. 1583.
Reese Mining Co. v. Smith, L. R. 4 H. L. 64, p. 1567, 1573.
Reese River etc. Co. v. Atwell, L. R. 7 Eq. 347, p. 1801.
Reese River Mining Co., In re, L. R. 2 Ch. 604, 609, p. 1572, 1573.
Reeve v. Bonwill, 5 Del. Ch. 1, p. 1729.
Reeve v. Kennedy, 43 Cal. 643, p. 1086.
Reeve v. Parkins, 2 Jacob & W. 390, p. 2670.
Reeve v. Whitmore, 4 De Gex, J. & S. 1, 16–18, p. 2577, 2586.
Reeves v. Ayers, 38 Ill. 418, p. 1019.
Reeves v. Baker, 18 Beav. 372, p. 1908, 1925.
Reeves v. Cooper, 12 N. J. Eq. 223, p. 2709.
Reeves v. Evans, (N. J. Eq.) 34 Atl. 477, p. 1328, 2383.
Reeves v. Howard, 118 Iowa, 121, 91 N. W. 896, p. 1736, 1779.
Reeves v. Kimball, 40 N. Y. 299, 304, 311, p. 1225, 1228, 1236, 1239, 2775.
Reeves v. Lisle, [1902] App. Cas. 461, p. 2371.
Reeves v. Morgan, 48 N. J. Eq. 415, 21 Atl. 1040, p. 78, 1463, 1464.
Reeves v. Pierce, 64 Kan. 502, 67 Pac. 1108, p. 2020, 2023.
Reeves v. Scully, Walk. Ch. 248, p. 1227.
Refield v. Ferrell, 27 Ark. 534, p. 2498.
Regby v. Connol, L. R. 14 Ch. Div. 482, 491, p. 668.
Regents Canal Co. v. Ware, 23 Beav. 575, p. 2319.
Reggett v. Findlater, L. R. 17 Eq. 29, p. 2690.
Reg. v. Bullivant, [1900] 2 Q. B. 163, 69 L. J., Q. B., 657, 82 L. T., N. S., 493, p. 278.
Regina Music Box Co. v. T. G. Otto & Son, 124 Fed. 747, p. 501.

Rehden v. Wesley, 29 Beav. 213, 215, p. 2058, 2090.
Rehoboth Chapel, In re, L. R. 19 Eq. 180, p. 2073.
Reichenbach v. Sage, 13 Wash. 364, 43 Pac. 354, 52 Am. St. Rep. 51, p. 740.
Reichert v. McClure, 23 Ill. 516, p. 1272.
Reichert v. Neuser, 93 Wis. 513, 67 N. W. 939, p. 1052, 1056.
Reickhoff v. Brecht, 51 Iowa, 633, 2 N. W. 522, p. 2024, 2032.
Reid v. Bank of Mobile, 70 Ala. 199, p. 1163.
Reid v. Burns, 13 Ohio St. 49, p. 2729.
Reid v. Campbell, Meigs, 378, 388, p. 825.
Reid v. Fitch, 11 Barb. 399, p. 701, 958, 2024.
Reid v. Flippen, 47 Ga. 273, p. 1565.
Reid v. Gifford, Hopk. Ch. 416, 419, 420, p. 397, 399, 451, 453, 2686.
Reid v. Gordon, 35 Md. 174, p. 2055.
Reid v. Kleyensteuber, (Ariz.) 60 Pac. 899, p. 1099, 1114.
Reid v. Lamar, 1 Strob. Eq. 27, 37, p. 2154.
Reid v. Langlois, 1 Macn. & G. 627, p. 277.
Reid v. Middleton, Turn. & R. 455, p. 2658.
Reid v. Reid, 25 Beav. 469; 478, p. 794, 1657.
Reid v. Reid, 33 Ch. Div. 220, p. 2174.
Reid v. Reid, 38 Ga. 24, p. 2653.
Reid v. Reid, 12 Rich. Eq. 213, p. 1902.
Reid v. Shergold, 10 Ves. 370, 380, p. 960, 961, 1468, 2156.
Reid v. Sprague, 72 N. Y. 457, 462, p. 1241.
Reid v. Welsh, 11 Bush, 450, p. 1861.
Reid, Murdock & Co. v. Lloyd, 52 Mo. App. 278, p. 983.
Reid, Murdock & Co. v. Sheffy, 75 Ill. App. 136, p. 1062, 1067, 1068, 1078.
Reid's Adm'r v. Blackstone, 14 Gratt. 363, p. 1926.
Reiff v. Horst, 52 Md. 255, p. 1905, 1912.
Reiff v. Strite, 54 Md. 298, p. 2312.
Reigard v. McNeil, 38 Ill. 400, p. 2369.
Reilley v. Roberts, 34 N. J. Eq. 294, p. 2765.
Reilly v. Cullen, 101 Mo. App. 32, 74 S. W. 370, p. 2374.
Reilly v. Mayer, 12 N. J. Eq. 55, p. 2455.
Reily v. Miami etc. Co., 5 Ohio, 333, p. 2515.
Reily v. Monck, 3 Ridg. App. 205, 244, 247, 261, p. 1681.
Reimers v. Druce, 23 Beav. 145, p. 1451.
Reineman v. Robb, 98 Pa. St. 474, p. 1297.
Reiner v. Marquis of Salisbury, L. R. 2 Ch. Div. 378, p. 256.
Reinhardt v. Gartrell, 33 Ark. 727, p. 2258, 2259.
Reinhardt v. Wendeck, 40 Mo. 577, p. 2740.
Reitz v. Reitz, 80 N. Y. 538, reversing 14 Hun, 536, p. 1764, 2004.
Rejah v. East India Co., 35 Eng. L. & Eq. 283, p. 274.
Relfe v. Relfe, 34 Ala. 500, 504, 73 Am. Dec. 467, p. 2533.
Remington v. Foster, 42 Wis. 608, 609, p. 468.
Remington v. Higgins, 54 Cal. 620, p. 2745.
Remington v. Irwin, 14 Pa. St. 143, 145, p. 761.
Remington Paper Co. v. O'Dougherty, 81 N. Y. 474, 484, p. 1639, 2679, 2728, 2729, 2756.
Remnie v. Ritchie, 12 Clark & F. 204, p. 1847, 2156.
Remsen v. Hay, 2 Edw. Ch. 535, p. 2371.
Renard v. Brown, 7 Nebr. 499, p. 2437.
Renard v. Clink, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692, p. 1495, 1499.
Rendall v. Rendall, 1 Hare, 152, p. 2655.
Rendell v. Scott, 70 Cal. 514, 11 Pac. 779, p. 1564.
Rendlesham v. Woodford, 1 Dow. 249, p. 806.
Renick v. Dawson, 55 Tex. 102, p. 1276.
Rennie v. Young, 2 De Gex & J. 136, p. 1438, 1451, 2482.
Rennyson v. Rozell, 106 Pa. St. 412, p. 558.
Reno v. Moss, 120 Pa. St. 49, p. 559.
Renshaw v. First Nat. Bank, (Tenn. Ch. App.) 63 S. W. 194, p. 1900.

Renshaw v. Gans, 7 Pa. St. 119, p. 1507.
Rensselaer etc. R. R. v. Miller, 47 Vt. 146, p. 2103.
Renton v. Chaplain, 9 N. J. Eq. 62, p. 2656.
Renz v. Stoll, 94 Mich. 377, 34 Am. St. Rep. 358, 54 N. W. 276, p. 1902.
Reorganized Church of Jesus Christ of Latter Day Saints v. Church of Christ, 60 Fed. 937, 946, p. 1356.
Repp v. Lesher, 27 Ind. App. 360, 61 N. E. 609, p. 2005.
Repp v. Repp. 12 Gill & J. 341, p. 2500.
Reppetoe v. Dwyer, 65 Tex. 703, p. 1066.
Republic of Costa Rica v. Erlanger, L. R. 1 Ch. Div. 171, L. R. 19 Eq. 33, p. 266, 272, 273, 289.
Republic of Peru v. Weguelin, L. R. 20 Eq. 140, p. 266.
Reservoir Co. v. Chase, 14 Conn. 123, p. 1493.
Respass v. Breckenridge's Heirs, 2 A. K. Marsh. 581, p. 2742.
Respass v. Zorn, 42 Ga. 389, p. 223.
Reubens v. Joel, 13 N. Y. 488, 493, p. 586.
Revalk v. Kraemer, 8 Cal. 66, 71, 68 Am. Dec. 304, p. 458, 2716, 2719.
Revell v. Hussey, 2 Ball & B. 280, 287, 288, p. 621, 2770.
Revels v. Revels, 64 S. C. 256, 42 S. E. 111, p. 1739.
Revett v. Harvey, 1 Sim. & St. 502, p. 1752, 1774, 1775.
Reviere v. Chambliss, (Ga.) 48 S. E. 122, p. 2569.
Rex v. Newman, 1 Lev. 284, p. 1945.
Rexford v. Rexford, 7 Lans. 6, p. 692, 695.
Rexroad v. Wells, 13 W. Va. 812, p. 2300.
Reybold v. Herdman, 2 Del. Ch. 34, p. 2765.
Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350, p. 353, 2421.
Reynard v. Spence, 4 Beav. 103, p. 850, 855.
Reynell v. Reynell, 10 Beav. 21, p. 1919.
Reynell v. Sprye, 10 Beav. 51, 11 Beav. 618, p. 278, 282.
Reynell v. Sprye, 1 De Gex, M. & G. 656, 660, 679, 688, 689, 691, 708, 709, 710, p. 286, 671, 664, 1566, 1568, 1569, 1581, 1584, 1587, 1588, 1590, 1601, 1633, 1702, 1716, 2555.
Reynell v. Sprye, 8 Hare, 222, 254, 255, p. 1499, 1501.
Reynish v. Martin, 3 Atk. 330, 333, p. 1682, 1683, 2204.
Reynolds v. Ætna Life Ins. Co., 28 App. Div. 591, 51 N. Y. Supp. 446, p. 2008.
Reynolds v. Blaisdell, 23 R. I. 16, 49 Atl. 42, p. 2000.
Reynolds v. Brandon, 3 Heisk. 593, p. 2141, 2155.
Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 339, 341–345, 346, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535, 544–549, p. 242, 244, 246, 251, 253, 257, 260, 271, 275, 284, 285, 526.
Reynolds v. Canal etc. Co., 30 Ark. 520, p. 2345.
Reynolds v. Crawfordsville Bank, 112 U. S. 410, 5 Sup. Ct. 216, p. 499.
Reynolds v. Cridge, 131 Pa. St. 189, 18 Atl. 1010, p. 2101.
Reynolds v. Dietz, 39 Nebr. 180, 58 N. W. 89, p. 2406.
Reynolds v. Ellis, 103 N. Y. 116, 8 N. E. 392, 57 Am. Rep. 701, p. 2473.
Reynolds v. First Nat. Bank, 112 U. S. 410, 5 Sup. Ct. 212, 216, p. 504.
Reynolds v. Godlee, Johns. 536, 582, p. 2328.
Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459, p. 1191.
Reynolds v. Haskins, 68 Vt. 426, 35 Atl. 349, p. 1271.
Reynolds v. Hooker, (Vt.) 56 Atl. 988, p. 1516, 1527.
Reynolds v. Kingsbury, 15 Iowa, 238, p. 1114.
Reynolds v. Kirk, 105 Ala. 446, 17 South. 95, p. 1019.
Reynolds v. Nelson, 6 Madd. 18, p. 2779.
Reynolds v. O'Neil, 26 N. J. Eq. 223, p. 2762.
Reynolds v. Pitt, 19 Ves. 134, 140, p. 632, 717, 752, 758, 759.
Reynolds v. Reynolds, 61 S. C. 243, 39 S. E. 391, p. 1836, 1881, 2488, 2493.

Reynolds v. Ruckman, 35 Mich. 80, p. 977, 982, 984, 985, 986, 994, 1009, 1146.
Reynolds v. Strong, 10 N. Dak. 81, 85 N. W. 987, 88 Am. St. Rep. 680, p. 2585.
Reynolds v. Sumner, 126 Ill. 58, 9 Am. St. Rep. 523, and note, 18 N. E. 334, 1 L. R. A. 327, p. 1994.
Reynolds v. Torin, 1 Russ. 129, 133, p. 819, 820, 837.
Rhame v. Rhame, 1 McCord's Eq. 197, 16 Am. Dec. 597, p. 2177.
Rhea v. Dick, 34 Ohio St. 420, p. 2750.
Rhea v. Hooper, 73 Tenn. (5 Lea) 390, p. 216.
Rhea v. Tucker, 56 Ala. 450, p. 1995, 1999.
Rheel v. Hicks, 25 N. Y. 289, p. 1477.
Rhett v. Mason's Ex'r, 18 Gratt. 541, p. 1926.
Rhoades v. Rhoades, 88 Ill. 139, p. 2486.
Rhode Island etc. Bank v. Hawkins, 6 R. I. 198, p. 2684.
Rhodes v. Bate, L. R. 1 Ch. 252, p. 1671, 1734, 1738, 1748, 1751.
Rhodes v. Beauvoir, 6 Bligh, 195, p. 1771.
Rhodes v. Buckland, 16 Beav. 212, p. 2436.
Rhodes v. Canfield, 8 Paige, 545, p. 1263.
Rhodes v. Childs, 64 Pa. St. 18, p. 1432, 2234, 2238, 2247, 2570.
Rhodes v. Gibbs, 39 Tex. 432, p. 2198.
Rhodes v. Outcalt, 48 Mo. 367, p. 1147.
Rhodes v. Rhodes, 44 Ch. Div. 94, p. 1726, 2605, 2622.
Rhodes v. Rhodes, 3 Sand. Ch. 279, 284, p. 2782.
Rhodes v. Rhodes, 88 Tenn. (4 Pickle) 637, 13 S. W. 590, p. 1960, 1977.
Ribon v. R. R. Cos., 16 Wall. 446, p. 2118.
Ricard v. Sanderson, 41 N. Y. 179, p. 2405.
Ricaud, Estate of, In re, Myrick's Prob. Rep. 158, p. 844.
Riccard v. Prichard, 1 Kay & J. 277, p. 2567.
Rice v. Boston etc. Aid Soc., 56 N. H. 191, p. 886, 888.
Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 61, 9 N. E. 420, p. 1725.
Rice v. Bunce, 49 Mo. 231, 234, 8 Am. Rep. 129, p. 1429, 1438, 1442, 1444.
Rice v. Cribb, 12 Wis. 179, p. 2417.
Rice v. Dewey, 54 Barb. 455, p. 1295.
Rice v. Downing, 12 B. Mon. 44, p. 2793.
Rice v. Ehele, 55 N. Y. 518, p. 293.
Rice v. Gilbert, 173 Ill. 348, 50 N. E. 1087, affirming 72 Ill. App. 649, p. 1222.
Rice v. Gordon, 11 Beav. 265, p. 1667.
Rice v. Groffman, 56 Mo. 434, 435, p. 1435.
Rice v. Hoffman, 35 Md. 344, p. 2193.
Rice v. Noakes, [1900] 2 Ch. 445, p. 2370.
Rice v. Pennypacker, 5 Del. Ch. 33, p. 1994.
Rice v. R. R. Bank, 7 Humph. 39, p. 2709.
Rice v. Railroad Co., 32 Ohio St. 380, 30 Am. Rep. 610, p. 2197.
Rice v. Rice, 2 Drew. 1, 73, p. 689, 691, 1028, 1029, 1183, 1187, 1188, 1189, 1235, 1261, 1265, 1267, 1296.
Rice v. Rice, 36 Fed. 858, 860, p. 2503, 2505, 2514.
Rice v. Rice, 4 Pick. 349, p. 2373, 2377.
Rice v. Rigley, 7 Idaho, 115, 61 Pac. 290, p. 2000.
Rice v. Rockefeller, 134 N. Y. 174, 30 Am. St. Rep. 658, 31 N. E. 907, 17 L. R. A. 237, p. 659.
Rice v. St. Paul etc. R. R., 24 Minn. 464, p. 2359.
Rice v. Sanders, 152 Mass. 108, 24 N. E. 1079, 23 Am. St. Rep. 804, 8 L. R. A. 315, p. 2408.
Rice v. Smith, 9 Iowa, 570, 576, p. 406.
Rice v. Stone, 1 Allen, 566, p. 2552.
Rice v. Winters, 45 Nebr. 517, 63 N. W. 830, p. 2422, 2425.
Rice's Appeal, 79 Pa. St. 108, p. 2796.
Rich v. Braxton, 158 U. S. 375, 406, 15 Sup. Ct. 1006, 39 L. ed. 1022, p. 516.
Rich v. Bray, 37 Fed. 273, 2 L. R. A. 225, p. 509.
Rich v. Cockell, 9 Ves. 369, 375, p. 796, 799, 2139, 2142, 2148.
Rich v. Doane, 35 Vt. 125, p. 2372.
Rich v. Jackson, 4 Brown Ch. 514, 6 Ves. 334. p. 1521.
Rich v. Rich, 12 Minn. 468, p. 2194.

Rich v. Roberts, 48 Me. 548, p. 1146.
Rich v. Whitfield, L. R. 2 Eq. 583, p. 2309, 2310.
Rickard, In re, 31 Beav. 244, p. 1934.
Richards v. Att'y-Gen., 6 Moore P. C. C. 381, p. 2319.
Richards v. Barrett, 5 Ill. App. 510, p. 2653, 2658.
Richards v. Chambers, 10 Ves. 580, p. 2156.
Richards v. Chave, 12 Ves. 462, p. 2655.
Richards v. Collins, 45 N. J. Eq. 283, 14 Am. St. Rep. 726, 17 Atl. 831, p. 2616.
Richards v. Daily, 34 Iowa, 427, 429, p. 1234.
Richards v. Delbridge, L. R. 18 Eq. 11, 13, p. 1866, 1870, 1876, 1985, 1986.
Richards v. Donner, 72 Cal. 207, 13 Pac. 584, p. 1729.
Richards v. Fisher, 8 W. Va. 55, p. 2533.
Richards v. Griffith, 92 Cal. 493, 27 Am. St. Rep. 156, 28 Pac. 484, p. 1277.
Richards v. Griggs, 16 Mo. 416, 57 Am. Dec. 240, p. 1216.
Richards v. Humphreys, 15 Pick. 133, 135, 136, p. 896, 911, 914, 917, 943, 947.
Richards v. Jackson, 18 Ves. 472, 474, p. 273, 280.
Richards v. McPherson, 74 Ind. 158, p. 2499, 2513.
Richards v. Revitt, L. R. 7 Ch. Div. 224, p. 1200.
Richards v. Salter, 6 Johns. Ch. 445, p. 2635, 2637, 2647.
Richards v. Shingle etc. Co., 74 Mich. 57, 41 N. W. 860, p. 2500.
Richards v. Snyder, 11 Oreg. 501, 6 Pac. 186, p. 1333, 1338, 1356, 1391.
Richards v. Waller, 49 Nebr. 639, 68 N. W. 1053, p. 1227.
Richards' Appeal, 57 Pa. St. 105, 98 Am. Dec. 202, p. 2667.
Richardson, In re, [1900] 2 Ch. 778, p. 1839.
Richardson v. Barrick, 16 Iowa, 407, p. 2369, 2376.
Richardson v. Bates, 8 Ohio St. 257, 264, p. 93, 2722.
Richardson v. Bowman, 40 Miss. 782, p. 2501.
Richardson v. Brooks, 52 Miss. 118, 123, p. 222, 1643.
Richardson v. Campbell, 34 Nebr. 181, 51 N. W. 753, 33 Am. St. Rep. 633, p. 734.
Richardson v. Chickering, 41 N. H. 380, 77 Am. Dec. 769, p. 1388.
Richardson v. Crandall, 48 N. Y. 348, p. 1700, 1701.
Richardson v. Day, 20 S. C. 418, p. 1995.
Richardson v. De Giverville, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426, p. 2140, 2153.
Richardson v. Draper, 87 N. Y. 337, p. 2609.
Richardson v. Duncan, 3 N. H. 508, p. 1736.
Richardson v. Elphinstone, 2 Ves. 463, p. 875.
Richardson v. Eveland, 126 Ill. 37, 18 N. E. 308, 1 L. R. A. 203, p. 894, 917, 945.
Richardson v. Green, 61 Fed. 423, 429, 15 U. S. App. 488, 9 C. C. A. 565, 159 U. S. 264, 15 Sup. Ct. 1042, p. 509.
Richardson v. Greese, 3 Atk. 64, 65, 68, p. 872, 873, 877.
Richardson v. Haney, 76 Iowa, 101, 40 N. W. 115, p. 1372.
Richardson v. Hockenhull, 85 Ill. 124, p. 1403.
Richardson v. Horton, 6 Beav. 185, p. 684, 2608.
Richardson v. Hutchins, 68 Tex. 81, 3 S. W. 276, p. 2089, 2142.
Richardson v. Inglesby, 13 Rich. Eq. 59, p. 1909.
Richardson v. Knight, 69 Me. 285, 289, p. 553, 2272.
Richardson v. Levi, 67 Tex. 359, 364, 3 S. W. 444, p. 1342.
Richardson v. Linney, 7 B. Mon. 571, 574, p. 644, 651, 1775, 2775.
Richardson v. McKim, 20 Kan. 346, p. 2392.
Richardson v. Marqueze, 59 Miss. 80, 42 Am. Rep. 353, p. 1857.
Richardson v. Mattison, 5 Biss. 31, p. 270.
Richardson v. Means, 22 Mo. 495, 498, p. 586.
Richardson v. Morton, L. R. 13 Eq. 411, p. 2486.

Richardson v. Peacock, 28 N. J. Eq. 151, 26 N. J. Eq. 40, p. 2675.
Richardson v. Richardson, L. R. 3 Eq. 686, p. 1867, 1868, 1870, 1875, 1876.
Richardson v. Rust, 9 Paige, 243, p. 2561.
Richardson v. Seever's Adm'r, 84 Va. 259, 270, 4 S. E. 712, p. 1909.
Richardson v. Smallwood, Jacob, 552. p. 1797.
Richardson v. Smart, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488, p. 1739.
Richardson v. Smith, L. R. 5 Ch. 648, p. 649, 2773.
Richardson v. Spencer, 18 B. Mon. 450, p. 1758.
Richardson v. Taylor, 45 Ark. 472, p. 1994.
Richardson v. Walton, 49 Fed. 888, p. 662.
Richardson v. White, 167 Mass. 58, 44 N. E. 1072, p. 1878, 2560, 2563.
Richardson v. Woodbury, 43 Me. 206, 210, p. 548, 549, 550, 553.
Richart v. Richart, 30 Iowa, 465, p. 848, 849.
Riches v. Owen, L. R. 3 Ch. 820, p. 2660.
Richeson v. Richeson, 2 Gratt. 497, p. 1270.
Richi v. Chattanooga Brewing Co., 105 Tenn. 651, 58 S. W. 646, p. 224, 338, 340.
Richmond v. Dubuque etc. R. R., 33 Iowa, 422, 487, 488, p. 384, 425, 451, 2761, 2773.
Richmond v. Ogden St. R'y Co., (Oreg.) 74 Pac. 333, p. 1489, 1491.
Richmond & Lexington T. Co. v. Rogers, 7 Bush. 532, 535, p. 585.
Richmond Enquirer Co. v. Robinson, 24 Gratt. 548, p. 1470, 2711.
Richmond Mfg. Co. v. Atlantic etc. Co., 10 R. I. 106, 14 Am. Rep. 658, p. 2687.
Richmond's Appeal, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85. p. 1751.
Richolson v. Freeman, 56 Kan. 463, 43 Pac. 772, p. 983.
Richter v. Leiby, 99 Wis. 512, 75 N. W. 82, p. 2294.
Richter v. Poppenhausen, 42 N. Y. 373, p. 682, 2607.
Richter v. Selin, 8 Serg. & R. 425, 440, p. 615, 2774.
Rickard, In re, 31 Beav. 244, p. 176.
Rickards v. Gledstanes, 3 Giff. 298, p. 1152, 1213.
Ricker v. Pratt, 48 Ind. 73, p. 2719.
Rickett v. Johnson, 8 Cal. 34, 36, p. 458, 492, 2719.
Ricketts v. Jolliff, 62 Miss. 440, p. 1725.
Ricks v. Broyles, 78 Ga. 610, 6 Am. St. Rep. 280, 3 S. E. 772, p. 2058.
Ricks v. Doe, 2 Blackf. 346, p. 1145.
Rico v. Spence, 21 Cal. 504, p. 2748.
Riddell v. Munro, 49 Minn. 532, 52 N. W. 141, p. 1335.
Riddell v. Riddell, (Nebr.) 97 N. W. 609, p. 2572.
Ridden v. Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684, p. 2231, 2237, 2244.
Riddle v. Cameron, 50 Ala. 263, p. 2762.
Riddle v. Cutter, 49 Iowa, 547, p. 1886.
Riddle v. Emerson, 1 Vern. 108, p. 1905.
Riddle v. George, 58 N. H. 25, p. 1263.
Rider v. Johnson, 20 Pa. St. 190, 193, p. 1224, 1229, 1294.
Rider v. Kidder, 10 Ves. 360, 366, 368, p. 1711, 1716, 1992, 1995, 1996, 1997, 2001.
Rider v. Powell, 28 N. Y. 310, p. 1494, 1518, 1523, 1541, 1560.
Ridges v. Morrison, 1 Brown Ch. 388, p. 886.
Ridgeway v. Bank of Tenn., 11 Humph. 523, 525, p. 2709.
Ridgeway v. Darwin, 8 Ves. 65, p. 2623.
Ridgeway v. Holliday, 59 Mo. 444, p. 1050, 1060, 1147, 1338, 1343.
Ridgeway v. Newbold, 1 Harr. (Del.) 385, p. 2736.
Ridgway v. Morrison, 28 Ind. 201, p. 1562.
Ridgway v. Sneyd, Kay, 627, p. 1508.
Ridgway's Appeal, 15 Pa. St. 177, 53 Am. Dec. 586, p. 1108, 1121.
Ridings v. Johnson, 128 U. S. 212, 217, 9 Sup. Ct. 72, 74, p. 494.
Ridley, In re, L. R. 11 Ch. Div. 645, p. 2158.
Ridley v. Ridley, 34 L. J. Ch. 462, p. 1753.
Ridout v. Earl of Plymouth, 2 Atk. 104, p. 2164.

Ridout v. Lewis, 1 Atk. 269, p. 2163.
Rieg v. Burnham, 55 Mich. 39, 20 N. W. 708, 21 N. W. 431, p. 2041.
Riegel v. American L. Ins. Co., 140 Pa. St. 193, 21 Atl. 392, 23 Am. St. Rep. 225, 11 L. R. A. 857, p. 1550.
Riehl v. Evansville Foundry Ass'n, 104 Ind. 70, 3 N. E. 633, p. 2030.
Rife v. Geyer, 59 Pa. St. 393, 396, 98 Am. Dec. 35, 351, p. 1830, 1840, 1846.
Rigby v. Connol, L. R. 14 Ch. Div. 482, 491, p. 1688, 1696.
Rigby v. Great West. R'y, 2 Phill. Ch. 44, p. 2676.
Rigden v. Vallier, 3 Atk. 735, 2 Ves. Sr. 252, 257, 258, p. 680, 681, 1824.
Riggins v. Adair, 105 Ga. 727, 31 S. E. 743, p. 1881.
Riggs v. American Tract Society, 95 N. Y. 503, p. 1727.
Riggs v. Union Life Ins. Co., (C. C. A.) 129 Fed. 207, p. 1640.
Righter v. Forrester, 1 Bush, 278, p. 1271.
Righton v. Righton, 36 L. J. Ch. 61, p. 2319.
Rigler v. Light, 90 Pa. St. 235, p. 1285.
Rigley, Ex parte, 19 Ves. 463, p. 2059.
Rigney v. Lovejoy, 13 N. H. 247, p. 2417.
Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425, 429, p. 1449, 1450.
Riker v. Leo, 115 N. Y. 98, 21 N. E. 719, p. 1929.
Riley v. Bell, 120 Iowa, 618, 95 N. W. 170, p. 1577.
Riley v. Jordan, 122 Mass. 231, p. 1702.
Riley v. Martinelli, 97 Cal. 575, 32 Pac. 599, 33 Am. St. Rep. 209, 21 L. R. A. 33, p. 1268, 1277, 1278, 1993.
Riley v. Pehl, 23 Cal. 70, p. 2756.
Riley v. Pierce, 50 Ala. 93, p. 2189.
Rilf v. Eberly, 23 Iowa, 467, p. 1648.
Rimmer v. Webster, [1902] 2 Ch. 163, p. 1248.
Rinchey v. Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 31 N. Y. 140, p. 2791.
Rindge v. Baker, 57 N. Y. 209, 15 Am. Rep. 475, p. 236.
Rindskopf v. Myers, 87 Wis. 80, 57 N. W. 967, p. 983.
Rindskopf v. Platto, 29 Fed. 130, p. 252.
Rinehardt v. Reifers, 158 Ind. 675, 64 N. E. 459, p. 1343.
Rinehart v. Long, 95 Mo. 396, 8 S. W. 559, p. 424.
Ring v. Richardson, 3 Keyes, 450, p. 1136.
Ring v. Steele, 3 Keyes, 450, p. 1358, 1359.
Ringgold v. Bryan, 3 Md. Ch. 488, p. 981, 1019, 2500, 2505.
Ringgold v. Ringgold, 1 Har. & G. 11, 18 Am. Dec. 250, p. 1754, 1755, 2061, 2066, 2095, 2096.
Ringgold v. Waggoner, 14 Ark. 69, p. 982.
Ringo v. Binns, 35 U. S. (10 Pet.) 269, p. 212, 1763.
Rinker v. Bissell, 90 Ind. 375, p. 2108.
Riopelle v. Doellner, 26 Mich. 102, p. 67, 228, 251, 259, 466, 468.
Riordan v. Banon, 10 Ir. Eq. 469, p. 2037.
Ripley v. Crooker, 47 Me. 370, 378, 74 Am. Dec. 491, p. 554.
Ripley v. Harris, 3 Biss. 199, Fed. Cas. No. 11,853, p. 2389.
Ripley v. McGavic, 120 Iowa, 52, 94 N. W. 452, p. 2061.
Ripley v. Waterworth, 7 Ves. 425, 435, p. 1985, 2324.
Ripperdon v. Cozine, 8 B. Mon. 465, p. 2521.
Rippetoe v. Dwyer, 65 Tex. 703, p. 1076.
Ripple v. Ripple, 1 Rawle, 386, pp. 985, 986, 1148.
Rippon v. Norton, 2 Beav. 63, p. 1841.
Rippy v. Gant, 4 Ired. Eq. 543, p. 1728.
Riser v. Walton, 78 Cal. 490, 21 Pac. 362, p. 1624.
Rishton v. Cobb, 9 Sim. 615, 619, p. 1681.
Risk v. Hoffman, 69 Ind. 137, p. 2407, 2408, 2410, 2414.
Risley v. Brown, 67 N. Y. 160, p. 2608.
Risley v. Indianapolis etc. R. R., 62 N. Y. 240, p. 2085.
Risley v. Phœnix Bank, 11 Hun, 484, p. 2563.
Risley v. Smith, 64 N. Y. 576, p. 2561.
Rison v. Knapp, 1 Dill. 186, 201, p. 1385.

Rison v. Moon, 91 Va. 384, 22 S. E. 165, p. 352.
Ritch v. Eichelberger, 13 Fla. 169, p. 2447, 2454.
Ritchie v. Couper, 28 Beav. 344, p. 1764.
Ritchie v. Griffiths, 1 Wash. 429, 25 Pac. 341, 22 Am. St. Rep. 155, 12 L. R. A. 384, p. 1097, 1118, 1119.
Ritson v. Dodge, 33 Mich. 463, p. 2779.
Ritter v. Bruss, 116 Wis. 55, 92 N. W. 361, p. 2200.
Ritter v. Cost, 99 Ind. 80, p. 2446.
Ritter v. Phillips, 53 N. Y. 586, p. 2411.
Ritter v. Ritter, 42 Mich. 108, p. 2729.
Ritter's Appeal, 59 Pa. St. 9, p. 1872.
River v. Plankroad Co., 30 Ala. 92, p. 1625.
Rivers v. A. & C. Wright & Co., 117 Ga. 81, 43 S. E. 499, p. 195, 2560, 2563.
Rivers v. Gooding, 43 S. C. 428, 21 S. E. 310, p. 836.
Rivers v. Rivers, 38 Fla. 65, 20 South. 807, p. 1325.
Rizer v. Perry, 58 Md. 112, p. 2325.
Roach v. Caraffa, 85 Cal. 437, 25 Pac. 22, p. 1906.
Roach v. Duckworth, 61 How. Pr. 128, p. 2709.
Roach v. Karr, 18 Kan. 529, 26 Am. Rep. 788, p. 1161, 1163, 1166, 1171.
Roach v. Riverside W. Co., 74 Cal. 263, 15 Pac. 776, p. 1086.
Roach v. Trood, L. R. 3 Ch. Div. 429, p. 1657.
Roadley v. Dixon, 3 Russ. 192, 200, 201, 202, p. 819, 820, 834, 835, 837.
Roane v. Baker, 120 Ill. 308, 11 N. E. 246, p. 1281.
Roane v. Rives, 15 Ark. 328, 330, p. 2144.
Roanoke Brick & Lime Co. v. Simmons, (Va.) 20 S. E. 955, p. 983, 1052.
Roanoke St. R'y Co. v. Hicks, 96 Va. 510, 32 S. E. 295, p. 265, 321.
Robb v. Green, [1895] 2 Q. B. 315, 317–320, p. 1765.
Robb v. Halsey, 11 Smedes & M. 140, p. 2710.
Robb v. Mann, 11 Pa. St. 300, 51 Am. Dec. 551, p. 615, 2774.
Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, p. 1641.
Robbins v. Bacon, 3 Me. 346, p. 2561.
Robbins v. Davis, 1 Blatch. 238, p. 286, 287.
Robbins v. Fitz, 33 N. Y. 420, p. 1858.
Robbins v. Hope, 57 Cal. 493, p. 1597.
Robbins v. Larson, 69 Minn. 436, 72 N. W. 456, 65 Am. St. Rep. 572, p. 1302.
Robbins v. Moore, 129 Ill. 30, 21 N. E. 934, p. 1314, 1371, 1373, 1376, 1440.
Robbins v. Robbins, 89 N. Y. 251, 256, 258, p. 1996, 2004.
Robbins v. Sand Creek T. Co., 34 Ind. 461, p. 416.
Robbins v. Springfield F. & M. Ins. Co., 149 N. Y. 477, 44 N. E. 159, p. 1158.
Robbins v. Welch, 68 Ala. 393, p. 1691.
Robb's Appeal, 41 Pa. St. 45, p. 701, 958, 2024.
Roberson v. Downing Co., (Ga.) 48 S. E. 429, p. 1121.
Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 546, 64 N. E. 442, 89 Am. St. Rep. 828, 59 L. R. A. 478, p. 50, 60.
Robert v. Corning, 89 N. Y. 225, p. 2305.
Robert v. Hodges, 16 N. J. Eq. 299, p. 2791.
Robert v. West, 15 Ga. 122, 123, p. 2153, 2161, 2191.
Roberts, Ex parte, 3 Atk. 308, 310, p. 2033.
Roberts, In re, [1902] 2 Ch. 834, p. 2222.
Roberts v. Anderson, 3 Johns. Ch. 371, 18 Johns. 515, p. 2706.
Roberts v. Bourne, 23 Me. 165, 39 Am. Dec. 614, p. 1101, 1132.
Roberts v. Carter, 38 N. Y. 107, p. 1233.
Roberts v. Croft, 2 De Gex & J. 1, 5, 6, 24 Beav. 223, p. 1005, 1008, 1011, 1016, 1045, 1261, 1296, 2539.
Roberts v. Dillon, 3 Daly, 50, p. 1385.
Roberts v. Dixwell, 1 Atk. 607, 609, p. 168, 1849, 2162.
Roberts v. Doan, 180 Ill. 187, 54 N. E. 207, p. 1265.
Roberts v. Eberhardt, Kay, 148, p. 2656, 2657.
Roberts v. Fitzallen, 120 Cal. 482, 52 Pac. 818, p. 2413.

Roberts v. Fleming, 53 Ill. 196, 198, p. 1065, 2430.
Roberts v. Francis, 2 Heisk. 127, p. 2534.
Roberts v. Grace, 16 Minn. 126, p. 1146.
Roberts v. Kelsey, 38 Mich. 602, p. 2774.
Roberts v. McMahan, 4 G. Greene, 34, p. 2381.
Roberts v. Moseley, 64 Mo. 507, p. 1147, 1754, 2048, 2051, 2080, 2085.
Roberts v. Northern Pac. R. R. Co., 158 U. S. 1, 30, 15 Sup. Ct. 756, 766, p. 503, 504.
Roberts v. Oppenheim, L. R. 26 Ch. Div. 484, 724, p. 271, 288.
Roberts v. Pocock, 4 Ves. 150, p. 2218.
Roberts v. Roberts, 3 P. Wms. 66, 74, p. 1678, 1716.
Roberts v. Rose, 2 Humph. 145, 147, p. 2518.
Roberts v. Smith, 1 Sim. & St. 513, p. 819, 837.
Roberts v. Spicer, 5 Madd. 491, p.
Roberts v. Stevens, 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266, p. 1844, 1852, 2143.
Roberts v. Sutherlin, 4 Oreg. 219, p. 2361, 2364.
Roberts v. Taliaferro, 7 Iowa, 110, 112, p. 212, 213.
Roberts v. Tunstall, 4 Hare, 257, p. 1742, 1784.
Roberts v. Walker, 101 Mo. 597, 14 S. W. 631, p. 2143.
Roberts v. Ware, 40 Cal. 634, p. 1992.
Roberts v. Watkins, 46 L. J. Q. B. 552, p. 2183.
Roberts v. Weatherford, 10 Ala. 72, p. 896, 910.
Roberts v. Wilcoxen, 36 Ark. 355, p. 2190.
Roberts v. Wynn, 1 Ch. Rep. 125, p. 1635.
Robertson v. Bingley, 1 McCord Eq. 333, p. 283.
Robertson v. Bradford, 73 Ala. 116, p. 651.
Robertson v. Broadbent, 8 App. Cas. (H. L.) 812, p. 2216.
Robertson v. City of Rockford, 21 Ill. 451, p. 407.
Robertson v. Cooper, 1 Ind. App. 78, 27 N. E. 104, p. 1226, 1228, 1229.
Robertson v. Guerin, 50 Tex. 317, p. 1056, 2393.
Robertson v. Deatherage, 82 Ill. 511, p. 2794.
Robertson v. McClay, (Tex. Civ. App.) 48 S. W. 35, p. 1103, 1280, 1274.
Robertson v. McPherson, 4 Ind. App. 595, 31 N. E. 478, p. 216.
Robertson v. Milburn, 1 Lea, 635, p. 2155.
Robertson v. Read, 52 Ark. 381, 14 S. W. 387, 20 Am. St. Rep. 188, p. 2428, 2430.
Robertson v. Rentz, 71 Minn. 489, 74 N. W. 133, p. 1097, 1133.
Robertson v. Rowell, 158 Mass. 94, 32 N. E. 898, 35 Am. St. Rep. 466, p. 2193.
Robertson v. Shewell, 15 Beav. 277, p. 287.
Robertson v. Stephens, 1 Ired. Eq. 247, 251, p. 845.
Robertson v. Stuhlmiller, 93 Iowa, 326, 61 N. W. 986, p. 2407.
Robertson v. Walker, 51 Ala. 484, p. 2725.
Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870, p. 1035, 1099, 1145.
Robertson v. Wilburn, 1 Lea, 633, p. 2143, 2198.
Roberts's Appeal, 92 Pa. St. 407, p. 2082, 2090.
Robeson v. Pittenger, 2 N. J. Eq. 57, 32 Am. Dec. 412, p. 2685.
Robeson v. Roberts, 20 Ind. 155, 83 Am. Dec. 308, p. 1226.
Robeson v. Robeson, (N. J. Eq.) 23 Atl. 612, p. 1297.
Robey etc. Iron-works v. Ollier, L. R. 7 Ch. 695, p. 2478, 2569.
Robins v. Swain, 68 Ill. 197, p. 1400, 1403.
Robinson, In re, 37 N. Y. 261, p. 2108.
Robinson, Matter of, 37 N. Y. 261, p. 2045.
Robinson v. Amateur Ass'n, 14 S. C. 148, p. 1667.
Robinson v. Addison, 2 Beav. 515, p. 2209.
Robinson v. Appleby, 69 App. Div. 509, 75 N. Y. Supp. 1, p. 1867.
Robinson v. Appleton, 124 Ill. 276, 15 N. E. 761, p. 339, 2530, 2534.
Robinson v. Atlantic etc. R'y, 66 Pa. St. 160, p. 2662.

Robinson v. Baugh, 31 Mich. 290, p. 2685.
Robinson v. Black Diamond Coal Co., 50 Cal. 460, 57 Cal. 412, 40 Am. Rep. 118, p. 2686.
Robinson v. Bland, 2 Burr. 1077, p. 1676, 1721.
Robinson v. Braiden, 44 W. Va. 183, 28 S. E. 798, p. 343.
Robinson v. Brems, 90 Ill. 351, p. 2191.
Robinson v. Briggs, 1 Smale & G. 188, p. 1159, 1174.
Robinson v. Brooks, 31 Wash. 60, 71 Pac. 721, p. 663.
Robinson v. Buck, 71 Pa. St. 386, 391, p. 560, 845, 2166.
Robinson v. Campbell, 3 Wheat. 212, 223, 323, 4 L. ed. 372, p. 495, 497, 501.
Robinson v. Centenary Fund & Preachers' Aid Soc., 68 N. J. L. 723, 54 Atl. 416, p. 730.
Robinson v. Cheney, 17 Nebr. 673, 24 N. W. 378, p. 756.
Robinson v. Commercial & F. Bank, (Va.) 17 S. E. 739, p. 1273.
Robinson v. Cox, 9 Mod. 263, p. 667, 669.
Robinson v. Craig, 16 Ala. 50, p. 258.
Robinson v. Crenshaw, 84 Va. 348, 5 S. E. 222, p. 1052, 1054.
Robinson v. Dart's Ex'rs, Dud. Eq. 128, 31 Am. Dec. 569, p. 2154.
Robinson v. Dauchy, 3 Barb. 20, p. 1385.
Robinson v. Dickey, 143 Ind. 205, 52 Am. St. Rep. 417, 42 N. E. 679, p. 235.
Robinson v. Farrelly, 16 Ala. 472, p. 2370.
Robinson v. Geldard, 3 Macn. & G. 735, 744, 745, p. 2217.
Robinson v. Gilbreth, 4 Bibb, 184, p. 325.
Robinson v. Governors of London Hospital, 10 Hare, 19, p. 2326.
Robinson v. Harkin, [1896] 2 Ch. 415, p. 2059, 2066, 2092.
Robinson v. Hersey, 60 Me. 225, p. 2103.
Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233, p. 1793, 1796.
Robinson v. Howes, 20 N. Y. 84, p. 1233.
Robinson v. Internat. Life Ins. Co., 42 N. Y. 54, 66, 1 Am. Rep. 400, p. 1696.
Robinson v. Kalbfleisch, 5 Thomp. & C. 212, p. 1699.
Robinson v. Kitchen, 35 Eng. L. & Eq. 558, p. 275.
Robinson v. Lamond, 15 Jur. 240, p. 276.
Robinson v. Leavitt, 7 N. H. 73, 100, p. 1409.
Robinson v. Leflore, 59 Miss. 148, p. 1995.
Robinson v. Litton, 3 Atk. 209, p. 2681, 2682.
Robinson v. Loomis, 51 Pa. St. 78, p. 632, 725.
Robinson v. Lord Byron, 1 Brown Ch. 588, p. 2697.
Robinson v. McIver, 63 N. C. 645, 649, p. 2494.
Robinson v. McWhirter, 52 Tex. 201, p. 2502, 2516.
Robinson v. Montgomeryshire Brewery Co., [1896] 2 Ch. 841, p. 1231.
Robinson v. O'Neal, 56 Ala. 541, p. 2143, 2145, 2153.
Robinson v. Owens, 103 Tenn. 91, 52 S. W. 870, p. 1060.
Robinson v. Page, 3 Russ. 114, p. 1521.
Robinson v. Pebworth, 71 Ala. 240, p. 1154, 1157.
Robinson v. Pett, 3 P. Wms. 249, 2 Lead. Cas. Eq., 4th Am. ed., 512, 514–537, 538–600, p. 2097, 2099.
Robinson v. Pickering, L. R. 16 Ch. Div. 371, 660, p. 2671.
Robinson v. Pierce, 118 Ala. 273, 72 Am. St. Rep. 160, 24 South. 984, 991, 45 L. R. A. 66, p. 2015, 2024.
Robinson v. Preston, 4 Kay & J. 505, 511, p. 681.
Robinson v. Preswick, 3 Edw. Ch. 246, p. 2682.
Robinson v. Ridley, 6 Madd. 2, p. 2481.
Robinson v. Ring, 72 Me. 140, 39 Am. St. Rep. 308, 7 L. R. A. 272, p. 1912, 2232, 2241, 2248.
Robinson v. Robinson, 19 Beav. 494, p. 2331.
Robinson v. Robinson, 1 De Gex, M. & G. 247, 254, 255, 256, 257, 263, p. 2069, 2073, 2079, 2087, 2321.
Robinson v. Russell, 24 Cal. 467, p. 2682, 2686.

Robinson v. Ryan, 25 N. Y. 320, p. 2434.
Robinson v. Sharp, 201 Ill. 86, 66 N. E. 299, p. 1772.
Robinson v. Smith, 3 Paige, 222, 24 Am. Dec. 212, p. 2125.
Robinson v. Springfield Co., 21 Fla. 203, 238, p. 424.
Robinson v. Suburban Brick Co., (C. C. A.) 127 Fed. 804, p. 1690, 1691.
Robinson v. Taylor, 2 Brown Ch. 589, p. 178, 1985.
Robinson v. Urquhart, 12 N. J. Eq. 515, p. 1409, 2424.
Robinson v. Wall, 10 Beav. 61, 2 Phill. Ch. 372, p. 1694.
Robinson v. Webb, 17 Beav. 260, p. 2208.
Robinson v. Wheeler, 51 N. H. 384, p. 526, 529, 1470, 1642, 2708.
Robinson v. Wheelright, 6 De Gex, M. & G. 535, 546, 21 Beav. 214, p. 846, 2161.
Robinson v. Whiteley, 9 Ves. 577, p. 947.
Robinson v. Williams, 22 N. Y. 380, p. 2387, 2518.
Robinson v. Willoughby, 65 N. C. 520, p. 2373, 2377.
Robinson v. Willoughby, 70 N. C. 358, p. 1097, 1358.
Robinson v. Woodson, 33 Ark. 307, p. 2524, 2527.
Robinson v. Woodward, 20 Ky. Law Rep. 1142, 48 S. W. 1082, p. 2022.
Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449, p. 2402.
Robinson's Estate, In re, L. R. 12 Ch. Div. 188, p. 2168, 2171.
Robley v. Robley, 2 Beav. 95, p. 886.
Roblin v. Palmer, 9 S. Dak. 36, 67 N. W. 949, p. 1082, 1271.
Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673, 53 Atl. 842, p. 2118.
Robson v. Doyle, 191 Ill. 566, 61 N. E. 435, p. 246, 274, 323.
Robson v. Flight, 4 De Gex, J. & S. 608, p. 1050, 2046.
Robson v. Whittingham, L. R. Ch. 442, p. 2684.
Roby v. Bismarck Nat. Bank, 4 N. Dak. 156, 59 N. W. 719, 50 Am. St. Rep. 633, p. 1097, 1284, 2530.
Roby v. Colehour, 135 Ill. 300, 25 N. E. 777, p. 1750.
Roby v. Cossitt, 78 Ill. 638, p. 2779.
Roby v. Skinner, 34 Me. 270, p. 550.
Roca v. Byrne, 145 N. Y. 182, 45 Am. St. Rep. 599, 39 N. E. 812, p. 2019.
Roch v. Cullen, 6 Hare, 531, p. 885, 886.
Rochdale Canal Co. v. King, 2 Sim., N. S., 78, p. 1450.
Roche, In re, 2 Dru. & War. 287, p. 2106.
Roche v. O'Brien, 1 Ball & B. 330, 338, 340, 353, 358, p. 1677, 1705.
Rochefoucauld v. Bonstead, [1897] 1 Ch. 196, p. 2039.
Rochester v. Alfred Bank, 13 Wis. 432, 80 Am. Dec. 746, p. 1483.
Rochester v. Bronson, 41 How. Pr. 78, p. 2660.
Rochester v. Erickson, 46 Barb. 92, p. 2683.
Rochester v. Levering, 104 Ind. 562, 4 N. E. 203, p. 1762, 1763, 2090.
Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 637, p. 2576.
Rochester German Ins. Co. v. Schmidt, 126 Fed. 998, p. 413.
Rochester Loan etc. Co. v. Liberty Ins. Co., 44 Nebr. 537, 48 Am. St. Rep. 745, 62 N. W. 877, p. 1158.
Rochfort v. Fitzmaurice, 2 Dru. & War. 1, 18, p. 1884, 1885, 1886, 1887.
Rochford v. Hackman, 9 Hare, 475, p. 1839.
Rock v. Mathews, 35 W. Va. 531, 14 S. E. 137, 14 L. R. A. 508, p. 667, 1703, 1712.
Rock v. Wallace, 14 Iowa, 593, p. 406.
Rockafellow v. Baker, 41 Pa. St. 319, 80 Am. Dec. 624, p. 1594.
Rockafellow v. Newcomb, 57 Ill. 186, p. 1752.
Rockdale Canal Co. v. King, 2 Sim., N. S., 78, p. 696.
Rockford Grocery Co. v. Standard G. & M. Co., 175 Ill. 89, 51 N. E. 642, 67 Am. St. Rep. 205, p. 2013.
Rockingham etc. Sav. Bank v. Portsmouth, 52 N. H. 17, p. 2678.
Rock Island & P. R. Co. v. Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105, p. 1022, 1030, 1031, 1039.

Rock Springs Nat. Bank v. Luman, 6 Wyo. 123, 42 Pac. 874, p. 1156.
Rockwell v. Blair Sav. Bank, 31 Nebr. 128, 47 N. W. 641, p. 2405.
Rockwell v. Bradley, 2 Conn. 1, 5, p. 2346.
Rockwell v. Hobby, 2 Sand. Ch. 9, p. 2540.
Rockwell v. Humphrey, 57 Wis. 410, 15 N. W. 394, p. 2375.
Rockwell v. Merwin, 8 Abb. Pr., N. S., 330, p. 2662.
Rockwell v. Morgan, 13 N. J. Eq. 384, p. 2734.
Rockwood v. Wiggin, 16 Gray, 402, p. 2233, 2234.
Roddy v. Cox, 29 Ga. 298, 74 Am. Dec. 64, p. 341.
Roddy v. Williams, 3 Jones & L. 1, p. 1609, 1613.
Roddy's Appeal, 72 Pa. St. 98, p. 2424.
Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 443, p. 1038.
Roderigas v. East Riv. Sav. Inst., 63 N. Y. 460, 20 Am. Rep. 555, p. 1635.
Rodes v. Haynes, 95 Tenn. 673, 33 S. W. 564, p. 1207.
Rodgers v. Burchard, 34 Tex. 441, 7 Am. Rep. 283, p. 1148, 1342.
Rodgers v. Gibson, 4 Yeates, 111, p. 1276, 1381.
Rodgers v. Kavanaugh, 24 Ill. 583, p. 1124.
Rodgers v. Marshall, 17 Ves. 294, p. 959, 962.
Rodgers v. Parker, 136 Cal. 313, 68 Pac. 975, p. 1301.
Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483, p. 1298, 1301.
Rodgers v. Rodgers, 11 Barb. 595, p. 2682.
Rodick v. Gandell, 1 De Gex, M. & G. 763, 768, 780, p. 195, 304, 1207, 2501, 2566, 2567.
Rodick v. Gandell, 10 Beav. 270, p. 284, 287.
Rodman v. Quick, (Ill.) 71 N. E. 1087, p. —.
Rodman v. Sanders, 44 Ark. 504, p. 2498, 2519.
Rodman v. Zilley, 1 N. J. Eq. 320, p. 1666.
Rodriguez v. Haynes, 76 Tex. 225, 13 S. W. 296, p. 2364.
Roe v. Roe, 21 N. J. Eq. 253, p. 782, 857.
Roebling v. First Nat. Bank, 30 Fed. 744, p. 383.
Rogan v. Walker, 1 Wis. 527, p. 631, 632, 1994, 2370.
Roger v. Johnson, 113 Ala. 589, 21 South. 477, p. 1910.
Rogers, Ex parte, 8 De Gex M. & G. 271, p. 1213, 2103.
Rogers v. Adams, 66 Ala. 600, p. 1383.
Rogers v. Beach, 115 Ind. 413, 17 N. E. 609, p. 2379.
Rogers v. Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613, p. 2359, 2364, 2427.
Rogers v. Blum, 56 Tex. 1, p. 2534.
Rogers v. Boyd, 33 Ala. 175, p. 2189.
Rogers v. Challis, 27 Beav. 175, p. 345.
Rogers v. Chase, 89 Iowa, 468, 56 N. W. 537, p. 1338.
Rogers v. Cincinnati, 5 McLean, 337, p. 515.
Rogers v. Dill, 6 Hill, 415, p. 2619.
Rogers v. Gwinn, 21 Iowa, 58, p. 592.
Rogers v. Haskings, 14 Ga. 166, p. 994.
Rogers v. Herron, 92 Ill. 583, p. 2437.
Rogers v. Higgins, 48 Ill. 211, p. 2155.
Rogers v. Higgins, 57 Ill. 244, p. 1603.
Rogers v. Hosack, 18 Wend. 319, p. 2568.
Rogers v. Hussey, 36 Iowa, 664, p. 1023, 1145, 1276, 1381.
Rogers v. Ingham, L. R. 3 Ch. Div. 351, 356, 357, p. 1488, 1503, 1540.
Rogers v. Jones, 3 Ch. Div. 688, 689, p. 781, 857.
Rogers v. Jones, 8 N. H. 264, p. 974, 977, 991, 1004, 1007, 1008, 1019, 1023, 1026, 1045, 1147.
Rogers v. Kennard, 54 Tex. 30, p. 2289.
Rogers v. King, 8 Paige, 210, p. 2283.
Rogers v. Lafayette etc. Works, 52 Ind. 296, p. 2125.
Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635, p. 1513.
Rogers v. Lindsey, 13 How. (54 U. S.) 441, p. 1345.
Rogers v. Lockett, 28 Ark. 290, p. 1761, 1763.
Rogers v. McCauley, 22 Minn. 384, p. 2004.
Rogers v. Meyers, 68 Ill. 92, p. 2787.

Rogers v. Munnerlyn, 36 Fla. 591, 18 South. 669, p. 1099.
Rogers v. N. J. Ins. Co., 8 N. J. Eq. 167, p. 1221.
Rogers v. Nowill, 3 De Gex, M. & G. 614, p. 2690.
Rogers v. Oxford etc. R'y, 2 De Gex & J. 662, p. 2677.
Rogers v. Palmer, 102 U. S. 263, p. 1154.
Rogers v. Parker, 1 Hughes, 148, p. 2711.
Rogers v. Penniston, 16 Mo. 432, p. 586.
Rogers v. Pettus, 80 Tex. 425, 15 S. W. 1093, p. 1355.
Rogers v. Ramsey, 137 Mo. 598, 39 S. W. 66, p. 1991.
Rogers v. Rathbun, 1 Johns. Ch. 367, p. 648, 1705.
Rogers v. Richards, 67 Kan. 706, 74 Pac. 255, p. 1900.
Rogers v. Rogers, 18 Hun, 409, p. 1837, 2110.
Rogers v. Rogers, 17 R. I. 623, 24 Atl. 46, p. 210, 211, 212, 1636, 1637.
Rogers v. Rogers, 97 Md. 573, 55 Atl. 450, p. 1750, 1781.
Rogers v. Rogers, 67 S. C. 168, 45 S. E. 176, 100 Am. St. Rep. 721, p. 2200, 2213.
Rogers v. Saunders, 16 Me. 92, 97, 33 Am. Dec. 635, p. 550, 2767, 2769, 2779.
Rogers v. Seale, Freem. Ch. 84, p. 1314.
Rogers v. Smith, 4 Pa. St. 93, p. 2154.
Rogers v. Soutten, 2 Keen, 598, p. 899.
Rogers v. Taylor, 40 Iowa, 193, p. 2775, 2776.
Rogers v. Traders' Ins. Co., 6 Paige, 583, p. 2424, 2557.
Rogers v. Tucker, 94 Mo. 346, 7 S. W. 414, p. 1282, 1283.
Rogers v. Turpin, 105 Iowa, 183, 74 N. W. 925, p. 1039.
Rogers v. Walker, 6 Pa. St. 371, 47 Am. Dec. 470, p. 2624.
Rogers v. Ward, 8 Allen, 387, 85 Am. Dec. 710, p. 2188, 2193.
Rogers v. Wiley, 14 Ill. 65, 56 Am. Dec. 491, p. 990.
Rogers v. Williams, 8 Phila. 123, p. 2762.
Rogers & B. H. Co. v. Cleveland B. Co., 132 Mo. 442, 34 S. W. 57, 53 Am. St. Rep. 494, 31 L. R. A. 335, p. 1672.
Rogers' Lessee v. Cawood, 31 Tenn. (1 Swan) 142, 55 Am. Dec. 729, p. 1102.
Rogers Locomotive & Machine Works v. Kelly, 19 Hun, 399, p. 1837, 1903, 1912.
Rogers Locomotive Works v. Erie R. R., 20 N. J. Eq. 379, p. 2698.
Rohrschneider v. Knickerbocker Ins. Co., 76 N. Y. 216, 32 Am. Rep. 290, p. 1559, 1567, 1570, 1573, 2116.
Roland Park Co. v. Hull, 92 Md. 301, 48 Atl. 366, p. 366.
Rolfe v. Gregory, 4 De Gex, J. & S. 576, 579, p. 1634, 1648, 2009, 2016, 2029, 2032, 2043.
Rolfe v. Gregory, 11 Jur., N. S., 98, p. 2097.
Rolfe v. Harris, 2 Price, 206, note, p. 753.
Rolfe v. Peterson, 2 Brown Parl. C., Tomlins's ed. 436, p. 727, 735, 750.
Roll v. Rea, 50 N. J. Law, 264, 12 Atl. 905, p. 1018, 1035, 1051, 1052, 1346, 1355.
Rolland v. Hart, L. R. 6 Ch. 678, 681-683, p. 1005, 1137, 1139, 1141, 1171. 1172, 1173, 1174, 1175, 1177, 1357.
Rollins v. Henry, 77 N. C. 467, p. 2657.
Rollins v. Hinks, L. R. 6 Eq. 555, p. 545.
Rollins v. Mitchell, 52 Minn. 41, 53 N. W. 1020, 38 Am. St. Rep. 519, p. 2033.
Rollins v. Shaver Wagon etc. Co., 80 Iowa, 380, 45 N. W. 1037, 20 Am. St. Rep. 427, p. 2013.
Rolls v. Pearce, L. R. 5 Ch. Div. 730, p. 2232, 2238, 2246.
Rolt v. Lord Somerville, 2 Eq. Cas. Abr. 759, p. 2682.
Rolt v. White, 3 De Gex, J. & S. 360, 365, p. 1609, 1613.
Rolt v. White, 31 Beav. 520, p. 1226, 1229.
Romaine v. Hendrickson, 27 N. J. Eq. 162, p. 1753, 2080.
Roman v. Mali, 42 Md. 513, p. 1646, 1712, 1769.
Roman v. Woolfolk, 98 Ala. 219, 13 South. 212, p. 2121, 2128.

Romanoff Land & Min. Co. v. Cameron, 137 Ala. 214, 33 South. 864, p. 1602, 1647.
Romberg v. McCormick, 194 Ill. 205, 62 N. E. 537, p. 2395.
Romig v. Erdman, 5 Whart. 112, 34 Am. Dec. 533, p. 1226.
Ronalds v. Feltham, Turn. & R. 418, p. 2489.
Ronan v. Bluhm, 173 Ill. 277, 50 N. E. 694, p. 1032.
Rondanez v. New Orleans, 29 La. Ann. 271, p. 2678.
Rood v. Chapin, Walk. Ch. 79, p. 1096.
Rook v. Worth, 1 Ves. Sr. 460, 461, p. 2333.
Rooke v. Lord Kensington, 2 Kay & J. 753, p. 1516.
Rook's Case, 5 Coke, 99b, p. 64, 706.
Roome v. Roome, 3 Atk. 183, p. 900, 909.
Rooney v. Michael, 84 Ala. 585, 4 South. 421, p. 459, 462, 465, 1067, 2189.
Rooney v. Soule, 45 Vt. 303, p. 692, 2758.
Roosevelt v. Davis, 49 Tex. 463, p. 2525.
Roosevelt v. Draper, 23 N. Y. 318, p. 369, 434, 435, 436, 438.
Roosevelt v. Land & River Co., 108 Wis. 653, 84 N. W. 157, p. 1080.
Roosevelt v. Roosevelt, 6 Abb. N. C. 447, p. 2068.
Roosevelt v. Thurman, 1 Johns. Ch. 220, p. 1549.
Root v. Bancroft, 8 Gray, 619, p. 1625.
Root v. Collins, 34 Vt. 173, p. 2444, 2447.
Root v. French, 13 Wend. 570, 28 Am. Dec. 482, p. 1384, 1385.
Root v. Reynolds, 32 Vt. 139, p. 1793, 1796.
Roots v. Williamson, 38 Ch. Div. 485, p. 1256.
Roper v. Holland, 3 Adol. & El. 99, p. 1879.
Roper v. McCook, 7 Ala. 318, p. 2498.
Roper's Trusts, In re, L. R. 11 Ch. Div. 272, p. 2619.
Ropes v. Upton, 125 Mass. 258, p. 542, 546, 2675.
Rorer v. Ferguson, 96 Va. 411, 31 S. E. 817, p. 1402.
Rorer Iron Co. v. Trout, 83 Va. 397, 419, 2 S. E. 713, 5 Am. St. Rep. 285, p. 1024, 1390, 1391, 1591.
Rork v. Shields, 16 Tex. Civ. App. 640, 42 S. W. 1032, p. 1103.
Rorke, In re, 13 Ir. Ch. 273, 14 Ir. Ch. 442, p. 1159.
Roscarrick v. Barton, 1 Cas. Chan. 217, p. 186, 2338.
Rose v. Bates, 12 Mo. 30, p. 2039.
Rose v. Bevan, 10 Mo. 466, 69 Am. Dec. 170, p. 2586, 2788.
Rose v. Brown, 11 W. Va. 122, p. 1801, 1803.
Rose v. Clarke, 1 Younge & C. Ch. 534, p. 2557.
Rose v. Cunynghame, 11 Ves. 554, p. 615.
Rose v. Fritz, 109 Fed. 810, p. 1224.
Rose v. Gandy, 137 Ala. 329, 34 South. 239, p. 2379.
Rose v. Hatch, 125 N. Y. 427, 26 N. E. 467, p. 1952, 1969.
Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145, 10 Pac. 554, p. 1764, 2024, 2032.
Rose v. Munie, 4 Cal. 173, p. 1270.
Rose v. Nees, 61 Ind. 484, p. 2748.
Rose v. Porter, 141 Mass. 309, 5 N. E. 641, p. 1929.
Rose v. Provident S., L. & I. Ass'n, 28 Ind. App. 25, 62 N. E. 293, p. 1285.
Rose v. Rose, 4 Abb. App. 108, p. 1968.
Rose v. Taylor, 17 Tex. Civ. App. 535, 43 S. W. 285, 44 S. W. 326, p. 2030.
Rose v. Truax, 21 Barb. 361, p. 1699.
Rose v. Watson, 10 H. L. Cas. 672, 678, p. 192, 2497, 2531, 2536.
Rosekrans v. White, 7 Lans. 486, p. 2740.
Roseman v. Canovan, 43 Cal. 110, 117, p. 1588, 1609. 1611, 1618.
Roseman v. Miller, 84 Ill. 297, p. 1323, 1335.
Rosenbaum v. Garrett, 57 N. J. Eq. 186, 41 Atl. 252, p. 1850.
Rosenberg v. Frank, 58 Cal. 387, p. 2250, 2260, 2262, 2302.
Rosevelt v. Fulton, 2 Cow. 129, p. 1523.
Rosewell v. Bennett, 3 Atk. 77, p. 910, 933, 937, 943.
Ross v. Buchanan, 13 Ill. 55, 58, p. 210, 221, 2706.

Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654, p. 2684.
Ross v. Cobb, 48 Ill. 111, p. 2741.
Ross v. Crockett, 14 La. Ann. 811, p. 2108.
Ross v. Duggan, 5 Col 85, p. 2786.
Ross v. Estates Investment Co., L. R. 3 Ch. 682, 3 Eq. 122, p. 1567, 1573.
Ross v. Gibbs, L. R. 8 Eq. 522, p. 277, 282.
Ross v. Harper, 99 Mass. 175, p. 304, 2704.
Ross v. Hendrix, 110 N. C. 403, 15 S. E. 4. p. 1020.
Ross v. Houston, 25 Miss (3 Cushm.) 591, 59 Am. Dec. 231, p. 1155.
Ross v. Huntzen, 36 Cal. 313, p. 2519, 2748.
Ross v. Linder, 12 S. C. 592, p. 2201.
Ross v. Payson, 160 Ill. 358, 43 N. E. 399, p. 1770.
Ross v. Ross, 6 Hun, 80, p. 1738, 1778.
Ross v. Ross, 123 Mass. 212, p. 2274.
Ross v. Singleton, 1 Del. Ch. 149, 12 Am. Dec. 86, p. 2190.
Ross v. Southwestern R. R. Co., 53 Ga. 514, p. 2633.
Ross v. Union Pac. R'y, 1 Woolw. 26, 36, p. 2764, 2765.
Ross v. Whitson, 6 Yerg. 50, p. 2502.
Ross v. Wood, 70 N. Y. 8, p. 1641, 1652.
Ross v. Worthington, 11 Minn. 438, 88 Am. Dec. 95, p. 1055, 1146.
Ross's Trust, In re, 1 Sim., N. S., 196, p. 2158.
Rotch v. Emerson, 105 Mass. 431, p. 1957.
Rothery v. N. Y. Rubber Co., 24 Hun, 172, p. 2687.
Rothgeb v. Mauck, 35 Ohio St. 503, p. 2300.
Rothschild v. Brookman, 5 Bligh, N. S., 165, p. 1763.
Rothschild v. Leonhard, (Ind. App.) 71 N. E. 673, p. 1022.
Rothschild's Admrs. v. Kohn, 93 Ky. 107, 19 S. W. 180, 40 Am. St. Rep. 184, p. 1068.
Rotter v. Scott, 111 Iowa, 31, 82 N. W. 437, p. 1911, 1994.
Rough v. Breitung, 117 Mich. 48, 75 N. W. 147, p. 1244.
Roundell v. Breary, 2 Vern. 482, p. 954, 2472.
Rounds v. McChesney, 7 Cal. 360, p. 1111.
Roundy v. Kent, 75 Iowa, 662, 37 N. W. 146, p. 1510.
Rous v. Barker, 4 Brown Parl. C. 660, p. 2737.
Rouse v. Merchants' Nat. Bank, 46 Ohio St. 493, 22 N. E. 293, 15 Am. St. Rep. 644, 5 L. R. A. 378, p. 2012, 2014.
Rousillon v. Rousillon, L. R. 14 Ch. Div. 351, p. 1690.
Roussain v. Norton, 53 Minn. 560, 55 N. W. 747, p. 1042, 1097, 1115.
Routh v. Spencer, 38 Ind. 393, p. 1111.
Routledge v. Dorril, 2 Ves. 357, p. 1657.
Row v. Dawson, 1 Ves. Sr. 331, 2 Lead. Cas. Eq., 4th Am. ed., 1531, 1562–1565, 1641–1660, p. 158, 195, 2547, 2561.
Row v. Row, L. R. 7 Eq. 414, p. 2222.
Rowan v. Sharps etc. Co., 29 Conn. 282, p. 2387, 2390, 2586.
Rowan v. State Bank, 45 Vt. 160, p. 692, 695.
Rowand v. Finney, 96 Pa. St. 192, p. 558.
Rowbotham v. Jones, 47 N. J. Eq. 337, 20 Atl. 731, p. 399, 453.
Rowe v. Beckett, 30 Ind. 154, 95 Am. Dec. 676, p. 1861.
Rowe v. Bentley, 29 Gratt. 756, p. 2057, 2089.
Rowe v. Granite Bridge Corp., 21 Pick. 344, p. 2683.
Rowe v. Ream, 105 Pa. St. 543, p. 1024, 1030.
Rowe v. Rowe, 29 Beav. 276, p. 2322.
Rowe v. Rowe, 2 De Gex & S. 294, 297, 298, p. 875, 876, 877.
Rowe v. Wood, 2 Jacob & W. 553, p. 2429.
Rowe v. ———, 13 Ves. 261, p. 297.
Rowell v. Jewett, 69 Me. 293, 303, p. 548, 549, 550, 2434.
Rowland v. Doty, Harr. (Mich.) 3, p. 2749.
Rowland v. Morgan, 2 Phill. Ch. 764, p. 1887.
Rowland v. Rowland, 29 S. C. 54, 6 S. E. 902, p. 1926.
Rowland v. Witherden, 3 Macn. & G. 568, p. 2059.
Rowley v. Bigelow, 12 Pick. 307, 23 Am. Dec. 607, p. 1384.

Rowley v. Houghton, 2 Brewst. 303, p. 2690.
Rowley v. Towsley, 53 Mich. 329, 19 N. W. 20, p. 2089.
Rowley v. Unwin, 2 Kay & J. 138, 142, p. 2147, 2159.
Rowth v. Howell, 3 Ves. 565, p. 2057.
Rowzee v. Pierce, 75 Miss. 846, 65 Am. St. Rep. 625, 23 South. 307, 40 L. R. A. 402, p. 1974.
Roxborough v. Messick, 6 Ohio St. 448, 67 Am. Dec. 346, p. 1324, 1325.
Roxbury v. Huston, 37 Me. 42, p. 551, 553.
Roy v. Duke of Beauford, 2 Atk. 190, p. 731, 1734.
Roy v. Haviland, 12 Ind. 364, p. 2729.
Roy v. McPherson, 11 Nebr. 197, 7 N. W. 873, p. 2006, 2024.
Roy v. Monroe, 47 N. J. Eq. 356, 20 Atl. 481, p. 2310, 2325.
Royal v. Royal, 30 Oreg. 448, 47 Pac. 828, 48 Pac. 695, p. 2052.
Royal Ins. Co. v. Davies, 40 Iowa, 469, 20 Am. Rep. 581, p. 2609.
Royall's Adm'r v. McKenzie, 25 Ala. 363, p. 2061, 2096.
Royalty v. Shirley, 21 Ky. Law Rep. 1015, 53 S. W. 1044, p. 2018.
Royan v. Walker, 1 Wis. 527, p. 753, 761.
Royce v. Adams, 123 N. Y. 402, 25 N. E. 386, p. 2109.
Royce v. Watrous, 73 N. Y. 597, p. 1445.
Royer's Estate, In re, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364, p. 1946, 1972.
Roys v. Vilas, 18 Wis. 169, p. 2656.
Royster v. Lane, 118 N. C. 156, 24 S. E. 796, p. 1097, 1122.
Royston v. Royston, 13 Ga. 425, p. 2743.
Rozier v. Griffith, 31 Mo. 171, p. 2742.
Rua v. Watson, 13 S. D. 453, 83 N. W. 572, p. 1910.
Rubber Co. v. Goodyear, 9 Wall. 788, p. 1436.
Rubelman v. Rummel, 72 Iowa, 40, 33 N. W. 354, p. 2374.
Rubens v. Prindle, 44 Barb. 336, p. 2407.
Rubidoex v. Parks, 48 Cal. 215, p. 1761, 1762.
Ruby v. Portland, 15 Me. 306, p. 2430.
Rucker v. Campbell, (Tex. Civ. App.) 79 S. W. 627, p. 737.
Ruckman v. Alwood, 71 Ill. 155, p. 2380.
Ruckman v. Bergholz, 37 N. J. L. 437, p. 1761.
Ruckman v. Decker, 23 N. J. Eq. 283, p. 1184, 1185.
Rudd v. Peters, 41 Ark. 177, p. 2153.
Ruddell v. Ambler, 18 Ark. 369, p. 648, 1705.
Rudge v. Hopkins, 2 Eq. Cas. Abr. 170, pl. 27, p. 362, 453, 455.
Rudisell v. Watson, 2 Dev. Eq. 430, p. 2144.
Rudy v. Austin, 56 Ark. 73, 35 Am. St. Rep. 85, 19 S. W. 111, p. 1803.
Rudy's Estate, 185 Pa. St. 359, 64 Am. St. Rep. 654, 39 Atl. 968, p. 2325.
Ruffier v. Womack, 30 Tex. 332, p. 2377.
Ruffin, Ex parte, 6 Ves. Sr. 119, 125, 126, p. 683, 2011.
Ruffles v. Alston, L. R. 19 Eq. 539, p. 2168, 2170.
Ruffner v. Riley, 81 Ky. 165, p. 1588.
Ruhling v. Hackett, 1 Nev. 360, p. 2726.
Rumbold v. Rumbold, 3 Ves. 65, p. 807.
Rumery v. Soy, 61 Nebr. 755, 86 N. W. 478, p. 1303.
Rumfelt v. Clemens, 46 Pa. St. 455, p. 1448.
Rumney v. Keyes, 7 N. H. 571, p. 2604.
Rumney and Smith, In re, [1897] 2 Ch. 351, p. 2050.
Rumph v. Abercrombie, 12 Ala. 64, p. 1729.
Rundle v. Allison, 34 N. Y. 180, p. 2089.
Rundle v. Spencer, 67 Mich. 89, 34 N. W. 548, p. 1448.
Runyan v. McClellan, 24 Ind. 165, p. 1276, 1381.
Runyan v. Mersereau, 11 Johns. 534, 6 Am. Dec. 393, p. 2360, 2417.
Rupert v. Mark, 15 Ill. 540, p. 998, 1050.
Ruple v. Bindley, 91 Pa. St. 296, 299, p. 2567, 2575, 2584.
Rupley v. Welch, 23 Cal. 452, p. 2686.
Ruppel v. Missouri Guarantee S. & B. Ass'n, 158 Mo. 613, 59 S. W. 1000, p. 648.

Ruppertsberger v. Clark, 53 Md. 402. p. 2710.
Rush v. Lewis, 21 Pa. St. 72, p. 1831.
Rush v. Mitchell, 71 Iowa, 333, 32 N. W. 367, p. 1336, 1356.
Rush Co. Com'rs v. Dinwiddie, 139 Ind. 128, 37 N. E. 795, p. 1961, 1974.
Rushin v. Shields, 11 Ga. 636, 56 Am. Dec. 436, p. 1104.
Russ v. Mebius, 16 Cal. 350, p. 1986, 1990, 1991.
Russ v. Wilson, 22 Me. 207, 209, 210, p. 548, 553, 555.
Russel v. Russel, 1 Brown Ch. 269, 1 Lead. Cas. Eq., 4th Am. ed., 931, p. 192, 2470, 2538.
Russel v. Smithies, 1 Anstr. 96, p. 2429.
Russell v. Allen, 5 Dill. 235, Fed. Cas. No. 12,149, p. 1933, 1945, 1954, 1975.
Russell v. Allen, 10 Paige, 249, p. 2401.
Russell v. Allen, 107 U. S. 172, 2 Sup. Ct. 327, 27 L. ed. 397, p. 1946, 1953, 1958, 1978.
Russell v. American etc. Co., 180 Mass. 467, 62 N. E. 751, p. 1244.
Russell v. Baughman, 94 Pa. St. 400, p. 558, 2778, 2780.
Russell v. Blake, 2 Pick. 505, p. 2430.
Russell v. Branham, 8 Blackf. 277, p. 1601.
Russell v. Church, 65 Pa. St. 9, p. 1550.
Russell v. Clark's Ex'rs, 7 Cranch, 69, 89, 97, p. 321, 325, 326, 1637, 2017, 2706.
Russell v. Cowley, 1 Web. Pat. Cas. 457, p. 260, 285.
Russell v. Deshon, 124 Mass. 342, p. 2756.
Russell v. Dickeschied, 24 W. Va. 61, p. 246, 250.
Russell v. Dickson, 2 Dru. & War. 133, 137, 4 H. L. Cas. 293, 304, p. 885, 888, 890.
Russell v. Dodson, 6 Baxt. 16, p. 2502, 2516.
Russell v. Durham, 17 Ky. Law Rep. 35, 303, 29 S. W. 635, p. 1735.
Russell v. East Anglian R'y, 3 Macn. & G. 104, p. 2661.
Russell v. Grinnell, 105 Mass. 425, p. 1851.
Russell v. Hammond, 1 Atk. 13, p. 1805.
Russell v. Howard, 2 McLean, 489, p. 2786.
Russell v. Jackson, 9 Hare, 387, p. 277, 278, 282.
Russell v. Jackson, 10 Hare, 204, 212, 213, p. 1607, 1653, 1929, 1986.
Russell v. Kearney, 27 Ga. 96, p. 1892.
Russell v. Kellett, 3 Smale & G. 264, p. 1939, 1941, 1964.
Russell v. Kirkbride, 62 Tex. 455, p. 1066, 1072, 2503, 2535.
Russell v. Loring, 3 Allen, 121, 125, p. 538.
Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807, p. 118, 163, 2087, 2093.
Russell v. Merchants' Bank, 47 Minn. 286, 50 N. W. 228, 28 Am. St. Rep. 368, p. 2399.
Russell v. Moore, 3 Met. 437, p. 1145.
Russell v. Nall, 2 Tex. Civ. App. 60, 23 S. W. 901, p. 1277, 1280.
Russell v. Nester, 46 Mich. 290, p. 2775, 2779.
Russell v. Peavy, 131 Ala. 563, 32 South. 492, p. 1154.
Russell v. Petree, 10 B. Mon. 184, 186, p. 985, 991.
Russell v. Peyton, 4 Ill. App. 473, p. 2046, 2056, 2066.
Russell v. Pistor, 7 N. Y. 171, 57 Am. Dec. 509, p. 1410, 2407, 2413, 2424.
Russell v. Pope, L. R. 3 Ex. 269, p. 2638.
Russell v. Russell, 129 Fed. 434, p. 1781.
Russell v. St. Aubyn, L. R. 2 Ch. Div. 398, p. 917, 918, 920.
Russell v. Southard, 12 How. 139, 148, 13 L. ed. 927, 931, p. 493, 2372, 2373, 2380.
Russell v. Stevenson, (Wash.) 75 Pac. 627, p. 1550.
Russell v. Sweezey, 22 Mich. 235, 239, p. 1007, 1009, 1010, 1019, 1023, 1024, 1045, 1146, 1152, 1163, 1166.
Russell v. Switzer, 63 Ga. 711, p. 1908.
Russell v. U. S. Trust Co., 127 Fed. 445, p. 1929.
Russell v. Wakefield Water W. Co., L. R. 20 Eq. 474, 479, 481, p. 2114, 2117, 2118, 2121.
Russell v. Watt, 41 Miss. 602, 93 Am. Dec. 270, p. 2501.
Russell's Appeal, 15 Pa. St. 319, p. 1111.

Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720, p. 2772.
Rust v. Ware, 6 Gratt. 50, 52 Am. Dec. 100, p. 224, 337, 338.
Rutgers v. Kingsland, 7 N. J. Eq. 178, 658, p. 1346.
Ruth v. Ford, 9 Kan. 17, p. 1329.
Ruth v. Oberbrunner, 40 Wis. 238, p. 1969.
Ruth v. Wells, 13 S. Dak. 482, 83 N. W. 568, 79 Am. St. Rep. 902, p. 1079.
Rutherford v. Douglas, 1 Sim. & St. 111, p. 2655.
Rutherford v. Mayo, 76 Va. 117, p. 821.
Rutherford v. Stewart, 79 Mo. 216, p. 2576.
Rutherford v. Tracy, 48 Mo. 325, 8 Am. Rep. 104, p. 1437.
Rutherford v. Ullman, 42 Mo. 216, p. 2750.
Rutherford v. Williams, 42 Mo. 18, 23, p. 586.
Rutherford Land & Improvement Co. v. Sanntrock, (N. J. Eq.) 44 Atl. 938, p. 992.
Rutherglen v. Wolf, 1 Hughes C. C. 78, Fed. Cas. No. 12,175, p. 1089.
Rutland v. Brister, 53 Miss. 683, p. 2501, 2509, 2520.
Rutland Electric L. Co. v. Bates, 68 Vt. 579, 54 Am. St. Rep. 904, 35 Atl. 480, p. 2085.
Rutland Marble Co. v. Ripley, 10 Wall. 339, 356, 357, p. 662, 2765, 2767, 2770, 2771, 2773, 2774.
Rutledge v. Smith, 1 McCord Eq. 119, p. 1908.
Rutter v. Maclean, 4 Ves. 531, p. 846.
Ryall v. Hannam, 10 Beav. 536, p. 1548.
Ryall v. Rolle, 1 Atk. 165, 166, 167, p. 2460.
Ryall v. Rowles, 1 Ves. Sr. 348, 1 Atk. 165, 2 Lead. Cas. Eq., 4th Am. ed., 1533, 1579, p. 1209, 1210, 1218.
Ryall v. Ryall, 1 Atk. 59, p. 1999.
Ryan v. Ashton, 42 Iowa, 365, p. 1769, 1772.
Ryan v. Blunt, 1 Dev. Eq. 386, p. 1549.
Ryan v. Boyd, 33 Ark. 778, p. 2709.
Ryan v. Brown, 18 Mich. 196, 100 Am. Dec. 154, p. 2693.
Ryan v. Donley, (Nebr.) 66 N. W. 234, p. 2577.
Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696, p. 179, 2039.
Ryan v. Dunlap, 17 Ill. 40, 63 Am. Dec. 334, p. 2417.
Ryan v. Leavenworth etc. R'y, 21 Kan. 365, p. 2114, 2125.
Ryan v. Mackmath, 3 Brown Ch. 15, p. 2728.
Ryan v. Mackmath, 13 Ves. 584, p. 2728.
Ryan v. Martin, 16 Wis. 57, p. 748.
Ryan v. Porter, 61 Tex. 106, p. 1977.
Ryan v. Staples, 23 C. C. A. 551, 78 Fed. 563, p. 1347.
Rycroft v. Christy, 3 Beav. 238, p. 1879, 3142.
Ryder v. Bateman, 93 Fed. 31, p. 271.
Ryder v. Rush, 102 Ill. 338, p. 1355.
Ryder v. Ryder, 19 R. I. 188, 32 Atl. 919, p. 1486, 1489.
Ryder v. Sisson, 7 R. I. 341, p. 2103.
Ryerson v. Willis, 81 N. Y. 277, p. 2727.
Ryhiner v. Frank, 105 Ill. 326, p. 2499, 2513.
Ryland v. Banks, 151 Mo. 1, 51 S. W. 720, p. 1839.
Rylands, Ex parte, L. R. 6 Ch. Div. 57, p. 2660.
Ryle v. Haggie, 1 Jacob & W. 234, 236, 237, p. 224, 316, 317, 331.
Ryman v. Gerlach, 153 Pa. St. 197, 25 Atl. 1031, 26 Atl. 302, p. 1245.
Rymer, In re, [1895] 1 Ch. 19, 34, p. 1965.
Ryno v. Darby, 20 N. J. Eq. 231, p. 1513, 1517, 1520.

S.

Sabel v. Slingluff, 52 Md. 132, p. 2169, 2170.
Sabin v. Bank of Woodstock, 21 Vt. 353, p. 1223.
Sabin v. Columbia Fuel Co., 25 Oreg. 15, 34 Pac. 692, 42 Am. St. Rep. 756, p. 2013.
Sable v. Maloney, 48 Wis. 331, p. 2725.
Sablicich v. Russell, L. R. 2 Eq. 441, p. 2636, 2648.
Saccharin Corporation v. Chemicals & Drugs Co., [1900] 2 Ch. 556, p. 272, 273.
Sackett v. Spencer, 65 Pa. St. 89, p. 2782.

Sackvill v. Aylesworth, 1 Vern. 105, 106, p. 262, 270, 295.
Sackville-West v. Viscount Holmesdale, L. R. 4 H. L. 543, p. 1885, 1886, 1887.
Sadler, Ex parte, 15 Ves. 52, p. 1790.
Sadler v. Hobbs, 2 Brown Ch. 114, p. 2095.
Sadler v. Pratt, 5 Sim. 632, p. 1656.
Sadlier v. Butler, 1 I. R. Eq. 415, 423, p. 816.
Safe Deposit & Trust Co. v. Baker, 91 Md. 297, 46 Atl. 1071, p. 2273.
Saffold v. Wade's Ex'r, 51 Ala. 214, p. 1329, 1373, 2796.
Safford v. Ensign Mfg. Co., (C. C. A.) 120 Fed. 480, 483, p. 252, 320.
Safford v. People, 85 Ill. 558, p. 2662.
Safford v. Rantoul, 12 Pick. 233, p. 1904.
Saffron etc. Soc. v. Rayner, L. R. 14 Ch. Div. 406, 409, 415, p. 1152, 1153, 1161, 1163, 1210, 1213.
Sage v. Hammonds, 27 Gratt. 651, p. 2130.
Sager v. Tupper, 35 Mich. 134, p. 2437.
Sailly v. Elmore, 2 Paige, 497, 499, p. 460, 461.
Sailor v. Hertzog, 4 Whart. 259, 264, p. 1019, 1048, 1107, 1148.
Saint v. Cornwall, 207 Pa. St. 270, 56 Atl. 440, p. 1407.
St. Andrews v. Lockwood, 2 Root, 239, p. 1098.
St. Andrew's Church Appeal, 67 Pa. St. 512, p. 1200, 2676.
St. Aubyn v. Smart, L. R. 3 Ch. 646, 650, p. 1631.
St. Aubyn v. Smart, L. R. 5 Eq. 183, p. 1630.
St. Clair v. Marquell, (Ind.) 67 N. E. 693, p. 1541.
Sainter v. Ferguson, 1 Macn. & G. 286, p. 727, 750, 2675.
St. Felix v. Rankin, 3 Edw. Ch. 323, p. 2742.
St. George v. Wake, 1 Mylne & K. 610, 623, p. 2165.
St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642, p. 2684, 2687.
St. James' Church v. Church of the Redeemer, 45 Barb. 356, p. 2085.
St. James' Orphan Asylum v. Shelby, 60 Nebr. 796, 84 N. W. 273, 83 Am. St. Rep. 553, p. 1943, 1956, 1968, 1975.
St. Jo. Mfg. Co. v. Daggett, 84 Ill. 556, p. 1444.
St. Joe & M. F. Consol. Min. Co. v. First Nat. Bank, 10 Colo. App. 339, 50 Pac. 1055, p. 2084.
St. John v. Benedict, 6 Johns. Ch. 111, p. 2770.
St. John v. Conger, 40 Ill. 535, p. 1120, 1132.
St. John v. Roberts, 31 N. Y. 441, 88 Am. Dec. 287, p. 1427.
St. John v. St. John, 11 Ves. 526, 535, 536, p. 1711, 1716, 2728.
St. John v. Spalding, 1 Thomp. & C. 483, p. 1299, 1300, 1374, 1382.
St. John v. Strauss, 60 Kan. 136, 55 Pac. 845, p. 1084.
St. Johns v. Charles, 105 Mass. 262, p. 2567.
St. Joseph, St. L. & S. F. Ry. Co. v. Smith, 170 Mo. 328, 70 S. W. 700, p. 2473.
St. Louis v. Clemens, 42 Mo. 69, p. 2553.
St. Louis v. St. Louis etc. Co., 5 Mo. App. 484, p. 1700.
St. Louis & S. F. R'y Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, p. 1613.
St. Louis Life Ins. Co. v. Alliance Mut. L. Ins. Co., 23 Minn. 7, p. 2651.
St. Louis S. D. & S. Bank v. Kennett Estate, (Mo. App.) 74 S. W. 474, p. 1449.
St. Lukes v. St. Leonards, 2 Anstr. 395, p. 2737.
St. Mary's Church v. Stockton, 9 N. J. Eq. 520, p. 750.
St. Paul v. Lord Dudley and Ward, 15 Ves. 167, 173, p. 1398.
St. Paul Division etc. v. Brown, 9 Minn. 157, p. 2768, 2777.
St. Paul Division etc. v. Brown, 11 Minn. 356, p. 2761.
St. Paul Fire & M. Ins. Co. v. Parsons, 47 Minn. 352, 50 N. W. 240, p. 1166.
St. Paul Title Ins. & T. Co. v. Berkey, 52 Minn. 497, 55 N. W. 60, p. 1097, 1146.
St. Paul Trust Co. v. Strong, 85 Minn. 1, 88 N. W. 256, p. 2086.
St. Paul's Church v. Attorney-General, 164 Mass. 188, 41 N. E. 231, p. 1956, 1957, 1979, 1985.

St. Peter's Church v. Brown, 21 R. I. 367, 43 Atl. 642, p. 1941, 1960, 1980.
St. Regis Paper Co. v. Santa Clara L. Co., 69 N. Y. Supp. 904, 34 Misc. Rep. 428, p. 1070.
Sale v. Crutchfield, 8 Bush, 636, p. 191, 2481.
Sale v. McLean, 29 Ark. 612, p. 1993.
Sale v. Moore, 1 Sim. 534, 540, p. 1925, 1929, 1930.
Salem Imp. Co. v. McCourt, 26 Oreg. 93, 41 Pac. 1105, p. 351.
Salinas v. Turner, 33 S. C. 231, 11 S. E. 702, p. 1155.
Salisbury v. Bigelow, 20 Pick. 174, p. 536.
Salisbury v. Clarke, 61 Vt. 453, 17 Atl. 135, p. 1991, 2040.
Salisbury v. Colt, 27 N. J. Eq. 492, p. 2090
Salisbury v. Morse, 7 Lans. 359, 365, 366, p. 1064, 1075.
Salisbury v. Salisbury, 6 Hare, 526, p. 956.
Salisbury v. Slade, 48 N. Y. Supp. 55, 22 App. Div. 346, p. 1894.
Salisbury Mills v. Townsend, 109 Mass. 115, p. 543, 2640, 2647.
Salkeld v. Vernon, 1 Eden, 64, p. 1785.
Salladin v. Mitchell, 42 Nebr. 859, 61 N. W. 127, p. 1332.
Sallee v. Chandler, 26 Mo. 124, p. 1758.
Salles v. Savignon, 6 Ves. 572, p. 2614.
Salmon v. Bennett, 1 Conn. 525, 528–551, 7 Am. Dec. 237, p. 1800.
Salmon v. Clagett, 3 Bland, 142, 145, p. 283, 389.
Salmon v. Cutts, 4 De Gex & S. 125, 132, p. 1784.
Salmon v. Downs, 55 Tex. 243, p. 2394, 2397, 2502.
Salomons v. Laing, 12 Beav. 377, p. 2118.
Salsbury v. Black, 110 Pa. St. 207, 4 Am. St. Rep. 631, 13 Atl. 67, p. 2039, 2040.
Salt, In re, [1895] 2 Ch. 203, p. 2222.
Salt v. Chattaway, 3 Beav. 576, p. 2327.
Salt v. Cooper, L. R. 16 Ch. Div. 544, p. 2660.
Salter v. Bird, 103 Pa. St. 436, p. 2040.
Salter v. Ham, 31 N. Y. 321, p. 2798.
Salter v. Salter, 6 Bush, 624, 638, p. 2066.
Salter v. Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249, p. 2167, 2174.
Salter v. Williamson, 2 N. J. Eq. 480, 489, 35 Am. Dec. 513, p. 578, 2281.
Saltern v. Melhuish, Amb. 247, p. 1654.
Saltonstall v. Sanders, 11 Allen, 446, p. 176, 1933, 1947, 1957, 1978.
Salusbury v. Denton, 3 Kay & J. 529, p. 687, 1890, 1951.
Salvage v. Haydock, 68 N. H. 484, 44 Atl. 695, 696, p. 1020, 1024, 1098, 1114, 2418.
Salway v. Salway, 4 Russ. 60, 2 Russ. & M. 215, p. 2056, 2058, 2059.
Salzman v. Creditors, 2 Rob. (La.) 241, p. 2397.
Sammons v. O'Neill, 60 Mo. App. 530, p. 983.
Sample v. Barnes, 14 How. 70, 73, 75, p. 461, 465.
Sampson v. Alexander, 66 Me. 182, p. 2193.
Sampson v. Sampson, L. R. 8 Eq. 479, p. 1548, 2210.
Sampson v. Shaw, 101 Mass. 145, p. 1688.
Samson v. Rouse, 72 Vt. 422, 48 Atl. 666, p. 2019.
Samuda v. Lawford, 8 Jur., N. S., 739, p. 345.
Samuel v. Berger, 24 Barb. 163, p. 2690.
Samuel v. Holladay, 1 Woolw. 400, p. 1859.
Samuel v. Jarrah Timber & Wood Paving Co., [1904] App. Cas. 323, p. 2371.
Samuel v. Samuel's Adm'rs, 4 B. Mon. 245, 253, p. 185.
Samuel v. Wiley, 50 N. H. 353, 354, 355, p. 522, 531.
Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499, p. 1689, 1711.
San Antonio & A. P. R'y Co. v. Gurley, (Tex.) 47 S. W. 513, p. 652.
San Antonio & G. S. R'y Co. v. San Antonio & G. R. Co., 25 Tex. Civ. App. 167, 60 S. W. 338, p. 650.
San Antonio Nat. Bank v. Bamberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738, 85 Am. St. Rep. 368–391, p. 1565, 1566.

San Antonio Nat. Bank v. McLane, (Tex.) 70 S. W. 201, p. 1509, 1510, 1542.
Sanborn v. Braley, 47 Vt. 171, p. 149.
Sanborn v. Doe, 92 Cal. 152, 23 Pac. 105, 27 Am. St. Rep. 101, p. 2555.
Sanborn v. Goodhue, 28 N. H. 48, 59 Am. Dec. 398, p. 2065.
Sanborn v. Kittredge, 20 Vt. 632, 636, 50 Am. Dec. 58, p. 224, 321, 326, 331, 333.
Sanborn v. Robinson, 54 N. H. 239, p. 1054.
Sanborn v. Sanborn, 7 Gray, 142, p. 535, 536.
Sanborn v. Woodman, 5 Cush. 36, 360, p. 758, 761.
Sandberg v. Palm, 53 Minn. 252, 54 N. W. 1109, p. 1161.
Sander v. Heathfield, L. R. 19 Eq. 21, p. 2046.
Sanders v. Ashford, 28 Beav. 609, p. 2228.
Sanders v. Carter, 91 Ga. 450, 17 S. E. 345, p. 760.
Sanders v. Devereux, 60 Fed. 311, 315, 19 U. S. App. 630, p. 501.
Sanders v. Forgasson, 59 Tenn. 249, p. 1774.
Sanders v. Houston Guano & Warehouse Co., 107 Ga. 49, 32 S. E. 610, p. 1881.
Sanders v. McAffie, 41 Ga. 684, p. 2512, 2514.
Sanders v. Metcalf, 1 Tenn. Ch. 419, p. 2678.
Sanders v. Pope, 12 Ves. 282, 290, p. 759.
Sanders v. Riedinger, 51 N. Y. Suppl. 937, 30 App. Div. 277, affirmed, 164 N. Y. 564, 58 N. E. 1092, p. 1022.
Sanders v. Rodway, 22 L. J. Ch., N. S., 230, p. 1679.
Sanders v. Soutter, 126 N. Y. 193, 27 N. E. 263, p. 334, 335, 2283.
Sanders v. Soutter, 136 N. Y. 97, 32 N. E. 638, p. 1231.
Sanders v. Steele, 124 Ala. 415, 26 South. 882, p. 1984, 1995.
Sanders v. Vautier, 4 Beav. 115, Ames' Cas. on Trusts, 454, p. 1851.
Sanders v. Village of Yonkers, 63 N. Y. 489, p. 2752, 2757.
Sanders v. Wagner, 32 N. J. Eq. 506, p. 1541.
Sanders v. Wallace, 118 Ala. 418, 24 South. 354, p. 823.
Sanders v. Wilson, 34 Vt. 318, p. 2428.
Sanderson v. Cockermouth etc. R'y, 11 Beav. 497, p. 2766.
Sanderson v. Jones, 6 Fla. 430, 63 Am. Dec. 217, p. 2190.
Sanderson v. Pennsylvania Coal Co., 86 Pa. St. 401, 27 Am. Rep. 711, p. 2686.
Sanderson v. Price, 21 N. J. L. 646, p. 2351.
Sanderson v. Walker, 13 Ves. 601, p. 1754, 1755.
Sanderson v. White, 18 Pick. 328, 29 Am. Dec. 591, p. 1979.
Sanderson's Trust, In re, 3 Kay & J. 497, p. 2622.
Sanders's Trusts, In re, L. R. 1 Eq. 675, p. 1546.
San Diego v. San Diego etc. R. R., 44 Cal. 106, 112–116, p. 2079, 2085.
Sandford v. Jackson, 10 Paige, 266, p. 809, 811, 820, 829, 830.
Sandfoss v. Jones, 35 Cal. 481, 489, p. 179, 2038.
San Francisco v. Ellis, 54 Cal. 72, p. 2748.
San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187, p. 2253.
San José Ranch Co. v. San José L. & W. Co., 132 Cal. 582, 64 Pac. 1097, p. 1225, 1297.
Sandley v. Caldwell, 28 S. C. 583, 6 S. E. 818, p. 1315, 1369.
Sandoe's Appeal, 65 Pa. St. 314, p. 782, 857.
Sandon v. Hooper, 6 Beav. 246, 248, p. 2429, 2430.
Sands v. Church, 6 N. Y. 347, p. 1706.
Sands v. Matthews, 27 Ala. 399, p. 2568.
Sands v. Sands, 112 Ill. 225, p. 1494, 1730.
Sands Brewing Co., In re, 3 Biss. 175, p. 1293.
Sandusky v. Faris, 49 W. Va. 150, 38 S. E. 563, 573, p. 1859.
Sanford v. Finkle, 112 Ill. 146, p. 2142.
Sanford v. First Nat. Bank of Belle Plaine, 94 Iowa, 680, 63 N. W. 459, p. 728, 730, 748, 762.
Sanford v. Head, 5 Cal. 297, 298, 299, p. 566, 2251, 2262.
Sanford v. Hill, 46 Conn. 42, p. 2447, 2451.

Sanford v. Pierce, 126 Mass. 146, p. 2427.
Sanford v. Poe, 69 Fed. 546, 548, 16 C. C. A. 305, 60 L. R. A. 641, p. 418, 456.
Sanford v. Remington, 2 Ves. 189, p. 277.
Sanford v. Sanford, 4 Hun, 753, p. 2227.
Sanford v. Sornborger. 26 Nebr. 295, 41 N. W. 1102, p. 1735.
Sanford v. Weeden, 2 Heisk. 76, p. 1999.
Sanford v. Weeks, 38 Kan. 319, 16 Pac. 465, 5 Am. St. Rep. 748, p. 1036.
Sanford's Estate, In re, 136 Cal. 97, 68 Pac. 494, p. 1895.
Sanger v. Craigue, 10 Vt. 555, p. 1119, 1124.
Sanger v. Eastwood, 19 Wend. 514, p. 1806.
Sanger v. Sanger, L. R. 11 Eq. 470, p. 2162.
Sangfelder v. Hill, 21 Wash. 371, 58 Pac. 250, p. 2482.
Sang Lung v. Jackson, 85 Fed. 502, p. 414, 445.
Sangster v. Love, 11 Iowa, 580, p. 2392, 2419.
Sanquirico v. Benedetti, 1 Barb. 315, p. 2675.
Santacruz v. Santacruz, 44 Miss. 714, 720, p. 149, 217.
Santa Cruz Rock Paving Co. v. Bowie, 104 Cal. 286, 37 Pac. 934, p. 2544.
Santley v. Wilde, [1899] 1 Ch. 747, p. 2371.
Sanxay v. Hunger, 42 Ind. 44, p. 2758.
Sapp v. Wightman, 103 Ill. 150, p. 1076.
Sappington v. Oeschli, 49 Mo. 244, 246, p. 1270, 1279.
Saratoga & Schenectady R. R. v. Row, 24 Wend. 74, 35 Am. Dec. 598, p. 1788, 1789.
Saratoga Co. Bank v. Pruyn, 90 N. Y. 256, p. 2200.
Sarel, In re, 10 Jur., N. S., 876, p. 2157.
Sargeant v. French, 54 Vt. 384, p. 2198.
Sargeant v. Sargeant, 18 Vt. 371, p. 1231.
Sargent v. Baldwin, 60 Vt. 17, 13 Atl. 854, p. 1873.
Sargent v. Howe, 21 Ill. 148, p. 1860, 1863, 2396.
Sargent v. Ohio & Miss. R. R., 1 Handy, 25, 60, p. 369.
Sargent v. Salmond, 27 Me. 539, 547, p. 551, 552.
Sargent v. Sturm, 23 Cal. 359, 83 Am. Dec. 118, p. 1278, 1330, 1381, 1385.
Sarles v. McGee, 1 N. Dak. 365, 48 N. W. 231, 26 Am. St. Rep. 633, p. 1097, 1130.
Sarles v. Sarles, 3 Sand. Ch. 601, p. 2682, 2693.
Sartoris, In re, [1892] 1 Ch. 11, p. 1843.
Sarver v. Clarkson, 156 Ind. 316, 59 N. E. 933, p. 2515.
Satterfield v. John, 53 Ala. 127, p. 2106.
Satterfield v. Malone, 35 Fed. 445, 1 L. R. A. 35, p. 980, 985, 1132, 1154, 1157, 1163, 1166, 2379.
Satterwhite v. Beall, 28 Ga. 525, p. 2105.
Sattig v. Small, 1 Kan. 170, 175, p. 507, 585.
Sauer v. Kansas, 69 Mo. 46, p. 2710.
Sauer v. Nehls, (Iowa) 96 N. W. 759, p. 1516.
Saufley v. Jackson, 16 Tex. 579, p. 1779.
Saull v. Browne, L. R. 9 Ch. 364, p. 283.
Saull v. Browne, L. R. 10 Ch. 64, p. 2703.
Saull v. Browne, L. R. 17 Eq. 402, p. 286.
Saunders v. Albritton, 37 Ala. 716, p. 2709.
Saunders v. Bennett, 160 Mass. 48, 35 N. E. 111, 39 Am. St. Rep. 456, p. 1284.
Saunders v. Cramer, 3 Dru. & War. 87, p. 1561, 2591.
Saunders v. Dehew, 2 Vern. 270, 271, p. 1197, 1289, 1377.
Saunders v. Edwards, 2 Jones Eq. 134, p. 1886.
Saunders v. Frost, 5 Pick. 259, 267, 16 Am. Dec. 394, p. 539, 2440.
Saunders v. Isbell, 5 Tex. Civ. App. 513, 24 S. W. 307, p. 1355.
Saunders v. Jones, L. R. 7 Ch. Div. 435, 443, p. 261, 272, 283.

Saunders v. Lee, 101 N. C. 3, 7 S. E. 590, p. 1344, 1345, 1384.
Saunders v. Nevil, 2 Vern. 428, p. 2054.
Saunders v. Racquet Club, 170 Pa. St. 265, 33 Atl. 79, 37 Wkly. Notes Cas. 130, p. 212.
Saunders v. Schmælzle, 49 Cal. 59, 67, p. 1897, 2045, 2046.
Saunders v. Simpson, 2 Har. & J. 8, p. 2602.
Saunders v. Smith, 3 Mylne & C. 711, 728, p. 2688.
Saunders v. Webber, 39 Cal. 287, p. 2059.
Saunders-Davies, In re, 34 Ch. Div. 482, p. 2223.
Saunderson v. Ballance, 2 Jones Eq. 322, 67 Am. Dec. 218, p. 1387.
Saunderson v. Broadwell, 82 Cal. 132, 23 Pac. 36, p. 1329.
Saunders's Heirs v. Sounders's Ex'rs, 2 Litt. 314, p. 2271.
Savage v. Allen, 59 Barb. 291, p. 229.
Savage v. Brocksopp, 18 Ves. 335, p. 290, 2770.
Savage v. Burnham, 17 N. Y. 561, 577, p. 811, 820, 832, 1895.
Savage v. Foster, 9 Mod. 35, p. 1386, 1724, 1725.
Savage v. Gregg, 150 Ill. 161, 37 N. E. 312, p. 1207.
Savage v. Hall, 12 Gray, 363, p. 1402, 1407.
Savage v. Jackson, 19 Ga. 305, p. 1592.
Savage v. Johnston, 125 Ala. 673, 28 South. 547, p. 2033.
Savage v. Murphy, 34 N. Y. 508, 90 Am. Dec. 733, 8 Bosw. 75, p. 1799, 1803, 2041.
Savage v. Winchester, 15 Gray, 453, p. 2793.
Savannah Nat. Bank v. Haskins, 101 Mass. 370, 3 Am. Rep. 373, p. 1464.
Savannah, Albany & G. R. R. v. Shiels, 33 Ga. 601, p. 2683.
Savannah & Charleston R. R. v. Callahan, 56 Ga. 331, p. 743, 746.
Savery v. King, 5 H. L. Cas. 627, 655, p. 182, 1605, 1627, 1738, 1742, 1751, 1769, 1778, 1784.
Savile v. Blacket, 1 P. Wms. 777, p. 2218.
Savile v. Savile, 2 Atk. 458, p. 920.
Savile v. Savile, 1 P. Wms. 745, 5 Vin. Abr. 516, pl. 25, p. 1665, 1670.
Savill v. Savill, 2 Coll. C. C. 721, p. 786, 845.
Saville v. Tankred, 1 Ves. Sr. 101, 2 Swanst. 141, p. 2763.
Savings Bank v. Portsmouth, 52 N. H. 17, p. 2678.
Savings Bank v. Scott, 10 Nebr. 83, p. 2195.
Savings B. & L. Assn. v. Tart, 81 Miss. 276, 32 South. 115, p. 1101.
Savings & Loan Soc. v. Davidson, 97 Fed. 696, 713, 38 C. C. A. 365, p. 185, 612, 623.
Sawrey v. Rumney, 5 De Gex. & S. 698, p. 886.
Sawtelle v. Witham, 94 Wis. 412, 69 N. W. 72, p. 1944, 1957, 1970.
Sawtelle's Appeal, 84 Pa. St. 306, p. 2197.
Sawyer, In re, 124 U. S. 200, 210, 8 Sup. Ct. 487, p. 494.
Sawyer v. Adams, 8 Vt. 172, 30 Am. Dec. 459, p. 1098, 1116, 1119.
Sawyer v. Baker, 72 Ala. 49, p. 1021.
Sawyer v. Hanson, 48 Wis. 611, p. 2726.
Sawyer v. Hovey, 3 Allen, 331, 81 Am. Dec. 659, p. 1516, 1541.
Sawyer v. Lyon, 10 Johns. 32, p. 2440.
Sawyer v. Prickett, 19 Wall. 146, p. 1563.
Sawyer v. White, 122 Fed. 223, (C. C. A.) p. 510, 1728, 1739, 1779.
Saxby v. Easterbrook, L. R. 3 C. P. D. 339, p. 2696.
Saxon v. Ames, 47 Miss. 565, p. 2276.
Saxon L. Ins. Co., In re, 1 De Gex, J. & S. 29, 2 Johns. & H. 408, p. 1494, 1499.
Saxton v. Davis, 18 Ves. 72, p. 428.
Say v. Barnes, 4 Serg. & R. 112, 8 Am. Dec. 679, p. 1775.
Say v. Barwick, 1 Ves. & B. 195, p. 1733, 1784.
Say and Seal, Lord, v. Jones, 3 Brown Parl. C. 113, p. 1397.
Sayer v. Sayer, 7 Hare, 377, p. 1467.
Sayers v. Burkhardt, 85 Fed. 246, 42 U. S. App. 742, p. 504.
Sayles v. Cox, 95 Tenn. 579, 49 Am. St. Rep. 940, 32 S. W. 626, 32 L. R. A. 715, p. 1914.
Sayles v. Mann, 4 Ill. App. 516, p. 1641, 1652.

Sayre v. Hewes, 32 N. J. Eq. 652, p. 2387.
Sayre v. Hughes, L. R. 5 Eq. 376, 380, 381, p. 1997, 1998.
Sayre v. Weil, 94 Ala. 466, 10 South. 546, 15 L. R. A. 544, p. 1331.
Sayward v. Thompson, 11 Wash. 706, 40 Pac. 379, p. 1133.
Scadden Flat Gold Min. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440, p. 1983.
Scales v. Baker, 28 Beav. 91, p. 2148.
Scales v. Maude, 6 De Gex, M. & G. 43, p. 1872, 1874.
Scammon v. Kimball, 5 Biss. 431, p. 653.
Scanlan, In re, 40 Ch. Div. 200, p. 2613, 2618.
Scanlon v. Grimmer, 71 Minn. 351, 70 Am. St. Rep. 326, 74 N. W. 146, p. 1706, 2411.
Scarborough v. Borman, 4 Mylne & C. 378, p. 2161.
Scarborough v. Scotten, 69 Md. 137, 9 Am. St. Rep. 409, 14 Atl. 704, p. 235.
Scarlet v. Gorham, 28 Ill. 319, p. 1080.
Scarlett v. Stein, 40 Md. 512, p. 2778.
Scarsdale, Lord, v. Curzon, 1 Johns. & H. 40, p. 1887.
Schaefer v. Gildea, 3 Colo. 15, p. 1452.
Schaeffer v. Farmers' etc. Ins. Co., 80 Md. 563, 45 Am. St. Rep. 361, p. 1158.
Schaeffer v. Mills, (Kan.) 76 Pac. 436, p. 1516, 1542.
Schaeffner's Appeal, 41 Wis. 260, p. 2293, 2300.
Schaeppi v. Glade, 195 Ill. 62, 62 N. E. 874, (aff. 95 Ill. App. 500), p. 1100, 1117.
Schafer v. Reilly, 50 N. Y. 61, 67, 68, p. 1236, 1239, 1241, 1256.
Schafer v. Wilson, 113 Iowa, 475, 85 N. W. 789, p. 1452.
Schaferman v. O'Brien, 28 Md. 565, 92 Am. Dec. 708, p. 1065.
Schaffer v. Lavretta, 57 Ala. 14, p. 1828.
Schafroth v. Ambs, 46 Mo. 114, p. 2194.
Schaidt v. Bland, 66 Md. 141, 6 Atl. 669, p. 1438.
Schakelford v. Bankhead, 72 Ala. 476, p. 2256.
Schanewerk v. Hoberecht, 117 Mo. 22, 38 Am. St. Rep. 691, 22 S. W. 949, p. 2049.
Schaper v. Schaper, 84 Ill. 603, p. 2729.
Schaps v. Lehner, 54 Minn. 208, 55 N. W. 911, p. 1726.
Scharman v. Scharman, 38 Nebr. 39, 56 N. W. 704, p. 1022, 2477.
Scheerer v. Cuddy, 85 Cal. 271, 24 Pac. 713, p. 1021, 1045.
Schell, Matter of, 53 N. Y. 263, 265, p. 2099.
Schell v. Erie R'y, 51 Barb. 368, p. 229, 467.
Schell v. Stein, 76 Pa. St. (26 P. F. Smith) 398, 18 Am. Rep. 416, p. 1108, 1119.
Schelling v. Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475, p. 1231.
Schenck v. Ellingwood, 3 Edw. Ch. 175, p. 960, 1468.
Schenck v. O'Neill, 23 Hun, 209, p. 2729.
Schenck v. Schenck, 2 N. J. Eq. 174, p. 2095.
Schenck v. Wicks, 23 Utah, 576, 65 Pac. 732, p. 112, 621, 2018. 2533, 2535.
Schermerhorn v. De Chambrun, 64 Fed. 195, 12 C. C. A. 81, 26 U. S. App. 212, p. 664.
Schermerhorn v. Talman, 14 N. Y. 93, p. 1707.
Schettler v. Fort Howard, 43 Wis. 48, p. 2678.
Schettler v. Smith, 41 N. Y. 328, p. 1895.
Scheulenburg v. Martin, 1 McCrary, 348. 2 Fed. 747, p. 2382.
Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 Am. Dec. 507, p. 2068, 2080.
Schiffer v. Dietz, 83 N. Y. 300, 307, 308, p. 1603, 1609, 1613, 1618, 1788.
Schiffman v. Schmidt, 154 Mo. 204, 55 S. W. 451, p. 1838.
Schilling v. Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475, p. 2563.
Schillinger Fireproof Cement & Asphalt Co. v. Arnott, 152 N. Y. 584, 46 N. E. 956, p. 2544.
Schlaefer v. Corson, 52 Barb. 510, p. 958, 2024, 2030.

Schlarfer v. Corson, 32 Barb. 510, p. 701.
Schlecht's Appeal, 60 Pa. St. 172, p. 2655.
Schlereth v. Schlereth, 173 N. Y. 444, 66 N. E. 130, 93 Am. St. Rep. 616, p. 2310.
Schlessinger v. Mallard, 70 Cal. 326, 11 Pac. 728, p. 1985, 1989.
Schley v. Fryer, 100 N. Y. 71, 2 N. E. 280, p. 2407.
Schlitz Brewing Co., Joseph, v. City of Superior, 117 Wis. 297, 93 N. W. 1120, p. 390, 452.
Schloss v. Hewlett, 81 Ala. 266, 1 South. 263, p. 2554.
Schlussel v. Willett, 34 Barb. 615, p. 1858.
Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659, p. 1329.
Schmaltz v. York Mfg. Co., 204 Pa. St. 1, 93 Am. St. Rep. 782, 53 Atl. 522, p. 709.
Schmid v. Lisiewski, 53 N. J. Eq. 670, 31 Atl. 603, p. 352.
Schmidt v. Gatewood, 2 Rich. Eq. 162, p. 1659, 2039.
Schmidt v. Hedden, (N. J. Eq.) 38 Atl. 843, p. 2387.
Schmidt v. Schmidt, 47 Minn. 457, 50 N. W. 598, p. 1738.
Schmidt v. West, 104 Fed. 272, p. 498.
Schmidt v. Zahrndt, 148 Ind. 447, 47 N. E. 335, p. 2386, 2387.
Schmieder v. Kingsley, 6 Misc. Rep. 107, 26 N. Y. Supp. 31, affirmed, 7 Misc. Rep. 744, 27 N. Y. Supp. 1124, p. 762.
Schmitheimer v. Eiseman, 7 Bush, 298, p. 1194, 1724.
Schmitt v. Hoyt, 1 Edw. Ch. 652, p. 1270.
Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765, p. 2412.
Schnabel v. Betts, 23 Fla. 178, 1 South. 692, p. 2190.
Schnavely v. Bishop, 8 Kan. App. 301, 55 Pac. 667, p. 982.
Schneider v. Heath, 3 Camp. 506, p. 1601.
Schneider v. Schneider, (Iowa) 98 N. W. 159, p. 1495, 1561, 1757, 1761.
Schneider v. Sellers, (Tex.) 84 S. W. 417, p. 1365, 2030, 2031, 2033.
Schnittger v. Old Home Consol. Min. Co., (Cal.) 78 Pac. 9, p. 2084.
Schoch v. Birdsall, 48 Minn. 441, 51 N. W. 382, p. 1097, 1135, 1283, 1363.
Schoener v. Lassauer, 107 N. Y. 112, 13 N. E. 741, p. 673, 1718, 1735.
Schofield v. Adams, 12 Hun, 366, p. 2216.
Schofield v. Heap, 27 Beav. 93, p. 903, 908.
Schofield's Estate, In re, 99 Ill. 513, p. 2089.
Scholefield v. Lockwood, 32 Beav. 436, p. 1515.
Scholefield v. Templer, 4 De Gex & J. 429, 433, p. 1607.
Scholefield v. Templar, Johns. 155, 166, p. 1494, 1550, 1625.
Scholey v. Central R'y etc., L. R. 9 Eq. 266, p. 1453, 1574.
Scholey v. Halsey, 72 N. Y. 578, p. 2607.
Schollay v. Moffitt-West Drug Co., (Colo. App.) 67 Pac. 182, p. 1154.
Scholle v. Scholle, 101 N. Y. 172, 4 N. E. 334, p. 1754.
Scholle v. Scholle, 113 N. Y. 261, 21 N. E. 84, p. 2309.
Schollmier v. Schoendelen, 78 Iowa, 426, 43 N. W. 282, 16 Am. St. Rep. 455, p. 2570.
School District No. 1 v. Weston, 31 Mich. 85, p. 2636, 2639.
School Dist. No. 3 v. Sheldon, 71 Vt. 95, 41 Atl. 1041, p. 2291.
School District No. 10 v. Peterson, 74 Minn. 122, 76 N. W. 1126, 73 Am. St. Rep. 337, p. 1269.
School Dist. No. 82 v. Taylor, 19 Kan. 287, p. 1019, 1021, 1045, 1100, 1145, 1293.
School Dists. of City of Sedalia v. De Weese, 100 Fed. 705, p. 1176.
Schooley v. Romain, 31 Md. 574, 579, 100 Am. Dec. 87, p. 725.
Schoolfield v. Hirsh, 71 Miss. 55, 14 South. 528, 42 Am. St. Rep. 450, p. 1207.
Schorn v. McWhirter, 6 Baxt. 311, 313, p. 2535.
Schotsmans v. Lancashire etc. R'y, L. R. 2 Ch. 332, p. 2765.
Schott v. Dosh, 49 Nebr. 187, 68 N. W. 346, 59 Am. St. Rep. 531, p. 1341.
Schouler, In re, 134 Mass. 426, p. 1938, 1958, 1978.
Schrack v. Shriner, 100 Pa. St. 451, p. 2455.

Schraum v. O'Connor, 98 Ill. 539, p. 1566, 1733, 1734.
Schreckhise v. Wiseman, (Va.) 45 S. E. 745, p. 1155.
Schreiber v. Creed, 10 Sim. 9, p. 1199.
Schreyer v. Mayor, 8 Jones & S. 255, p. 2567, 2584.
Schrimpf v. Tennessee Mfg. Co., 86 Tenn. 219, 6 S. W. 131, 6 Am. St. Rep. 832, p. 736.
Schroder v. Schroder, Kay, 571, 578, 18 Jur. 987, 24 L. J. Ch., N. S., 510, 513, p. 806.
Schroeder v. Cal. Yukon Trading Co., 95 Fed. 296, p. 728.
Schroeder v. Gurney, 10 Hun, 413, p. 2750.
Schroeder v. Gurney, 73 N. Y. 430, p. 1270, 2757.
Schroeder v. Kinney, 15 Utah, 462, 49 Pac. 894, p. 2408.
Schroeder v. Loeber, 75 Md. 195, 23 Atl. 579, 24 Atl. 226, p. 463.
Schroppel v. Hopper, 40 Barb. 425, p. 621, 2760.
Schryver v. Teller, 9 Paige, 173, p. 2447.
Schuessler v. Hatchett, 58 Ala. 181, p. 2770.
Schulenberg-Boeckeler Lumber Co. v. Town of Hayward, 20 Fed. 422, 424, p. 374, 433.
Schuler v. Laclede Bank, 27 Fed. 424, p. 2570.
Schuler v. Post, 46 N. Y. Supp. 18, 18 App. Div. 374, p. 1845.
Schultz v. Plankington Bank, 141 Ill. 116, 30 N. E. 346, 33 Am. St. Rep. 290, p. 2392.
Schultz v. Stroelowitz, 191 Ill. 249, 61 N. E. 92, reversing 86 Ill. App. 344, p. 1304.
Schultze v. Houfes, 96 Ill. 335, p. 1861.
Schultz's Appeal, 80 Pa. St. 405, p. 2036.
Schulze v. Bolting, 8 Biss. 174, Fed. Cas. No. 12,849, p. 2388.
Schumacher v. Truman, 134 Cal. 430, 66 Pac. 591, p. 1026, 1028.
Schuster v. Schuster, 93 Mo. 438, 6 S. W. 259, p. 1997.
Schutt v. Large, 6 Barb. 373, p. 1095, 1112, 1136, 1345, 1358, 1359.
Schuyler v. Pelissier, 3 Edw. Ch. 191, 192, p. 2637, 2646, 2718.
Schuyler Fraud Cases, 17 N. Y. 592, p. 419.
Schuylkill County v. Copley, 67 Pa. St. 386, 5 Am. Rep. 441, p. 1650.
Schwab v. Frisco M. & M. Co., 21 Utah, 258, 60 Pac. 940, p. 352.
Schwalber v. Ehman, 62 N. J. Eq. 314, 49 Atl. 1085, p. 217.
Schwalm v. Holmes, 49 Cal. 665, p. 1690.
Schwartz v. Gerhardt, (Oreg.) 75 Pac. 698, p. 2020.
Schwartz v. Lieber. (Miss.) 32 South. 954, p. 2381.
Schwartz v. Woodruff, (Mich.) 93 N. W. 1067, p. 2534.
Schwarz v. Stein, 29 Md. 112, 119, p. 2526.
Schwarz v. Wendell, Walk. Ch. 267, p. 1754.
Schwear v. Haupt, 49 Mo. 225, p. 2726.
Schweder's Estate, In re, [1891] 3 Ch. 44, p. 2225, 2226.
Schwind v. Ibert, 60 App. Div. 378, 69 N. Y. Supp. 921, p. 1868, 1869.
Schwickerath v. Cooksey, 53 Mo. 75, p. 2728.
Schwimm v. Bush, 23 Mich. 99, p. 1590, 1609.
Schwind v. Boyce, 94 Md. 510, 51 Atl. 45, p. 1170.
Schwoerer v. Boylston Market Ass'n, 99 Mass. 285, p. 2595.
Scofield v. Adams, 12 Hun, 366, p. 2227.
Scofield v. City of Lansing, 17 Mich. 437, p. 404, 436, 454, 2757.
Scofield v. Eighth School District, 27 Conn. 499, 504, p. 407.
Scofield v. Gaskill, 60 Ga. 277, p. 2794.
Scofield v. Van Bokkelen, 5 Jones Eq. 342, p. 2694.
Scofield v. Whitelegge, 49 N. Y. 259, p. 2667.
Scoles v. Wilsey, 11 Iowa, 261, p. 1100.
Scollans v. Rollins, 173 Mass. 279, 73 Am. St. Rep. 284, 53 N. E. 863; s. c., 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 983, p. 1242.
Scorpion S. M. Co. v. Marsano, 10 Nev. 370, p. 2749, 2751.
Scotch Lumber Co. v. Sage, 132 Ala. 598, 90 Am. St. Rep. 932, 32 South. 607, p. 1042, 1133, 1176.

Scott, In re, [1903] 1 Ch. 1, p. 908, 909.
Scott v. Abercombie, 14 Ala. 270, p. 2256.
Scott v. Armstrong, 146 U. S. 499, 512. 13 Sup. Ct. 148, 152, p. 495.
Scott v. Austin, 36 Minn. 460, 32 N. W. 89, 864, p. 648, 657.
Scott v. Berkshire Bk., 140 Mass. 457, 2 N. E. 925, p. 1866.
Scott v. Billgerry, 40 Miss. 119, p. 2762.
Scott v. Crawford, 12 Ind. 411, p. 585.
Scott v. Depeyster, 1 Edw. Ch. 513, 543, 53 Am. Dec. 624, p. 2063, 2066.
Scott v. Donald, 165 U. S. 107, 17 Sup. Ct. 262, p. 377.
Scott v. Dunbar, 1 Molloy, 442, p. 1765.
Scott v. Elmore, 10 Hun, 68, p. 2662.
Scott v. Erie R. R. Co., 34 N. J. Eq. 354, p. 380.
Scott v. Farmers & Merchants' Nat. Bank, (Tex.) 75 S. W. 7, p. 2085.
Scott v. Fields, 7 Ohio, 424, p. 2779.
Scott v. Freeland, 7 Smedes & M. 409, 45 Am. Dec. 310, p. 1761, 1773.
Scott v. Gallagher, 14 Serg. & R. 333, 334, 16 Am. Dec. 508, p. 1030.
Scott v. Guernsey, 60 Barb. 163, 180, 181, affirmed, 48 N. Y. 106, 124, p. 2480, 2740, 2800.
Scott v. Haddock, 11 Ga. 258, p. 2096.
Scott v. Hanson, 1 Sim. 13, 1 Russ. & M. 128, p. 649, 1590, 1591.
Scott v. Henry, 13 Ark. 112, p. 2373, 2437.
Scott v. Jenkins, (Fla.) 35 South. 101, p. 635.
Scott v. Key, 35 Beav. 291, p. 1929.
Scott v. Land, Mortgage etc. Co., 127 Ala. 161, 28 South. 709, p. 2423, 2425.
Scott v. Lewis, 40 Oreg. 37, 66 Pac. 299, p. 1024.
Scott v. Lord Hastings, 4 Kay & J. 633, p. 1207.
Scott v. McFarland, 70 Fed. 280, p. 378, 420.
Scott v. McMillen, 1 Litt. 302, 13 Am. Dec. 239, p. 2790.
Scott v. Magloughlin, 133 Ill. 33, 24 N. E. 1030, p. 1227.
Scott v. Mann, 33 Tex. 725, p. 1756.
Scott v. Mann, 36 Tex. 157, p. 1761.
Scott v. Mewhirter, 49 Iowa, 487, p. 2376.
Scott v. Mineral Development Co., (C. C. A.) 130 Fed. 497, p. 1127.
Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 714, 35 L. ed. 358, p. 500, 505, 506.
Scott v. Nesbit, 2 Brown Ch. 641, 2 Cox, 183, p. 1075.
Scott v. Nesbitt, 14 Ves. 437, 444, p. 2480.
Scott v. Onderdonk, 14 N. Y. 9, 67 Am. Dec. 106, p. 2755.
Scott v. Orbison, 21 Ark. 202, p. 2498.
Scott v. Patchin, 54 Vt. 253, p. 2486.
Scott v. Pattison, 54 Vt. 253, p. 2486.
Scott v. Porcher, 3 Mer. 652, p. 2564.
Scott v. Rand, 118 Mass. 215, p. 2106, 2107.
Scott v. Rayment, L. R. 7 Eq. 112, p. 345, 2771.
Scott v. Sadler, 52 Pa. St. 211, p. 1232.
Scott v. Scott, 1 Cox, 366, p. 1561, 1679.
Scott v. Scott, 33 Ga. 102, 104, p. 1642, 2707.
Scott v. Searles, 5 Smedes & M. 25, 7 Smedes & M. 498, 45 Am. Dec. 317, p. 2278.
Scott v. Shreeve, 12 Wheat. 605, p. 2705.
Scott v. Sierra Lumber Co., 67 Cal. 71, 7 Pac. 131, p. 1096, 1113, 1755.
Scott v. Slaughter, (Tex. Civ. App.) 80 S. W. 643, p. 1502, 1503.
Scott v. Spashett, 3 Macn. & G. 599, 603, p. 646, 2167, 2170, 2173.
Scott v. Stebbins, 91 N. Y. 605, p. 2493.
Scott v. Turner, 15 La. Ann. 346, p. 241.
Scott v. Tyler, 2 Brown Ch. 431, 2 Dick. 712, 2 Lead. Cas. Eq., 4th Am. ed., 429, 475, 478–480, 483–485, 486–493, 494–499, p. 1678, 1680, 1681, 1682, 1684, 1686.
Scott v. Umbarger, 41 Cal. 410, p. 1753, 1755, 1779, 1897, 2016, 2032
Scott v. Wallace, 4 J. J. Marsh. 654, p. 2789.
Scott v. Ward, 35 Ark 480, p. 2190.
Scott v. Ward, 13 Cal. 458, 469, 470, p. 841.
Scott v. Webster, 44 Wis. 185, p. 1403, 1406.

Scott v. Webster, 50 Wis. 53, 6 N. W. 363, p. 2429.
Scottish-American Mortg. Co. v. Clowney, (S. C.) 49 S. E. 569, p. 1755.
Scottish Eq. Life Ins. Co., In re Policy No. 6402 of, [1902] 1 Ch. 282, p. 1996.
Scottish Union etc. Ins. Co. v. J. H. Mohlman Co., 73 Fed. 66, p. 441.
Scott's Estate, In re, 202 Pa. St. 380, 51 Atl. 1023, p. 2052.
Scovill v, Barney, 4 Oreg. 288, p. 1665, 1666, 1670.
Scoville v. Brock, 75 Vt. 243, 54 Atl. 177, p. 2291.
Scoville v. Brock, (Vt.) 57 Atl. 967, p. 2291.
Scowcroft, In re, [1898] 2 Ch. 638, p. 1945.
Screven v. Clark, 48 Ga. 41, p. 2662.
Scribner v. Adams, 73 Me. 541, p. 2796.
Scribner v. Allen, 12 Minn. 148, p. 403, 433.
Scribner v. Collar, 40 Mich. 375, 29 Am. Rep. 541, p. 1760.
Scribner v. Lockwood, 9 Ohio, 184, p. 1276, 1381.
Scripps v. King, 103 Ill. 469, p. 2267.
Scripture v. Scottish-Am. Mortg. Co., (Tex. Civ. App.) 49 S. W. 644, p. 1175.
Scrivens v. North Eastern S. B., 166 Mass. 255, 44 N. E. 251, p. 1864.
Scrivin v. Hursh, 39 Mich. 98, p. 2704, 2709.
Scroggins v. Dougal, 8 Ala. 382, p. 1044.
Scroggins v. Hoadley, 56 Ga. 165, p. 2533.
Scruggs v. Blair, 44 Miss. 406, 412, p. 149.
Scudamore v. Scudamore, Prec. Ch. 543, p. 2306, 2316.
Scudder v. Van Amburgh, 4 Edw. Ch. 29, p. 1077.
Scudder's Ex'rs v. Vanarsdale, 13 N. J. Eq. 109, p. 2306.
Sculthorpe v. Tipper, L. R. 13 Eq. 232, p. 2057, 2069, 2073, 2090.
Sea v. Morehouse, 79 Ill. 216, p. 2758.
Seabright v. Seabright, 28 W. Va. 412, 475, p. 2232, 2234, 2242.
Seabrook v. Brady, 47 Ga. 650, p. 1064, 1075, 1144.
Seaburn's Ex'r v. Seaburn, 15 Gratt. 423, p. 1971.
Seacoast R. Co. v. Wood, (N. J. Eq.) 56 Atl. 337, p. 2085.
Seagar v. Burns, 4 Minn. 141, p. 1146.
Seagram v. Tuck, L. R. 18 Ch. Div. 296, p. 2662.
Seagrave v. Kirwan, 1 Beat. 157, p. 2035.
Seagrave v. Seagrave, 13 Ves. 439, 443, p. 2162.
Seal, In re, [1894] 1 Ch. 316, p. 1548.
Seals v. Cashin, 2 Ga. Dec. 76, p. 2358.
Seals v. Weldon, 121 Ala. 319, 25 South. 1021, p. 2257.
Seaman v. Aschermann, 51 Wis. 678, 37 Am. Rep. 849, p. 2780.
Seaman v. Lee, 10 Hun, 607, p. 2687.
Seaman v. Van Rensselaer, 10 Barb. 81, 86, p. 615, 2768.
Seaman v. Waddington, 16 Johns. 510, p. 1696.
Seaman v. Woods, 24 Beav. 372, p. 789.
Seaman v. Wright, 12 Abb. Pr. 304, p. 2646.
Seaman's F. Soc. v. Hopper, 33 N. Y. 619, p. 1727.
Seamonds v. Hodge, 36 W. Va. 304, 32 Am. St. Rep. 854, 15 S. E. 156, p. 1926.
Search's Adm'r v. Search's Adm'rs, 27 N. J. Eq. 137, p. 2281.
Searle v. Law, 15 Sim. 95, p. 1872, 1877.
Searles v. Costillo, 12 La. Ann. 203, p. 2750.
Searles v. Jacksonville etc. R. R., 2 Woods, 621, p. 2662.
Searles v. Scott, 14 Smedes & M. 94, p. 2277.
Sears v. Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502, p. 1946, 1956, 1958, 1979.
Sears v. Choate, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786, p. 1844, 1851.
Sears v. Dixon, 33 Cal. 326, p. 2376.
Sears v. Hardy, 120 Mass. 524, p. 538.
Sears v. Hicklin, 13 Colo. 143, 21 Pac. 1022, p. 1587.
Sears v. Hotchkiss, 25 Conn. 171, 65 Am. Dec. 557, p. 237, 2125.
Sears v. Munson, 23 Iowa, 380, p. 1019.

Sears v. Shafter, 6 N. Y. 268, p. 1779.
Sears v. Smith, 2 Mich. 243, p. 2500, 2509.
Seat v. Knight, 3 Tenn. Ch. 262, p. 2535.
Seaver v. Durant, 39 Vt. 103, p. 2431.
Seaverus v. Presbyterian Hospital, 173 Ill. 414, 50 N. E. 1079, 64 Am. St. Rep. 125, p. 1177.
Seaving v. Brinkerhoff, 5 Johns. Ch. 329, p. 1858.
Seay v. Bank of Rome, 66 Ga. 609, p. 1331.
Sebring v. Mersereau, Hopk. Ch. 501, 9 Cow. 344, p. 2739, 2740.
Second Church v. Disbrow, 52 Pa. St. 219, p. 1927.
Second Cong. Soc. v. First Cong. Soc., 14 N. H. 315, p. 1975.
Second Nat. Bank v. Walbridge, 19 Ohio St. 419, 2 Am. Rep. 408, p. 1436.
Second Nat. Bank v. Williams, 13 Mich. 282, p. 2238.
Secrest v. McKenna, 1 Strob. Eq. 356, p. 643, 2775.
Security Co. v. Bryant, 52 Conn. 311, 52 Am. Rep. 599, p. 2227.
Security Co. v. Hardenberg, 53 Conn. 169, 2 Atl. 391, p. 466.
Security Sav. & Loan Ass'n v. Buchanan, 66 Fed. 799, 14 C. C. A. 97, 31 U. S. App. 244, p. 218, 1463, 1464.
Security Sav. & Tr. Co. v. Loewenberg, 38 Oreg. 159, 62 Pac. 647, p. 1107, 1123, 1274, 1275.
Security Sav. Soc. v. Cohalan, 31 Wash. 266, 71 Pac. 1020, p. 1771.
Seda v. Huble, 75 Iowa, 429, 39 N. W. 685, 9 Am. St. Rep. 495, p. 1938, 1974.
Sedam v. Cincinnati etc. Canal Co., 2 Disn. 309, p. 2574, 2584.
Sedgwick v. Cleveland, 7 Paige, 287, p. 1064.
Sedgwick v. Johnson, 107 Ill. 385, p. 2417.
Sedgwick v. Stanton, 14 N. Y. 289, p. 1699.
Seed v. Bradford, 1 Ves. Sr. 501, p. 880.
Seeley v. Bacon, (N. J. Eq.) 34 Atl. 139, p. 1265, 1510, 2425.
Seeley v. Engell, 13 N. Y. 542, p. 2714, 2722.
Seeley v. Fisher, 11 Sim. 581, 583, p. 545.
Seeley v. Howard, 13 Wis. 336, p. 2777.
Seeley v. Jago, 1 P. Wms. 389, p. 2331, 2332.
Seeley v. Reed, 25 Fed. 361, p. 1603, 1625.
Seely v. Hills, 49 Wis. 473, p. 2059.
Seevers v. Delashmutt, 11 Iowa, 174, 77 Am. Dec. 139, p. 1373.
Segar v. Parish, 20 Gratt. 672, p. 67.
Seguin v. Maverick, 24 Tex. 526, 532, 76 Am. Dec. 117, p. 571, 588.
Segur v. Tingley, 11 Conn. 134, p. 1509.
Sehorn v. McWhirter, 6 Baxt. 311, 313, p. 2534.
Seibel v. Bath, 5 Wyo. 409, 40 Pac. 756, p. 2024, 2030.
Seibel v. Rapp, 85 Va. 28, 6 S. E. 478, p. 1920.
Seiberling v. Tipton, 113 Mo. 373, 21 S. W. 4, p. 1051.
Seibert v. Todd, 31 S. C. 206, 9 S. E. 822, 4 L. R. A. 606, p. 1280.
Seibet v. Bath, 5 Wyo. 409, 40 Pac. 756, p. 964, 1072.
Seichrist's Appeal, 66 Pa. St. 237, p. 2038, 2762.
Seidelbach v. Knaggs, 60 N. Y. Supp. 774, 44 App. Div. 169, p. 1894.
Seigert v. Findlater, L. R. 7 Ch. Div. 801, p. 2690.
Seiler v. Northern Bank, 86 Ky. 128, 5 S. W. 536, p. 2379.
Seitz v. Union Pac. R'y, 16 Kan. 133, p. 2534.
Seitzinger v. Ridgway, 9 Watts, 496, 498, p. 559.
Seixo v. Provezende, L. R. 1 Ch. 192, p. 2690.
Selah v. Selah, 23 N. J. Eq. 185, p. 1733.
Selby v. Alston, 3 Ves. 339, p. 168, 1396.
Selby v. Case, 87 Md. 459, 39 Atl. 1041, p. 633, 1214.
Selby v. Geines, 12 Ill. 69, p. 1523.
Selby v. Jackson, 6 Beav. 192, 204, p. 1726.
Selby v. Sanford, 7 Kan. App. 781, 54 Pac. 17, p. 2403.
Selby v. Stanley, 4 Minn. 65, p. 2501.
Selden v. Vermilyea, 1 Barb. 58, p. 1894.

Selden's Appeal, 31 Conn. 548, p. 1909.
Seligman v. Kalkinan, 8 Cal. 207, p. 1621.
Sell v. West, 125 Mo. 621, 46 Am. St. Rep. 508, 28 S. W 969, p. 49, 2006.
Sellack v. Harris, 5 Vin. Abr. 521, p. 2035.
Selleck v. Tallman, 87 N. Y. 106, p. 2775, 2777.
Sellers v. Sellers, 35 Ala. 235, p. 335, 580, 2299, 2302.
Sellers Chapel Meth. Ch., In re, 139 Pa. St. 61, 21 Atl. 145, 27 Wkly. Notes Cas. 383, 11 L. R. A. 282, p. 1941, 1976.
Sellon v. Braden, 13 Iowa, 365, p. 684, 2608.
Sells v. Sells, 1 Dru. & Sm. 42, p. 1516.
Selma etc. Co. v. Harris, 132 Ala. 179, 31 South. 508, p. 1221.
Selna v. Selna, 125 Cal. 357, 58 Pac. 16, 73 Am. St. Rep. 47, p. 2499, 2511.
Selons, In re, [1901] 1 Ch. 921, p. 1396.
Selsey v. Rhoades, 1 Bligh, N. S., 1, 2 Sim. & St. 41, p. 1763, 1787.
Selwood v. Gray, 11 Oreg. 534, 5 Pac. 196, p. 2435, 2437.
Selz v. Unna, 73 U. S. (6 Wall.) 327, p. 664.
Semmes v. Whitney, 50 Fed. 666, p. 508.
Semmes v. Worthington, 38 Md. 298, p. 2780, 2781.
Semon v. Terhune, 40 N. J. Eq. 364, 2 Atl. 18, p. 1136.
Semple v. Burd, 7 Serg. & R. 286, p. 2504.
Seneca Co. Bank v. Neass, 5 Denio, 329, 337, p. 1164.
Senft v. Vanek, 209 Ill. 361, 70 N. E. 720, p. 2439.
Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250, p. 1313, 1314.
Senhouse v. Earl, 2 Ves. Sr. 450, p. 267.
Senior v. Pawson, L. R. 3 Eq. 330, p. 696, 1450, 2698.
Sensenderfer v. Kemp, 83 Mo. 581, p. 982, 1197.
Senter v. Lambeth, 59 Tex. 259, p. 1269, 1273, 2502.
Senter v. Turner, 10 Iowa, 517, p. 1100.
Sepulveda v. Sepulveda, 39 Cal. 13, 18, p. 2748, 2750.
Sergeant v. Ingersoll, 7 Pa. St. 340, 15 Pa. St. 343, 348, 349, p. 1009, 1018, 1048, 1057, 1058, 1380.
Sergeson v. Sealy, 2 Atk. 412, p. 1726.
Servis v. Beatty, 32 Miss. 52, p. 2501, 2528.
Sessions v. Moseley, 4 Cush. 87, p. 2233, 2236.
Sessions v. Sessions, 33 Ala. 522, 525, p. 148, 215.
Seton v. Slade, 7 Ves. 265, 273, p. 2368, 2777.
Settembre v. Putnam, 30 Cal. 490, p. 701, 958, 2024.
Setter v. Alvey, 15 Kan. 157, p. 1145.
Sever v. Russell, 4 Cush. 513, 50 Am. Dec. 811. p. 2273, 2274.
Severance v. Ash, 81 Me. 278, 17 Atl. 69, p. 1588.
Severance v. Kimball, 8 N. H. 386, p. 1736.
Severn etc. Bridge Co., In re, [1896] 1 Ch. 559, p. 1911.
Sewall v. Boston Water Works, 4 Allen, 277, 81 Am. Dec. 701, p. 1253, 1382, 2784.
Seward v. Jackson, 8 Cow. 406, 423, 430, 434, 438, p. 1324, 1800.
Sewell v. Denny, 10 Beav. 315, p. 1989.
Sewell v. Nelson, 23 Ky. Law Rep. 2438, 67 S. W. 985, p. 1324.
Sewell v. Smith, 54 Ga. 567, p. 855.
Sexton v. Pike, 13 Ark. 193, p. 147, 149.
Sexton v. Wheaton, 8 Wheat. 229, 230, 1 Am. Lead. Cas., 4th Am. ed., 17, 50, 51, p. 1186, 1724, 1792, 1800, 1805, 1806.
Seylar v. Carson, 69 Pa. St. 81, p. 1744.
Seymore v. Tresilian, 3 Atk. 358, p. 2164.
Seymour v. Belding, 83 Ill. 222, p. 2729.
Seymour v. Canandaigua etc. R. R., 25 Barb. 284, 303, p. 2576, 2583.
Seymour v. Cushway, 100 Wis. 580, 7 N. W. 769, 69 Am. St. Rep. 957, p. 2040.
Seymour v. Darrow, 31 Vt. 122, p. 2383.
Seymour v. De Lancey, Hopk. Ch. 436, 14 Am. Dec. 552, p. 2771.

Seymour v. Delancey, 6 Johns. Ch. 222, 224, 225, 3 Cow. 455, 15 Am. Dec. 270, p. 662, 1665, 1666, 2762.
Seymour v. Long Dock Co., 29 N. J. Eq. 396, p. 2799.
Seymour v. McAvoy, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544, p. 1843.
Seymour v. Mackay, 126 Ill. 341, 18 N. E. 552, p. 2371.
Seymour v. McKinstry, 106 N. Y. 230, 238, 12 N. E. 348, 14 N. E. 94, p. 1023, 1328, 1355, 1390, 1391.
Seymour v. Prescott, 69 Me. 376, p. 1735.
Seymour v. Seymour, 4 Johns. Ch. 409, 411, p. 245, 258, 321, 324, 326, 576, 2283.
Seymour v. Smith, 114 N. Y. 481, 21 N. E. 1042, 11 Am. St. Rep. 683, p. 1224.
Shackelford v. Bankhead, 72 Ala. 476, p. 250, 323, 2255.
Shackell v. Macauley, 2 Sim. & St. 79, 2 Russ. 550, note, 1 Bligh, N. S., 96, 133, 134, p. 257.
Shackelton v. Sebree, 86 Ill. 616, p. 1732, 1733.
Shackle v. Baker, 14 Ves. 468, p. 2675.
Shackleton v. Allen Chapel A. M. E. Church, 25 Mont. 421, 65 Pac. 428, p. 1133.
Shackleton v. Sutcliffe, 1 De Gex & S. 609, p. 1015, 1596.
Shacklett v. Polk, 4 Heisk. 104, p. 2198.
Shad v. Livingston, 31 Fla. 89, 12 South. 646, p. 1331.
Shadbolt v. Vanderplank, 29 Beav. 405, p. 872.
Shaddle v. Disborough, 30 N. J. Eq. 370, p. 1665, 1666, 2770.
Shaeffer v. Chambers, 6 N. J. Eq. 548, 47 Am. Dec. 211, p. 2428, 2429, 2432.
Shaeffer v. Sleade, 7 Blackf. 178, p. 1566.
Shafer v. Niver, 9 Mich. 253, p. 2778.
Shaffer v. Whelpley, 37 Wis. 334, p. 2750, 2780.
Shaftesbury v. Arrowsmith, 4 Ves. 71, p. 244, 262.
Shaftsbury v. Shaftsbury, 2 Vern. 747, p. 2213.
Shakel v. Duke of Marlborough, 4 Madd. 463, p. 2659.
Shakels v. Richardson, 2 Coll. C. C. 31, p. 2490.
Shakespeare v. Markham, 72 N. Y. 400, p. 1727, 1730.
Shakespear v. Smith, 77 Cal. 638, 20 Pac. 294, 11 Am. St. Rep. 327, p. 1229.
Shall v. Biscoe, 18 Ark. 142, 162, p. 2477, 2498, 2519.
Shallcross v. Finden, 3 Ves. 738, p. 2489.
Shanahan v. Kelly, 88 Minn. 202, 92 N. W. 948, p. 1971.
Shand v. Du Buisson, L. R. 18 Eq. 283, p. 2568.
Shand v. Hanley, 71 N. Y. 319, p. 1803.
Shankland's Appeal, 47 Pa. St. 113, p. 1831, 1840, 1846.
Shanley v. Harvey, 2 Eden, 126, p. 2236.
Shannon v. Bradstreet, 1 Schoales & L. 52, 63, p. 1467, 1468, 1469.
Shannon v. Bruner, 36 Fed. 147, p. 2554.
Shannon v. Canney, 44 N. H. 592, p. 2195.
Shannon v. Hall, 72 Ill. 354, 22 Am. Rep. 146, p. 1099, 1119.
Shannon v. Hoboken, 37 N. J. Eq. 123, p. 2561.
Shannon v. Marselis, 1 N. J. Eq. 413, 421, p. 2447, 2454, 2455.
Shannon v. Pentz, 1 App. Div. 331, 37 N. Y. Supp. 304, p. 1066.
Shannon v. Shannon, 2 Gray, 285, p. 2176.
Shapland v. Smith, 1 Brown Ch. 75, 76, p. 1397, 1824.
Shapleigh v. Pilsbury, 1 Me. 271, p. 1974.
Shapley v. Abbott, 42 N. Y. 443, 448, 1 Am. Rep. 548, p. 1427.
Shapley v. Rangeley, 1 Wood. & M. 213, 216, 2 Ware, 242, p. 514.
Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, p. 1594, 1602, 1646.
Sharitz v. Moyers, 99 Va. 519, 3 Va. Sup. Ct. Rep. 359, 39 S. E. 166, p. 1062.
Sharkey v. Sharkey, 47 Mo. 543, p. 2376.
Sharon v. Gager, 46 Conn. 189, p. 1734.
Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709, p. 123.

Sharon v. Tucker, 144 U. S. 542, 12 Sup. Ct. 720, p. 199, 200, 201, 361, 363, 385, 451, 710, 1460.
Sharp v. Cheatham, 88 Mo. 498, 57 Am. Rep. 433, p. 1199, 2598.
Sharp v. Findley, 59 Ga. 722, p. 2620.
Sharp v. Goodwin, 51 Cal. 219, p. 1895, 1897, 2016, 2048, 2056.
Sharp v. Hunter, 7 Cold. 389, p. 1389.
Sharp v. Jackson, [1899] A. C. 419, p. 2017.
Sharp v. Mayor, 40 Barb. 256, p. 1583.
Sharp v. St. Sauveur, L. R. 7 Ch. 343, 352, p. 1834, 2333.
Sharp v. Sharp, 76 Ala. 312, p. 2258.
Sharp v. Taylor, 2 Phill. Ch. 801, p. 673, 1711, 1713.
Sharp v. Trimmer, 24 N. J. Eq. 422 p. 2778.
Sharp v. Wightman, 205 Pa. St. 285, 54 Atl. 888, p. 881, 882.
Sharp v. Wright, 28 Beav. 150, p. 2775.
Sharpe v. Foy, L. R. 4 Ch. 35, 37, 40, 41, p. 1173, 1202, 1296, 1347, 1386, 1613, 1724, 2150.
Sharples v. Adams, 32 Beav. 213, 216, p. 1289, 1377.
Sharpless v. Philadelphia, 21 Pa. St. 148, 59 Am. Dec. 759, p. 407.
Sharpley v. Louth etc. R'y, L. R. 2 Ch. Div. 663, 681, p. 1453, 1574, 1788.
Sharps Rifle M. Co. v. Rowan, 35 Conn. 127, p. 2768.
Shartel's Appeal, 64 Pa. St. 25, p. 1502.
Shartzer v. Mountain Lake Park Ass'n, 86 Md. 335, 37 Atl. 786, p. 1155.
Shattock v. Shattock, L. R. 2 Eq. 182, 35 Beav. 489, p. 2155, 2180, 2185.
Shattuck v. Bascom, 105 N. Y. 39, 12 N. E. 283, p. 2360.
Shattuck v. Carson, 2 Cal. 588, p. 2752, 2757.
Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442, p. 983.
Shaver v. Heller & Merz Co., 108 Fed. 821, 48 C. C. A. 48, affirming 102 Fed. 882, p. 660, 661.
Shaver v. Radley, 4 Johns. Ch. 310, p. 1647.
Shaver v. Western Union Tel. Co., 57 N. Y. 459, 464, p. 195, 304, 2562, 2563.
Shaver v. Williams, 87 Ill. 469, p. 1265.
Shaw, Ex parte, Jacob, 270, p. 284, 287.
Shaw v. Beebe, 35 Vt. 205, p. 1148.
Shaw v. Carlile, 9 Heisk. 594, p. 1712.
Shaw v. Coster, 8 Paige, 339, 35 Am. Dec. 690, p. 2635, 2642, 2648.
Shaw v. Dixon, 6 Bush, 644, p. 1727.
Shaw v. Dwight, 27 N. Y. 244, 84 Am. Dec. 275, p. 2790.
Shaw v. Earl of Jersey, L. R. 4 C. P. D. 120, 359, p. 2696.
Shaw v. Fisher, 5 De Gex, M. & G. 596, p. 2764.
Shaw v. Foster, L. R. 5 H. L. 321, p. 2530.
Shaw v. Gray, 23 Me. 174, 178, p. 548, 549, 550.
Shaw v. Heisey, 48 Iowa, 468, p. 2435.
Shaw v. Holland, [1900] 2 Ch. 305, p. 2084.
Shaw v. Lawless, 1 Lloyd & G. 558, 5 Clark & F. 129, p. 1925, 2050.
Shaw v. Lindsey, 60 Ala. 344, p. 2702.
Shaw v. Livermore, 2 G. Greene, 338, p. 2600.
Shaw v. Neale, 6 H. L. Cas. 581, reversing 20 Beav. 157, p. 1091, 2382, 2385.
Shaw v. Norfolk Co. R. R., 5 Gray, 162, 182, p. 539.
Shaw v. Reed, 30 Me. 105, p. 1703.
Shaw v. Republic Ins. Co., 69 N. Y. 286, p. 1467.
Shaw v. Shaw, 2 Dana, 342, p. 821, 855.
Shaw v. Spencer, 100 Mass. 382, 388, 97 Am. Dec. 107, p. 1986, 2030.
Shaw v. Thackeray, 1 Smale & G. 537, p. 1732, 1733.
Shaw v. Vincent, 64 N. C. 690, p. 649.
Shaw v. Williams, 100 N. C. 272, 6 S. E. 196, p. 1491.
Shawmut etc. Co. v. Stevens, 9 Allen, 332, p. 1625.
Shaw's Trusts, In re, L. R. 12 Eq. 124, p. 2049, 2053.
Shay v. Pettes, 35 Ill. 360, p. 1517.
Shays v. Norton, 48 Ill. 100, p. 2381.
Shea v. Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215, p. 1729, 1739.

Sheafe v. Sheafe, 24 N. H. 564, 567, p. 2176.
Sheafe v. Sheafe, 40 N. H. 516, 518, p. 530, 2791.
Shearer v. Loftin, 26 Ala. 703, p. 1863.
Shearn v. Robinson, 22 S. C. 32, p. 1022.
Sheasley v. Keens, 48 Nebr. 57, 66 N. W. 1010, p. 1083, 1102.
Shea's Appeal, 121 Pa. St. 302, 15 Atl. 629, 1 L. R. A. 422, p. 1747, 1750, 1781.
Shebby v. Smith, 2 A. K. Marsh. 504, p. 1523.
Sheboygan v. Sheboygan etc. R. R., 21 Wis. 667, p. 2683.
Shedden v. Patrick, 1 Macq. 535, p. 1651.
Sheddon v. Goodrich, 8 Ves. 481, 482, 496, p. 798, 800, 803, 804.
Sheedy v. Roach, 124 Mass. 472, 26 Am. Rep. 680, p. 2232, 2234, 2237, 2239, 2242, 2247.
Sheehan v. Hamilton, 2 Keyes, 304, 4 Abb. App. 211, p. 1398.
Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543, p. 1999.
Sheets's Estate, 52 Pa. St. 257, 566, p. 1909.
Sheetz's Appeal, 35 Pa. St. 88, 95, p. 382, 451.
Sheffield v. Coventry, 2 Russ. & M. 317, p. 902.
Sheffield v. Dutchess of Buckingham, 1 Atk. 628, p. 1635.
Sheffield City Co. v. Tradesmen Nat. Bank, 131 Ala. 185, 32 South. 598, p. 469.
Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 579, 13 Sup. Ct. 936, 37 L. ed. 853, p. 501, 2471.
Sheffield Gas Consumers' Co. v. Harrison, 17 Beav. 294, p. 2771.
Sheffield Water Works v. Yeomans, L. R. 2 Ch. 8, 11, p. 363, 379, 394, 413, 419, 420, 431, 455.
Shegogg v. Perkins, 34 Ark. 117, p. 2258, 2259.
Shehan's Heirs v. Barnett's Heirs, 6 T. B. Mon. 592, p. 2647.
Sheirburn v. De Cordova, 24 How. 423, 16 L. ed. 741, p. 495.
Shelburne, Lady, v. Lord Inchiquin, 1 Brown Ch. 338, p. 1515.
Shelby v. Bowden, (S. Dak.) 94 N. W. 416, p. 1098.
Shelby v. Creighton, 65 Nebr. 485, 91 N. W. 369, p. 2086.
Shelden v. Walbridge, 44 Mich. 251, 6 N. W. 681, p. 252.
Sheldon v. Bliss, 8 N. Y. 31, p. 820.
Sheldon v. Centre School District, 25 Conn. 224, 228, p. 434, 437, 438.
Sheldon v. Chappell, 47 Hun, 59, p. 1834.
Sheldon v. Cox, 2 Eden, 224, p. 1152, 1159.
Sheldon v. Dodge, 4 Denio, 217, p. 1858.
Sheldon v. Edwards, 35 N. Y. 279, p. 1402.
Sheldon v. Keokuk etc. Packet Co., 8 Fed. 769, p. 416, 424, 453.
Sheldon v. Rockwell, 9 Wis. 166, 179, 76 Am. Dec. 265, p. 383, 451.
Sheldon v. Sheldon, 2 Root, 512, p. 2263.
Sheldon v. Town of Stockbridge, 67 Vt. 299, 31 Atl. 414, p. 1944, 1948, 1956, 1961, 1978.
Sheldon v. Walbridge, 44 Mich. 251, 6 N. W. 681, p. 2275.
Sheldon H. B. Co. v. Eickemeyer H. B. Co., 90 N. Y. 607, p. 1453.
Shell v. Boyd, 32 S. C. 359, 11 S. E. 205, p. 2287.
Shell v. Martin, 19 Ark. 139, 141, p. 2753, 2756.
Shellard, Ex parte, L. R. 17 Eq. 109, p. 2566, 2567, 2568.
Shelley v. Shelley, L. R. 6 Eq. 540, 546, p. 1887.
Shelley v. Westbrooke, Jacob, 266, note, p. 2616.
Snelly v. Nash, 3 Madd. 232, 235, p. 1742, 1743.
Shelton v. Hadlock, 62 Conn. 143, 25 Atl. 483, p. 2190.
Shelton v. Johnson, 4 Sneed, 672, 70 Am. Dec. 265, p. 1077.
Shelton v. Lewis, 27 Ark. 190, p. 2030.
Shelton v. Shelton, 5 Jones Eq. (58 N. C.) 292, p. 1898, 1899.
Shenandoah Valley R. R. Co. v. Miller, 80 Va. 821, p. 2561.
Shepard v. Akers, 3 Tenn. Ch. 215, p. 1642.
Shepard v. Brown, 4 Giff. 208, p. 2800.
Shepard v. Jones, 21 Ch. Div. 469, p. 2430.

Shepard v. Manhattan R'y Co., 117 N. Y. 442, 23 N. E. 30, p. 340.
Shepard & Morse Lumber Co. v. Eldridge, 171 Mass. 516, 68 Am. St. Rep. 446, 51 N. E. 9, p. 1175.
Shepard v. Sanford, 3 Barb. Ch. 127, p. 321, 326.
Shepard v. Shepard, 36 Miss. 173, p. 980, 1124.
Shepard v. Speer, 140 Ill. 238, 29 N. E. 718, affirming 41 Ill. App. 211, p. 2267.
Shepardson v. Stevens, 71 Ill. 646, p. 977, 979, 982, 1018, 1145.
Shepardson v. Supervisors, 28 Wis. 593, p. 2755, 2757.
Sheperd v. Adams, 32 Me. 63, p. 2447.
Shephard v. Elliot, 4 Madd. 254, p. 2432.
Shepherd v. Bevin, 9 Gill, 32, 39, p. 1665, 1673.
Shepherd v. Burkhalter, 13 Ga. 443, 58 Am. Dec. 523, p. 1104, 1119, 1122.
Shepherd v. Comm'rs of Ross Co., 7 Ohio, 271, p. 2632.
Shepherd v. McEvers, 4 Johns. Ch. 136, 8 Am. Dec. 561, p. 1856, 1904, 2106.
Shepherd v. May, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. ed. 456, p. 2402, 2406.
Shepherd v. Mouls, 4 Hare, 500, 503, 504, p. 2068.
Shepherd v. Shepherd, 1 Md. Ch. 244, p. 619, 634, 2590.
Shepley v. Atlantic etc. R. R., 55 Me. 395, 407, p. 549, 550, 551.
Sheppard v. Green, 48 S. C. 165, 26 S. E. 224, p. 2287.
Sheppard v. Lessingham, Amb. 122, p. 1545.
Sheppard v. Oxenford, 1 Kay & J. 491, p. 2656.
Sherburne v. Herst, 121 Fed. 998, p. 729.
Sheridan v. Jackson, 72 N. Y. 170, p. 2667.
Sheridan v. Sheridan, 136 Pa. St. 14, 19 Atl. 1068, p. 2309.
Sheriden v. Andrews, 49 N. Y. 478, p. 1067, 1088.
Sherman v. Baker, 2[illegible] Atl. 11, 40 L. R. [illegible] 1935, 1938, 1980.
Sherman v. Banford, 10 R. I. 559, p. 407, 454.
Sherman v. Clark, 4 Nev. 138, 97 Am. Dec. 516, p. 569, 586.
Sherman v. Congregational Home Miss. Co., 176 Mass. 349, 57 N. E. 702, p. 1943, 1947, 1979.
Sherman v. Dodge, 28 Vt. 26, 30, 31, p. 1828, 1850.
Sherman v. Felt, 2 N. Y. 186, p. 569.
Sherman v. Fitch, 98 Mass. 59, p. 310, 312, 2707, 2757.
Sherman v. Lewis, 44 Minn. 107, 46 N. W. 318, p. 788, 789, 809.
Sherman v. New Bedford etc. Bank, 138 Mass. 581, p. 1867, 1868.
Sherman v. Parish, 53 N. Y. 483, 489, p. 2068, 2077, 2078, 2091.
Sherman v. Scott, 27 Hun, 331, p. 2780.
Sherman v. Sherman, 4 Allen, 392, p. 2204.
Sherman v. Turpin, 7 Cold. 382, p. 2198.
Sherman v. Wright, 49 N. Y. 227, p. 662, 2768.
Sherod v. Ewell, 104 Iowa, 253, 73 N. W. 493, p. 1100, 1114.
Sherrill v. Sherrill, 73 N. C. 8, p. 1454.
Sherrington v. Yates, 12 Mees. & W. 855, p. 1332.
Sherry v. Sansberry, 3 Ind. 320, p. 1775.
Sherwood v. Andrews, 2 Allen, 79, 81, p. 1872.
Sherwood v. Baker, 105 Mo. 472, 16 S. W. 938, 24 Am. St. Rep. 399, p. 2279.
Sherwood v. Meadow Valley M. Co., 50 Cal. 412, p. 1239, 1240, 1247, 1253.
Sherwood v. Reade, 7 Hill, 431, reversing 8 Paige, 633, p. 1861, 2434.
Sherwood v. Sanderson, 19 Ves. 280, 285, p. 2623.
Sherwood v. Saxton, 63 Mo. 78, p. 1862.
Sherwood v. Sherwood, 44 Iowa, 192, p. 567, 585.
[illegible] v. Sherwood, 45 Wis. 357, [illegible] Rep. 757, p. 1549.
[illegible] v. Sutton, 5 Mason, 143, [illegible] No. 12,872, p. [illegible]
[illegible] all, 119 N. C. [illegible]
[illegible] p. 678, 26 S. E. [illegible]

Shewell v. Dwarris, Johns. 172, p. 1683, 2145.
Shewmake v. Williams, 54 Ga. 206, p. 2729.
Shey's Appeal, 73 Conn. 122, 46 Atl. 832, p. 1834.
Shick v. Citizens' Enterprise Co., 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48, p. 1573.
Shields v. Barrow, 58 U. S. (17 How.) 130, p. 215.
Shields v. Kimbrough, 64 Ala. 504, p. 2431.
Shields v. Lozear, 34 N. J. L. 496, 3 Am. Rep. 256, p. 2337, 2351.
Shields v. McAuley, 37 Fed. 302, p. 2036.
Shields v. McCandlish, 73 Fed. 318, p. 217.
Shields v. McClung, 6 W. Va. 79, p. 1470, 2708.
Shields v. Mitchell, 10 Yerg. 8, p. 1102.
Shields v. Thomas, 71 Miss. 260, 42 Am. St. Rep. 458, 14 South. 84, p. 2022.
Shields v. Titus, 46 Ohio St. 528, 22 N. E. 717, p. 1199.
Shields v. Trammell, 19 Ark. 51, p. 1658, 1659.
Shields v. Whitaker, 82 N. C. 516, p. 2765.
Shiell v. McNit, 9 Paige, 101, 103, 106, p. 731, 734, 742, 750.
Shillibeer v. Jarvis, 8 De Gex, M. & G. 79, p. 2781.
Shimer v. Hammond, 51 Iowa, 401, 1 N. W. 656, p. 1403.
Shimer v. Morris Canal & B. Co., 27 N. J. Eq. 363, 364, p. 384, 451, 2685, 2686.
Shine v. Gough, 1 Ball & B. 436, 444, p. 1376, 2482.
Shinn v. Taylor, 28 Ark. 523, p. 2533.
Ship v. Crosskill, L. R. 10 Eq. 73, 82, 83, 84, p. 1573, 1579, 1581, 1633, 2116.
Ship Warre, In re, 8 Price, 269, note, 273, note, p. 2576, 2581, 2582.
Shipe v. Repass, 28 Gratt. 716, p. 2534.
Shipley v. Rangeley, Daveis, (3 Ware) 242, p. 364.
Shipley v. Reasoner, 80 Iowa, 548, 45 N. W. 1077, p. 1715.
Shipley v. Ritter, 7 Md. 408, 61 Am. Dec. 371, p. 2694.
Shipman v. Ætna Insurance Co., 29 Conn. 245, p. 1220.
Shipman v. Bank of the State, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, p. 1176.
Shipman v. Furniss, 69 Ala. 555, 44 Am. Rep. 528, p. 350, 1781.
Shipman v. Lord, 58 N. J. Eq. 380, 44 Atl. 215, affirmed, 60 N. J. Eq. 484, 46 Atl. 1101, p. 603, 622, 2477.
Shippen v. Whittier, 117 Ill. 282, 7 N. E. 642, p. 1227.
Shipperdson v. Tower, 1 Younge & C. Ch. 441, p. 2321.
Shipway v. Ball, L. R. 16 Ch. Div. 376, p. 2168, 2173, 2621.
Shirk v. Neible, 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281, p. 1770, 1772.
Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381, p. 1271, 1278.
Shirk v. Whitten, 131 Ind. 455, 31 N. E. 87, p. 2426.
Shirley v. Earl Ferrers, 3 P. Wms. 77, p. 297.
Shirley v. Shirley, 7 Blackf. 452, p. 2536.
Shirley v. Shattuck, 28 Miss. 13, p. 2099.
Shirley v. Shirley, 9 Paige, 363, p. 1847, 2139, 2161.
Shirley v. Stratton, 1 Brown Ch. 440, p. 1619.
Shirley v. Sugar Ref. Co., 2 Edw. Ch. 505, p. 2502, 2515.
Shirley v. Watts, 3 Atk. 200, p. 2789.
Shirras v. Caig, 7 Cranch, 34, 48, 3 L. ed. 260, p. 1188, 1190, 2382, 2385, 2387.
Shish v. Foster, 1 Ves. Sr. 88, p. 643, 644.
Shitz v. Dieffenbach, 3 Pa. St. 233, p. 2539.
Shiveley's Adm'rs v. Jones, 6 B. Mon. (Ky.) 274, 276, p. 1070.
Shively v. Welch, 2 Oreg. 288, p. 1515, 1517.
Shively v. Gilpin, 23 Ky. Law Rep. 2090, 66 S. W. 763, p. 1101, 1120.
Shivers v. Simmons, 54 Miss. 520, 28 Am. Rep. 372, p. 2749.
Shnyder v. Noble, 94 Pa. St. 286, p. 2197.

Shoemaker v. Brown, 10 Kan. 383, 390, p. 567, 585, 2270.
Shoemaker v. Hinze, 53 Wis. 116, 10 N. W. 86, p. 1916.
Shonk v. Brown, 61 Pa. St. 320, p. 2139, 2154.
Short v. Battle, 52 Ala. 456, p. 1327, 2143, 2145, 2153, 2189.
Short v. Mercier, 3 Macn. & G. 205, p. 257, 274, 276.
Short v. Moore, 10 Vt. 446, 451, p. 646.
Short v. Stevenson, 63 Pa. St. 95, p. 1782.
Shortall v. Mitchell, 57 Ill. 161, p. 2778.
Shorter v. Frazer, 64 Ala. 74, p. 2498, 2511, 2515, 2516.
Shortridge v. Bartlett, 14 B. Mon. 200, p. 2703.
Shotwell v. Harrison, 22 Mich. 410, p. 1356, 1357.
Shotwell v. Harrison, 30 Mich. 179, p. 977, 982, 992, 1009, 1146.
Shotwell v. Lawson, 30 Miss. 27, 64 Am. Dec. 145, p. 212, 568, 2632.
Shotwell v. Murray, 1 Johns. Ch. 512, 516, p. 1482, 1503, 1508.
Shotwell v. Smith, 20 N. J. Eq. 79, p. 67, 244, 245, 250, 255, 259, 290.
Shotwell v. Strube, 21 N. J. Eq. 31, p. 283.
Shotwell's Ex'rs v. Mott, 2 Sand. Ch. 46, p. 1954.
Shoufe v. Griffiths, 4 Wash. 161, 30 Pac. 93, 31 Am. St. Rep. 910, p. 1191.
Shoup v. Cook, 1 Cart. 135, p. 632.
Shovelton v. Shovelton, 32 Beav. 142, 143, p. 1921, 1929.
Showmar v. Miller, 6 Md. 479, p. 1487, 1517.
Shreve v. Brereton, 51 Pa. St. 175, 180, p. 742, 743, 746.
Shrewsbury v. Hornby, 5 Hare, 406, p. 1939.
Shrewsbury v. Shrewsbury, 1 Ves. 233, p. 1411.
Shrewsbury etc. R'y v. London etc. R'y, 3 Macn. & G. 70, p. 2676.
Shriver v. Garrison, 30 W. Va. 456, 4 S. E. 660, p. 1503.
Shriver v. Seiss, 49 Md. 384, p. 2770.
Shropshire Union Railways & Canal Co. v. Reg., L. R., 7 H. L. 496, p. 1255, 1297.
Shryock v. Waggoner, 28 Pa. St. 430, p. 1269, 1840, 2107.
Shudall v. Jekyll, 2 Atk. 516, 518, p. 893, 900, 933, 937, 943.
Shuey v. Latta, 90 Ind. 136, p. 1198, 1297.
Shufelt v. Shufelt, 9 Paige, 137, 145, 37 Am. Dec. 381, p. 1706.
Shuford v. Cain, 1 Abb. 302, 305, p. 494, 495.
Shuler v. Hardin, 25 Ind. 386, p. 2401, 2402.
Shulman v. Fitzpatrick, 62 Ala. 571, p. 2189.
Shulters v. Johnson, 38 Barb. 80, p. 2493.
Shults v. Moore, 1 McLean, 521, p. 1114.
Shumate v. Reavis, 49 Mo. 333, p. 1147.
Shumate's Ex'rs v. Crockett, (W. Va.) 27 S. E. 240, p. 1087.
Shupe v. Bartlett, 106 Iowa, 654, 77 N. W. 455, p. 1984, 1993.
Shurtleff v. Rile, 140 Mass. 213, 40 N. E. 407, p. 2066.
Shurtz v. Colvin, (Ohio St.) 45 N. E. 527, p. 1371.
Shute v. Hamilton, 3 Daly, 462, p. 727, 729, 747.
Shute v. Shute, Prec. Ch. 111, p. 2734.
Shute v. Taylor, 5 Met. 61, p. 729.
Shuttleworth v. Greaves, 4 Mylne & C. 35, p. 785, 789, 791, 792, 809, 811, 813, 2208, 2228.
Shuttleworth v. Kentucky Coal, I. & D. Co., 22 Ky. L. Rep. 1341, 60 S. W. 534, p. 1230.
Shuttleworth v. Kentucky C., I. & D. Co., 22 Ky. L. Rep. 1806, 61 S. W. 1013, p. 1051.
Shuttleworth v. Laycock, 1 Vern. 244, p. 644.
Sibley v. Leffingwell, 8 Allen, 584, p. 978, 1140.
Sibley v. Perry, 7 Ves. 522, 529, 534, p. 2207, 2208, 2219.
Sibley v. Ross, 88 Mich. 315, 50 N. W. 379, p. 2470.
Sickles v. City of New Orleans, 26 C. C. A. 204, 80 Fed. 868, p. 2305.
Siddall v. Harrison, 73 Cal. 560, 15 Pac. 130, p. 2260.
Sidebotham v. Watson, 11 Hare, 170, p. 2207, 2209, 2211.

Sidelinger v. Bliss, 95 Me. 316, 49 Atl. 1094, p. 1357.
Sidenberg v. Ely, 90 N. Y. 263, 43 Am. Rep. 163, p. 2429.
Sidmouth v. Sidmouth, 2 Beav. 447, 454, p. 1996, 1997, 2001, 2002.
Sidney v. Shelley, 19 Ves. 352, 359, p. 1986.
Sidney v. Sidney, L. R. 17 Eq. 65, p. 2213.
Sidway v. Nichol, 62 Ark. 146, 34 S. W. 529, p. 2179.
Sidwell v. Wheaton, 114 Ill. 267, 2 N. E. 183, p. 2499, 2522, 2525.
Siegert v. Abbott, 61 Md. 276, 48 Am. Rep. 101, p. 669, 1695.
Siegert v. Findlater, L. R. 7 Ch. Div. 801, p. 1695.
Sieghortner v. Weissenborn, 20 N. J. Eq. 172, p. 2656.
Siegman v. Malone, 63 N. J. Eq. 422, 51 Atl. 1003, p. 2127.
Siegman v. Maloney, (N. J. Eq.) 54 Atl. 405, p. 2121.
Siemon v. Schurck, 29 N. Y. 598, 610, p. 1276, 1279, 1381, 2004, 2016.
Sierra Nev. Min. Co. v. Sears, 10 Nev. 346, p. 2671.
Sieveking v. Behrens, 2 Mylne & C. 581, p. 2635.
Sieveking v. Litzler, 31 Ind. 13, 17, p. 1563, 1565.
Siever v. Union Pac. R. Co., (Nebr.) 93 N. W. 943, p. 126, 387, 446, 448, 452.
Sigourney v. Munn, 7 Conn. 324, p. 981, 1050, 1144.
Silbar v. Ryder, 63 Wis. 106, 23 N. W. 106, p. 1504, 1542.
Silk v. Prime, 1 Brown Ch. 138, note, p. 236.
Silk v. Prime, 2 Lead. Cas. Eq., 4th Am. ed., 369-372, p. 2491.
Silkstone & Haigh Moore Coal Co. v. Edey, [1900] 1 Ch. 167, p. 2086.
Sillibourne v. Newport, 1 Kay & J. 602, p. 2050.
Silliman v. Taylor, (Tex. Civ. App.) 80 S. W. 651, p. 1542.
Silloway v. Brown, 12 Allen, 30, p. 2349.
Silloway v. Neptune Ins. Co., 12 Gray, 73, p. 1436.
Sills v. Lawson, 133 Ind. 137, 32 N. E. 875, p. 1276.
Sillyman v. King, 36 Iowa, 207, p. 1356.
Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307, p. 2021.
Silver Lake Bank v. North, 4 Johns. Ch. 370, p. 2434.
Silverman v. Kirstufek, 162 Ill. 222, 44 N. E. 430, p. 1828, 1829.
Silvery, In re, 42 Cal. 210, 211, p. 809, 841, 842.
Silvester v. Wilson, 2 Term Rep. 444, 450, p. 1397, 1824, 1919.
Silveus's Ex'rs v. Porter, 74 Pa. St. 448, p. 2197.
Silvey v. Hodgdon, 52 Cal. 363, p. 1906, 1912.
Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523, p. 1565.
Sime v. Howard, 4 Nev. 473, 482, 483, p. 1901, 1902.
Sime v. Norris, 8 Phila. 84, p. 1668.
Simmonds, Ex parte, L. R. 16 Q. B. D. 308, p. 1503.
Simmonds v. Palles, 2 Jones & L. 489, p. 1855.
Simmons v. Burlington, C. R. & N. R'y Co., 159 U. S. 278, 16 Sup. Ct. 1, 40 L. ed. 150, p. 2459.
Simmons v. Crumbley, 84 Ga. 495, 10 S. E. 1090, p. 2266.
Simmons v. Hendricks, 8 Ired. Eq. 84-86, 55 Am. Dec. 439, p. 148, 580, 2300.
Simmons v. Hutchinson, 81 Miss. 351, 33 South. 21, p. 1101, 1124, 1125.
Simmons v. Ingram, 60 Miss. 886, p. 1994, 2000.
Simmons v. Oliver, 74 Wis. 633, 43 N. W. 561, p. 2078.
Simmons v. Palmer, 93 Va. 389, 25 S. E. 6, p. 1509.
Simmons v. Saul, 138 U. S. 439, 454, 460, 11 Sup. Ct. 369, 376, p. 509.
Simmons v. Shelton, 112 Ala. 284, 57 Am. St. Rep. 39, 21 South. 309, p. 983.
Simmons v. Simmons, 6 Hare, 352, 359, p. 2141.
Simmons v. Simmons's Adm'r, 33 Gratt. 451, p. 2291.
Simmons v. Wood, 45 How. Pr. 262, p. 2662.
Simmons & Co., Francis T., v. Terry, (Tex. Civ. App.) 79 S. W. 1003, p. 1689.

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, p. 1019, 1038, 1157, 1465.
Simms v. Buist, 52 S. C. 554, 30 S. E. 400, p. 1828.
Simms v. Freihen, 100 Ga. 607, 28 S. E. 288, p. 1051.
Simms v. Morse, 2 Fed. 325, p. 983.
Simms v. Registrar of Probates, [1900] App. Cas. (Privy Coun.) 323, p. 278.
Simms v. Richardson, 2 Litt. 274, p. 1348.
Simon v. Barber, 5 Russ. 112, p. 1962.
Simonds v. East Windsor Elect. R'y Co., 73 Conn. 513, 48 Atl. 210, p. 670.
Simon Gregory Dry Goods Co. v. Schooley, 66 Mo. App. 406, p. 974.
Simons v. First Nat. Bank, 93 N. Y 269, p. 2382, 2385, 2387.
Simons v. Vulcan Oil etc. Co., 61 Pa. St. 202, 100 Am. Dec. 628, p. 1782, 2114, 2129.
Simonton v. First Nat. Bank of Minn., 24 Minn. 216, p. 1916.
Simonton v. Gray, 34 Me. 50, p. 1402.
Simpson, In re, [1904] 1 Ch. 1, p. 2141.
Simpson, In re, [1897] 1 Ch. 256, p. 2108.
Simpson v. Ashworth, 6 Beav. 412, p. 2310.
Simpson v. Brown, 33 Beav 482, p. 282.
Simpson v. Del Hoyo, 94 N. Y. 189, p. 1256, 1304, 1344, 1345, 1355, 1374.
Simpson v. Denison, 10 Hare, 51, p. 2118.
Simpson v. Eriseur, 155 Mo. 157, 55 S. W. 1029, p. 1838.
Simpson v. Ferguson, 112 Cal. 180, 40 Pac. 104, 44 Pac. 484, 53 Am. St. Rep. 201, p. 2399.
Simpson v. Field, 2 Ch. Cas. 22, p. 684, 2608.
Simpson v. Gardiner, 97 Ill. 237, p. 2424, 2440.
Simpson v. Hinson, 88 Ala. 527, 7 South. 264, p. 991, 1059.
Simpson v. Lester, 4 Jur., N. S., 1269, p. 2322.
Simpson v. Lord Howden, 1 Keen, 583, 3 Mylne & C. 97, 103, 108, 9 Clarke & F. 61, 10 Ad. & E. 793, p. 307, 1698, 2701, 2728, 2755.
Simpson v. Lord Howden, 7 Ves. 3, 21, p. 2728.
Simpson v. McAllister, 56 Ala. 228, p. 2498, 2511, 2515, 2516, 2520.
Simpson v. Molson's Bk., [1895] A. C. 270, p. 2018.
Simpson v. Montgomery, 25 Ark. 365, 99 Am. Dec. 228, p. 1197.
Simpson v. Mundee, 3 Kan. 172, p. 1100, 2503.
Simpson v. Pearson, 1 Ind. 65, p. 1429.
Simpson v. Pearson, 31 Ind. 1, 5, 99 Am. Dec. 577, p. 1441, 1444, 1445.
Simpson v. Tenney, 41 Kan. 561, 21 Pac. 634, p. 1996, 2005.
Simpson v. Vaughan, 2 Atk. 31, p. 683, 2609.
Simpson v. Wallace, 83 N. C. 477, p. 2741.
Simpson v. Welcome, 72 Me. 496, 39 Am. Rep. 349, p. 1940, 1974.
Simpson v. Westminster Hotel Co., 2 De Gex, F. & J. 141, 8 H. L. Cas. 712, p. 2118.
Sims v. Aughtery, 4 Strob. Eq. 103, 121, p. 321, 324, 326.
Sims v. Everhardt, 102 U. S. 300, p. 1448.
Sims v. Gray, 93 Iowa, 38, 61 N. W. 171, p. 1100, 2041.
Sims v. Hammond, 33 Iowa, 368, p. 1135, 1358, 1359, 2419.
Sims v. Shelton, 2 Strob. Eq. 221, p. 234.
Sims v. Sims, 101 Mo. App. 407, 74 S. W. 449, p. 1737, 1781.
Sims v. Sims, 10 N. J. Eq. 152, 153, 158, 162, 163, p. 896, 910, 935, 938, 945.
Simson v Bates, 10 Phila. 66, p. 2679.
Simson v. Brown, 68 N. Y. 355, 361, p. 1229.
Simson v. Brown, 6 Hun, 251, p. 2409.
Sinclair v. Armitage, 12 N. J. Eq. 174, p. 2477.
Sinclair v. Comm'rs of Winona County, 23 Minn. 404, 23 Am. Rep. 694, p. 2678.
Sinclair v. Jackson, 8 Cow. 543, p. 2060, 2094.
Sinclair v. Sinclair, 79 Va. 40, p. 1268.
Sinclair v. Slawson, 44 Mich. 123, 6 N. W. 207, 38 Am. Rep. 235, p. 1096, 1122.
Sinft v. Williams, 68 Md. 236, 11 Atl. 835, p. 1329.

Singer v. Jacobs, 11 Fed. 559, p. 983.
Singer v. Salt Lake City Copper Mfg. Co., 17 Utah, 143, 70 Am. St. Rep. 773, 53 Pac. 1024, p. 1783, 2084.
Singer Mfg. Co. v. Domestic etc. Co., 49 Ga. 70, 15 Am. Rep. 674, p. 2696.
Singer Mfg. Co. v. Holdfodt, 86 Ill. 455, 29 Am. Rep. 43, p. 1154.
Singer Mfg. Co. v. Loog, L. R. 18 Ch. Div. 395, p. 2690.
Singer Mfg. Co. v. Rawson, 50 Iowa, 634, p. 1734.
Singer Mfg. Co. v. Wilson, L. R. 2 Ch. Div. 434, p. 1695, 2690.
Singer Mfg. Co. v. Yarger, 2 McCrary, 585, 12 Fed. 487, 488, p. 498.
Singer Sewing-Mach. Co. v. Union etc. Co., 1 Holmes, 253, p. 2675.
Single v. Scott Paper Mfg. Co., 55 Fed. 553, 556, p. 500.
Singleton v. Lowndes, 9 S. C. 465, p. 2059, 2099.
Singleton v. Touchard, 1 Black, 345, 17 L. ed. 50, p. 495.
Singley v. Warren, 18 Wash. 434, 444, 51 Pac. 1066, 63 Am. St. Rep. 896, p. 1191.
Sing You v. Won Free Lee, (S. D.) 92 N. W. 1073, p. 1999.
Sinnett v. Herbert, L. R. 7 Ch. 232, p. 1962.
Sinnett v. Herbert, L. R. 12 Eq. 201, p. 1951.
Sinnott v. Moore, 113 Ga. 908, 39 S. E. 415, p. 1843.
Sioux City & Iowa Falls Land Co. v. Walker, 78 Iowa, 476, 43 N. W. 294, p. 1672.
Sioux City & St. P. R. Co. v. Singer, 49 Minn. 301, 32 Am. St. Rep. 554, 51 N. W. 905, p. 1097, 1127.
Sioux Nat. Bk. v. Cudahy Packing Co., 58 Fed. 20, p. 215.
Sipes v. Decker, 102 Wis. 588, 78 N. W. 769, p. 2040.
Sipley v. Wass, 49 N. J. Eq. 463, 24 Atl. 233, p. 959, 1277, 1329.
Siron v. Ruleman's Ex'r, 32 Gratt. 215, p. 2486, 2489.
Sisemore v. Pelton, 17 Oreg. 546, 21 Pac. 667, p. 2025.
Sisk v. Almon, 34 Ark. 391, p. 1023, 1024.
Sismey v. Eley, 17 Sim. 1, p. 667, 669.
Sisson v. Giles, 32 L. J., N. S., Ch. 606, 3 De Gex, J. & S. 614, p. 2331, 2332.
Siter v. McClanachan, 2 Gratt. 280, 283, p. 185, 621, 1111, 1291, 2316.
Siter's Appeal, 26 Pa. St. 180, p. 621.
Sitler v. McComas, 66 Md. 135, 6 Atl. 527, p. 1106, 1114.
Sitwell v. Barnard, 6 Ves. 520. p. 2321.
Sitz v. Deihl, 55 Mo. 17, p. 2534.
Six v. Shaner, 26 Md. 415, p. 2193.
Sixth Ward Bldg. Ass'n v. Wilson, 41 Md. 506, 514, p. 1106.
Skahen v. Irving, 206 Ill. 597, 69 N. E. 510, p. 1997.
Skarf v. Soulby, 1 Macn. & G. 364, 374, p. 1797, 1800.
Skeel v. Spraker, 8 Paige, 82, p. 1402, 1411, 2447.
Skeele v. Stanwood, 33 Me. 307, p. 532.
Skeeles v. Shearley, 8 Sim. 153, 3 Mylne & C. 112, p. 268.
Skeen v. Morriott, 22 Utah, 73, 61 Pac. 296, p. 1865.
Skeggs, In re, 2 De Gex, J. & S. 533, p. 2319.
Skehill v. Abbott, 184 Mass. 147, 68 N. E. 37, p. 1996.
Skein v. Marriot, 22 Utah, 73, 61 Pac. 296, p. 1906.
Skellinger's Ex'rs v. Skellinger's Ex'rs, 32 N. J. Eq. 659, p. 1989.
Skerrett v. Presbyterian Soc., 41 Ohio St. 606, p. 1324.
Skiddy v. Atlantic etc. R. R., 3 Hughes, 320, Fed. Cas. No. 12,922, p. 2470, 2474.
Skidmore v. Bradford, L. R. 8 Eq. 134, p. 1561, 2592.
Skilbeck v. Hilton, L. R. 2 Eq. 587, p. 1634, 1785.
Skiles's Appeal, 110 Pa. St. 248, 29 Atl. 722, p. 2481.
Skilton v. Webster, Bright N. P., 203, p. 560.
Skinner v. Buck, 29 Cal. 253, p. 2354.
Skinner v. Dayton, 2 Johns. Ch. 526, 534, 535, 17 Johns. 339, 357, p. 717, 750, 752, 753.
Skinner v. Harker, 23 Colo. 333, 48 Pac. 648, p. 2405, 2452.
Skinner v. James, 69 Wis. 605, 35 N. W. 37, p. 2005.

Skinner v. Judson, 8 Conn. 528, 21 Am. Dec. 691, p. 257, 274, 275.
Skinner v. Reynick, 10 Nebr. 323, 6. N. W. 369, 35 Am. Rep. 479, p. 2411.
Skinner v. Stuart, 15 Abb. Pr. 391, p. 2791.
Skinner v. Tirrell, 159 Mass. 474, 38 Am. St. Rep. 447, 34 N. E. 692, p. 2603, 2605.
Skinner v. White, 17 Johns. 357, p. 2704.
Skinners' Co. v. Irish Soc., 1 Mylne & C. 162, p. 2658.
Skip v. Harwood, 3 Atk. 564, p. 2654.
Skipp v. Hettrick, 63 N. C. 329, p. 2089.
Skipper v. Stokes, 42 Ala. 255, 94 Am. Dec. 646, p. 2553, 2575, 2584.
Skipwith v. Strother, 3 Rand. 214, p. 1676, 1709.
Skipwith's Ex'r v. Cunningham, 8 Leigh, 271, 31 Am. Dec. 642, p. 1902.
Skirving v. Williams, 24 Beav. 275, p. 2322.
Skottowe v. Williams, 3 De Gex, F. & J. 535, p. 1738, 1788.
Skottowe v. Williams, 7 Jur., N. S., 118, p. 1447.
Slack v. Black, 109 Mass. 496, p. 262, 263.
Slack v. Northwestern Nat. Bank, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841, p. 2013.
Slack v. Rees, (N. J. Eq.) 59 Atl. 466, p. 1738.
Slack v. Wood, 9 Gratt. 40, p. 2703.
Slade v. Barlow, L. R. 7 Eq. 296, p. 2741.
Slade v. Patten, 68 Me. 380, p. 553.
Slade v. Rhodes, 2 Dev. & B. Eq. 24, p. 1703, 2555.
Slade v. Street, 27 Ga. 17, p. 575, 1636, 2264, 2265.
Slaney v. Sidney, 14 Mees. & W. 800, p. 2651.
Slanning v. Style, 3 P. Wms. 334, 337–339, p. 2139, 2204.
Slater v. Breese, 36 Mich. 77, p. 1124, 1125, 2404.
Slater v. Maxwell, 6 Wall. 268, 273, p. 1665, 1692.
Slater v. Oriental Mills, 18 R. I. 352. 27 Atl. 443, p. 2022, 2023.
Slater's Trusts, In re, L. R. 11 Ch. Div. 227, p. 1742, 1743, 1744, 1745.
Slattery v. St. Louis etc. R. R. Co., 91 Mo. 217, 4 S. W. 79, 60 Am. St. Rep. 245, p. 2123.
Slattery v. Schwannecke, 118 N. Y. 548, 23 N. E. 922, p. 1166, 1170.
Slattery v. Wason, 151 Mass. 266, 21 Am. St. Rep. 448, 23 N. E. 843, 7 L. R. A. 393, p. 1844.
Slaughter v. Foust, 4 Blackf. 379, p. 2417.
Slaughter v. Owens, 60 Tex. 668, p. 2503, 2512.
Slaughter's Adm'r v. Gerson, 13 Wall. 379, p. 1560, 1567, 1588, 1590, 1596.
Sledge v. Boone, 57 Miss. 222, p. 2130.
Slee v. Bloom, 5 Johns. Ch. 366, 20 Johns. 669, p. 2801.
Slee v. The Manhattan Co., 1 Paige, 48, p. 1755, 2377.
Sleech v. Thorington, 2 Ves. Sr. 560, 561, 564, p. 2224.
Sleeman v. Wilson, L. R. 13 Eq. 36, p. 2096.
Sleeper v. Chapman, 121 Mass. 404, p. 1056, 1057, 1257, 1373, 1382, 1384.
Sleeper v. Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377, p. 1329.
Sleeper v. Iselin, 62 Iowa, 583, 17 N. W. 922, p. 1198, 1910.
Slegel v. Herbine, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547, p. 351.
Sleicher's Estate, In re, 201 Pa. St. 612, 51 Atl. 329, p. 1956, 1977.
Slevin, In re, [1891] 2 Ch. 236, 1 Ch. 373, p. 1963.
Slim v. Croucher, 1 De Gex, F. & J. 518, 523, 524, 525, 528, 2 Giff. 37, p. 992, 1387, 1427, 1430, 1434, 1438, 1584, 1603. 1631.
Slingsby v. Boulton, 1 Ves. & B. 334, p. 2644, 2648.
Slingsby v. Grainger, 7 H. L. Cas. 273, p. 1547.
Sloan v. Becker, 34 Minn. 491, 26 N. W. 730, p. 2380.
Sloan v. Campbell, 71 Mo. 387, 36 Am. Rep. 493, p. 2501, 2520, 2521.
Sloan v. Frothingham, 72 Ala. 589, p. 2108.
Sloan v. Moore, 37 Pa. St. 217, p. 2656.
Sloan v. Whitaker, 58 Ga. 319, p. 855.
Sloan's Appeal, 168 Pa. St. 422, 47 Am. St. Rep. 889, 32 Atl. 42, p. 2494.

Sloane v. Hatfield, Bunb. 18, p. 257.
Slocombe v. Glubb, 2 Brown Ch. 545, p. 2165.
Slocum v. Catlin, 22 Vt. 137, p. 1402, 1406.
Slocum v. Marshall, 2 Wash. C. C. 397, p. 1778, 1908.
Slocum v. O'Day, 174 Ill. 215, 51 N. E. 243, p. 1099, 1124.
Slocum v. Slocum, 4 Edw. Ch. 613, p. 2325.
Slocum v. Wooley, 43 N. J. Eq. 453, 11 Atl. 264, p. 2040.
Sloman v. Bank of England, 14 Sim. 475, p. 1252, 2784.
Sloman v. Walter, 1 Brown Ch. 418, 2 Lead. Cas. Eq., 4th Am. ed., 2014, 2023, 2044, p. 627, 631, 716.
Sloper, In re, cited 22 Beav. 198, p. 2320.
Slowey v. McMurray, 27 Mo. 113, 116, 72 Am. Dec. 251, p. 2377.
Slutz v. Desenberg, 28 Ohio St. 371, p. 2373, 2376.
Small v. Brackley, 2 Vern. 602, p. 1790.
Small v. Herkimer Mfg. Co., 2 N. Y. 335, p. 764.
Small v. Jones, 6 Watts & S. 122, p. 1744.
Small v. Small, 74 N. C. 16, p. 1774.
Small v. Stagg, 95 Ill. 39, p. 2499, 2519.
Smallcombe's Case, L. R. 3 Eq. 769, 771, p. 1557, 1788.
Smalley v. Greene, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78, p. 1690.
Smallman v. Onions, 3 Brown Ch. 621, p. 2681.
Smallwood v. Lewin, 15 N. J. Eq. 60, p. 1147, 1358.
Smart, Ex parte, L. R. 8 Ch. 220, p. 2478.
Smart v. Hunt, 1 Vern. 418, note, p. 2428.
Smart v. Smart, [1892] App. Cas. (Priv. Coun.) 425, p. 2616.
Smart v. Waterhouse, 10 Yerg. 94, p. 2736.
Small's Will, In re, 27 App. Div. 438, 50 N. Y. Supp. 341, p. 1911.
Smedes v. Bank of Utica, 20 Johns. 372, p. 2045.
Smee v. Smee, 49 L. J. P. & M. 8, p. 1726.
Smelser v. Pugh, (Ind.) 64 N. E. 943, p. 1510, 1541.
Smiley v. Bell, Mart. & Y. 378, 17 Am. Dec. 813, p. 469.
Smiley v. Jones, 3 Tenn. Ch. 312, p. 2486.
Smillie v. Titus, 32 N. J. Eq. 51, p. 1735.
Smirthwaite's Trusts. In re, L. R. 11 Eq. 251, p. 2109.
Smith, In re, 108 Cal. 115, 120, 121, 40 Pac. 1037, p. 854, 855.
Smith, In re, [1896] 1 Ch. 171, p. 2050, 2069.
Smith, In re, [1896] 2 Ch. 590, p. 2071.
Smith v. Allen, 63 Ill. 474, p. 2703, 2710.
Smith v. Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33, p. 1523.
Smith v. Allen, 18 Wash. 1, 50 Pac. 783, 63 Am. St. Rep. 864, p. 2504.
Smith v. Anderson, L. R. 15 Ch. Div. 247, p. 1696.
Smith v. Appelgate, 23 N. J. L. 352, p. 1699.
Smith v. Atkins, 18 Vt. 461, p. 2472.
Smith v. Attersoll, 1 Russ. 266, p. 1902.
Smith v. Auditor-General, 20 Mich. 398, p. 651.
Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955, p. 981, 1057, 1154, 2017, 2104.
Smith v. Babcock, 2 Wood. & M. 246, p. 1567, 1583.
Smith v. Balcom, 24 App. Div. 437, 48 N. Y. Supp. 487, p. 1994, 2039.
Smith v. Bangs, 15 Ill. 399, p. 2683.
Smith v. Bank of New England, 69 N. H. 254, 45 Atl. 1082, 2 Ames' Cas. Eq. 79, p. 414, 442, 445.
Smith v. Bank of New England, 72 N. H. 4, 54 Atl. 386, p. 2056.
Smith v. Barnes, L. R. 1 Eq. 65, p. 2016.
Smith v. Bates Mach. Co., 182 Ill. 166, 55 N. E. 69, p. 237, 2563, 2584.
Smith v. Bayright, 34 N. J. Eq. 424, p. 2306, 2320.
Smith v. Beaufort, 1 Hare, 507, p. 284.
Smith v. Bergengren, 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768, p. 721.
Smith v. Bivens, 56 Fed. 352, 2 Ames' Cas. Eq. Jur. 62, p. 424.
Smith v. Black, 115 U. S. 308, 6 Sup. Ct. 50, p. 1756.
Smith v. Bone, 7 Bush, 367, p. 830.

Smith v. Bourbon Co., 127 U. S. 105, 8 Sup. Ct. 1043, 32 L. ed. 73, p. 2557.
Smith v. Bouvier, 70 Pa. St. 325, p. 1676.
Smith v. Bowen, 35 N. Y. 83, p. 1896, 1897, 1908, 1909, 1912, 1920, 1926.
Smith v. Bowes, 38 Md. 463, p. 961, 1469.
Smith v. Boyd, 162 Mo. 146, 62 S. W. 439, p. 1102, 1175.
Smith v. Bradford, 76 Va. 758, p. 2142.
Smith v. Branch Bank, 21 Ala. 125, p. 1104.
Smith v. Brand, 64 Ind. 427, p. 2380.
Smith v. Brannan, 13 Cal. 107, 114, p. 2748, 2751.
Smith v. Brittenham, 98 Ill. 188, p. 1646.
Smith v. Brittenham, 109 Ill. 540, p. 1019, 1625, 1627.
Smith v. Bromley, 2 Doug. 696, 697, 698, p. 1711, 1716, 1718, 1719.
Smith v. Brotherline, 62 Pa. St. 461, p. 1770, 1771.
Smith v. Brown, 164 Mass. 584, 42 N. E. 101, p. 737.
Smith v. Brownlow, L. R. 9 Eq. 241, p. 395.
Smith v. Bruning, 2 Vern. 392, p. 1678, 1716.
Smith v. Bulkley, (Colo. App.) 70 Pac. 958, p. 2121.
Smith v. Burgess, 133 Mass. 513, p. 1051.
Smith v. Burnham, 3 Sumn. 435, p. 701, 958, 2024.
Smith v. Butler, (Ark.) 80 S. W. 580, p. 2527.
Smith v. Butler, 11 Oreg. 46, 4 Pac. 517, p. 1512, 1513, 1542, 1549.
Smith v. Capron, 7 Hare, 185, p. 1053.
Smith v. Carmack, (Tenn. Ch. App.) 64 S. W. 372, p. 1165.
Smith v. Casen, 1 P. Wms. 406, p. 2235.
Smith v. Cassidy, 73 Tex. 161, 12 S. W. 13, p. 1066, 1068.
Smith v. Chadwick, 9 App. Cas. (H. L.) 187, affirming 20 Ch. Div. 29, p. 1567, 1573, 1578, 1588.
Smith v. Cherrill, L. R. 4 Eq. 390, 395, p. 1801.
Smith v. Chilton, 84 Va. 840, 6 S. E. 142, p. 664.
Smith v. Clark, 12 Ves. 477, p. 1608, 1693, 1694.
Smith v. Claxton, 4 Madd. 484, 492, p. 2324, 2326.
Smith v. Clay, 3 Brown Ch. 688, p. 697.
Smith v. Clews, 114 N. Y. 194, 21 N. E. 160, 4 L. R. A. 392, 11 Am. St. Rep. 627, p. 1238.
Smith v. Clopton, 4 Tex. 109, 113, p. 571, 588, 589, 593.
Smith v. Coe, 33 N. Y. Sup. Ct. 480, p. 727, 738.
Smith v. Coker, 65 Ga. 461, p. 1065.
Smith v. Cooke, [1891] App. Cas. 297, p. 1989.
Smith v. Countryman, 30 N. Y. 655, p. 1616.
Smith v. Cremer, 71 Ill. 185, p. 2380, 2381.
Smith v. Crosby, 47 Wis. 160, 2 N. W. 104, p. 2373, 2377.
Smith v. Cuff, 6 Maule & S. 160, p. 1718.
Smith v. Cummings, 2 Pars. Cas. 92, p. 2684.
Smith v. Cunningham, 2 Tenn. Ch. 565, p. 2393.
Smith v. Daniell, L. R. 18 Eq. 649, p. 279.
Smith v. Davis, 49 Md. 470, p. 1773, 2130.
Smith v. Denton, 42 Iowa, 48, p. 1060, 1145, 1152, 1163, 1166.
Smith v. Des Moines Nat. Bk., 107 Iowa, 620, 78 N. W. 238, p. 2019.
Smith v. Dobbins, 87 Ga. 303, 13 S. E. 496, p. 379, 390, 418, 446, 454, 456.
Smith v. Doe, 26 Miss. 291, p. 1860.
Smith v. Dorsey, 38 Ind. 451, 10 Am. Rep. 118, p. 2233, 2247.
Smith v. Doyle, 46 Ill. 451, p. 2376.
Smith v. Drake, 23 N. J. Eq. 302, p. 191, 2481.
Smith v. Dresser, L. R. 1 Eq. 651, p. 2098.
Smith v. Duke of Beaufort, 1 Hare, 507, p. 273.
Smith v. Duke of Beaufort, 1 Phill. Ch. 209, p. 263.

Smith v. Dunn, 27 Ala. 315, p. 2744.
Smith v. Dutton, 42 Iowa, 48, p. 1339.
Smith v. Earl of Effingham, 2 Beav. 232, p. 2658.
Smith v. East India Co., 1 Phill. Ch. 50, p. 282.
Smith v. Ellis, 29 Me. 422, 425, 426, p. 555, 556.
Smith v. Evans, 28 Beav. 59, p. 192, 2497, 2528.
Smith v. Everett, 4 Brown Ch. 64, p. 195, 2563.
Smith v. Everett, 126 Mass. 304, [1878] p. 541, 542, 546.
Smith v. Everett, 50 Miss. 575, p. 2276.
Smith v. Executor of Moore, 4 N. J. Eq. 485, p. 2281.
Smith v. Farmers' Loan & Trust Co., 21 Tex. Civ. App. 170, 51 S. W. 515, p. 1051.
Smith v. Fellows, 9 Jones & S. 36, p. 2754, 2757.
Smith v. Fellows, 131 Mass. 20, p. 2492, 2494.
Smith v. Felton, 43 N. Y. 419, p. 1234.
Smith v. Fitzgerald, 3 Ves. & B. 2, p. 2218.
Smith v. Fly, 24 Tex. 345, 76 Am. Dec. 109, p. 1648.
Smith v. Ford, 48 Wis. 115, p. 1896, 1908.
Smith v. Fort Scott etc. R. R. Co., 99 U. S. 401, p. 505.
Smith v. Fox, 48 N. Y. 674, p. 1234.
Smith v. Fox's Adm'r, 82 Va. 763, 1 S. E. 200, p. 2153.
Smith v. Frost, 70 N. Y. 65, p. 1753, 2032.
Smith v. Gale, 144 U. S. 509, 12 Sup. Ct. 674, p. 1039, 1088.
Smith v. Gibson, 15 Minn. 89, 99, p. 1023, 1096, 1146.
Smith v. Greeley, 14 N. H. 378, p. 528, 1523, 1529, 1534.
Smith v. Green, 1 Coll. C. C. 555, p. 2436.
Smith v. Griswold, 6 Oreg. 440, p. 1639.
Smith v. Guild, 34 Me. 443, 447, p. 787, 812, 815, 820.
Smith v. Hall, 20 R. I. 170, 37 Atl. 698, p. 2070.
Smith v. Hammond, 6 Sim. 10, p. 2637, 2645, 2640.
Smith v. Harrington, 4 Allen, 506, p. 1850, 1851.
Smith v. Hays, 1 Jones Eq. 321, 323, p. 228, 461, 466.
Smith v. Haytwell, Amb. 66, 3 Atk. 566, p. 2669.
Smith v. Hibbard, 2 Dick. 730, p. 192, 2228, 2497.
Smith v. Hiles-Carver Co., 107 Ala. 272, 18 South. 37, p. 2470.
Smith v. Hodsdon, 78 Me. 180, 3 Atl. 276, p. 1062, 1065, 1067, 1082.
Smith v. Howe, 31 Ind. 233, p. 2192.
Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646, p. 1672.
Smith v. Hurst, 10 Hare, 30, p. 1855.
Smith v. Hutchinson, 61 Mo. 83, p. 1436.
Smith v. Iliffe, L. R. 20 Eq. 666, 668, p. 1543, 1887.
Smith v. Jackson, 1 Madd. 618, p. 1483.
Smith v. James, 22 Tex. Civ. App. 154, 54 S. W. 41, p. 1022, 1026, 1047.
Smith v. Jewett, 40 N. H. 530, 534, p. 632, 766.
Smith v. Jeyes, 4 Beav. 503, p. 2656.
Smith v. Jordan, 25 Ga. 687, p. 1280.
Smith v. Jordan, 13 Minn. 264, 97 Am. Dec. 232, p. 1489.
Smith v. Kammerer, 152 Pa. St. 98, 25 Atl. 165, p. 1708.
Smith v. Kane, 2 Paige, 303, p. 646.
Smith v. Kay, 7 H. L. Cas. 750, 775, 779, p. 1605, 1671, 1737, 1738, 1750, 1784.
Smith v. Kelley, 56 Me. 64, p. 343, 2772, 2782.
Smith v. Kerr, [1902] 1 Ch. 774, affirming [1900] 2 Ch. 511, p. 1946.
Smith v. Kinskern, 4 Johns. Ch. 9, p. 820, 836.
Smith v. Kittridge, 21 Vt. 238, 245, p. 2233, 2238.
Smith v. Lambeth, 15 La. Ann. 566, p. 1146.
Smith v. Lampton, 8 Dana, 69, p. 2218.
Smith v. Lansing, 22 N. Y. 520, 531, p. 2085.
Smith v. Lawrence, 15 Mich. 499, p. 2779.
Smith v. Lehrman, 85 Ala. 394, 5 South. 204, p. 1366.
Smith v. Leveaux, 2 De Gex, J. & S. 1, p. 211, 542, 2800.

Smith v. Lockwood, 13 Barb. 209, p. 2683.
Smith v. Los Angeles etc. Ass'n, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53, p. 2084.
Smith v. Lowe, 1 Edw. Ch. 33, p. 2656.
Smith v. Lowther, 35 W. Va. 300, 13 South. 999, p. 2059.
Smith v. Lucas, L. R. 18 Ch. Div. 531, p. 845, 2141, 2146.
Smith v. Lyne, 2 Younge & C. Ch. 345, p. 789.
Smith v. McAtee, 27 Md. 420, 92 Am. Dec. 641, p. 2193.
Smith v. McCann, 24 How. 398, 403, 405, p. 494, 1848.
Smith v. McClain, 146 Ind. 77, 45 N. E. 41, p. 1339.
Smith v. McCluskey, 45 Barb. 610, 613, p. 1460.
Smith v. McCrary, 3 Ired. Eq. 204, 207, p. 185, 621, 2325.
Smith v. McDougal, 2 Cal. 586, p. 1483.
Smith v. McElwain, 57 Ga. 247, p. 2675.
Smith v. McIver, 9 Wheat. 532, p. 220, 2706.
Smith v. Mackin, 4 Lans. 41, p. 1516.
Smith v. McKitterick, 51 Iowa, 548, p. 2208, 2210.
Smith v. McLain, 11 W. Va. 654, p. 2708.
Smith v. Manning, 9 Mass. 422, p. 2437.
Smith v. Mariner, 5 Wis. 551, 68 Am. Dec. 73, p. 764.
Smith v. Marks, 2 Rand. 449, p. 2798.
Smith v. Marshall, 1 Root, 159, p. 875.
Smith v. Mason, 122 Cal. 426, 55 Pac. 145, p. 1907.
Smith v. Matthews, 3 De Gex, F. & J. 139, p. 1901, 1903, 1908, 2168, 2169.
Smith v. Meyers, 1 Thomp. & C. 665, p. 2614.
Smith v. Miller, 63 Tex. 72, p. 1027, 1030, 1047.
Smith v. Mitchell, 6 Ga. 458, p. 1583.
Smith v. Moore, 26 Ill. 392, p. 2534.
Smith v. Moore, 112 Iowa, 60, 83 N. W. 813, p. 1328.
Smith v. Moore, 11 N. H. 55, p. 2417.
Smith v. Moore's Ex'rs, 4 N. J. Eq. 485, p. 578.
Smith v. Myers, 56 Nebr. 503, 76 N. W. 1084, p. 1032.
Smith v. Nettles, 13 La. Ann. 241, p. 1358.
Smith v. Newell, 37 Fla. 147, 20 South. 249, p. 743.
Smith v. Newton, 38 Ill. 230, p. 1438.
Smith v. Ostermeyer, 68 Ind. 432, p. 1403.
Smith v. Parkes, 16 Beav. 115, p. 1226, 1229.
Smith v. Pattison, 84 Md. 341, 35 Atl. 963, p. 983.
Smith v. Patton, 12 W. Va. 541, p. 1992, 1995, 1998, 1999, 2476.
Smith v. Peacock, 114 Ga. 691, 88 Am. St. Rep. 53, 40 S. E. 757, p. 1907.
Smith v. Pearce, 6 Baxt. 72, p. 2709.
Smith v. Penn, 22 Gratt. 402, p. 1482.
Smith v. Perkins, 81 Tex. 152, 16 S. W. 805, 26 Am. St. Rep. 794, p. 1667.
Smith v. Peters, L. R. 20 Eq. 511, p. 2773.
Smith v. Pettingill, 15 Vt. 82, 40 Am. Dec. 667, p. 2694.
Smith v. Phillips, 1 Keen, 694, p 1400.
Smith v. Phillips, 9 Okl. 297, 60 Pac. 117, p. 1023.
Smith v. Poor, 3 Ware, 148, Fed. Cas. No. 13,093, p. 2114, 2121, 2125.
Smith v. Powell, 50 Ill. 21, p. 2710.
Smith v. Prattville M. Co., 29 Ala. 503, p. 2125.
Smith v. Rathbun, 22 Hun, 150, p. 2066, 2093, 2095, 2114, 2121.
Smith v. Reese River M. Co., L. R. 2 Ch. 604, 613, 2 Eq. 264, 269, p. 1573, 1583, 1584, 1587, 1598.
Smith v. Richards, 6 Cal. 47, 65 Am. Dec. 475, p. 1276.
Smith v. Richards, 13 Pet. 26, 36, p. 1563, 1567, 1581, 1583.
Smith v. Ridgway, L. R. 1 Ex. 331, p. 1548.
Smith v. Roberts, 91 N. Y. 470, p. 1398, 1405.
Smith v. Robinson, 23 Ala. 312, p. 1567.
Smith v. Robinson, 10 Allen, 130, p. 649, 1704.
Smith v. Rome, 19 Ga. 89, p. 2682.
Smith v. Rowe, 4 Cal. 6, p. 566, 585.

Smith v. Rowland, 13 Kan. 245, p. 192, 2503, 2528.
Smith v. Rowley, 66 Barb. 502, p. 1735, 2729.
Smith v. Rudd, 48 Kan. 296, 29 Pac. 310, p. 1341.
Smith v. Rumsey, 33 Mich. 183, p. 2796.
Smith v. Savage, 3 Kan. App. 556, 43 Pac. 847, p. 1271.
Smith v. Scholtz, 68 N. Y. 41, p. 1918.
Smith v. Security L. & T. Co. of Cass, 8 N. Dak. 451, 79 N. W. 981, p. 1838.
Smith v. Seiberling, 35 Fed. 677, p. 2139.
Smith v. Sherman, 4 Cush. 408, p. 2552.
Smith, Estate of, 108 Cal. 115, 121, 40 Pac. 1037, p. 841, 843, 855.
Smith, Estate of, 144 Pa. St. 428, 27 Am. St. Rep. 641, 22 Atl. 916, p. 1864, 1869, 1886.
Smith v. Smith, 9 Abb. Pr., N. S., 420, p. 2502, 2520.
Smith v. Smith, 1 Allen, 129, p. 873.
Smith v. Smith, 3 Atk. 304, p. 2621.
Smith v. Smith, 21 Beav. 385, p. 1833.
Smith v. Smith, 12 Cal. 216, 225, 73 Am. Dec. 533, p. 841.
Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549, p. 2354.
Smith v. Smith, 3 Giff. 121, p. 2173.
Smith v. Smith, 3 Giff. 263, p. 876.
Smith v. Smith, 14 Gray, 532, p. 815, 820.
Smith v. Smith, 85 Ill. 189, p. 1995.
Smith v. Smith, 80 Ind. 267, p. 2192.
Smith v. Smith, 4 Johns. Ch. 281, 445, p. 2077.
Smith v. Smith, L. R. 20 Eq. 500, p. 1450, 2685, 2687, 2698.
Smith v. Smith, 148 Mass. 1, 18 N. E. 595, 2 Ames' Cas. Eq. Jur. 64, p. 414, 453.
Smith v. Smith, 11 N. H. 80, p. 1804.
Smith v. Smith, 125 N. Y. 224, 26 N. E. 259, p. 2470, 2471.
Smith v. Smith, 10 Paige, 470, p. 2741.
Smith v. Smith, 13 Ohio St. 532, p. 1104.
Smith v. Smith, 4 Rand. 95, 102, p. 2744.
Smith v. Smith, 2 Strange, 955, p. 2242.
Smith v. Smith, 11 Tex. 102, 106, p. 571, 589, 2288.
Smith v. Smith's Adm'r, 30 N. J. Eq. 564, p. 2729.
Smith v. Smith's Adm'r, 92 Va. 696, 24 S. E. 280, p. 271, 321, 2231, 2234.
Smith v. Southern Express Co., 104 Ala. 387, 16 South. 62, p. 1154.
Smith v. Sprague, 119 Mich. 148, 77 N. W. 689, 75 Am. St. Rep. 384, p. 1436.
Smith v. State, 46 Md. 617, p. 2794.
Smith v. Stephenson, 45 Iowa, 645, p. 1764.
Smith v. Strahan, 16 Tex. 314, 67 Am. Dec. 622, p. 1833.
Smith v. Strong, 4 Brown Ch. 493, p. 903.
Smith v. Sweigerer, 129 Ind. 363, 28 N. E. 696, p. 1197.
Smith v. Tanner, 32 S. C. 259, 10 S. E. 1008, p. 1502.
Smith v. Target, 2 Anstr. 529, p. 2646.
Smith v. Tebbetts, L. R. 1 P. & M. 398, p. 1727.
Smith v. Thompson, 2 McAr. 291, 29 Am. Rep. 621, p. 2154.
Smith v. Towers, 69 Md. 77, 14 Atl. 497, 15 Atl. 92, p. 1844.
Smith v. Townshend, 27 Md. 368, 92 Am. Dec. 637, p. 1757.
Smith v. Tracey, 36 N. Y. 79, p. 1625.
Smith v. Turner, 50 Md. 367, p. 2775.
Smith v. Vail, 53 App. Div. 628, 65 N. Y. Supp. 834, p. 748.
Smith v. Ventrees, 2 Bush, 63, p. 1861.
Smith v. Vreeland, 16 N. J. Eq. 199, p. 1147.
Smith v. Walker, 8 Smedes & M. 131, p. 304.
Smith v. Warde, 15 Sim. 56, p. 2002.
Smith v. Water Comm'rs, 38 Conn. 208, p. 1156.
Smith v. White, L. R. 1 Eq. 626, p. 1702, 1711.
Smith v. White, 62 Nebr. 56, 86 N. W. 930, p. 1355.
Smith v. Whitmore, 2 De Gex, J. & S. 297, p. 1652.
Smith v. Wildman, 39 Conn. 387, p. 1919.
Smith v. Willard, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313, p. 1273, 1376, 1447, 1993.

Smith v. Woodruff, 48 Barb. 438, p. 2690.
Smith v. Worman, 19 Ohio St. 145, p. 1285.
Smith v. Worster, 59 Kan. 640, 644, 54 Pac. 676, 68 Am. St. Rep. 385, 388, p. 1082, 1083.
Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167, p. 1027, 1096, 1144, 1357.
Smith & Fleek's Appeal, 69 Pa. St. 474, p. 2682.
Smith & Vaile Co. v. Burns, 72 Miss. 966, 18 South. 483, p. 1070.
Smith Co. v. McGuinness, 14 R. I. 59, p. 2476.
Smither v. Calvert, 44 Ind. 242, p. 1561.
Smithers v. Hooper, 23 Md. 273, p. 2315.
Smith M. P. Co., Geo. T. v. McGroarty, 136 U. S. 240, 10 Sup. Ct. 1019, p. 500.
Smith's Adm'r v. Poythress, 2 Fla. 92, 48 Am. Dec. 176, p. 2191.
Smith's Appeal, 47 Pa. St. 128, p. 1148.
Smith's Appeal, 113 Pa. St. 579, 6 Atl. 251, p. 1691.
Smith's Case, L. R. 2 Ch. 604, p. 1567, 1574.
Smith's Ex'r v. Cockrell, 66 Ala. 64, p. 2754, 2756.
Smith's Heirs v. Branch Bank, 21 Ala. 125, p. 1144.
Smithson v. Thompson, 1 Atk. 520, p. 644.
Smithsonian Institute v. Meech, 169 U. S. 398, 18 Sup. Ct. Rep. 396, 42 L. ed. 793, p. 1997, 2001.
Smith's Will, In re, 95 N. Y. 516, 523, p. 1751, 1768.
Smithurst v. Edmunds, 14 Pa. St. 408, p. 2576, 2578, 2580.
Smithwick v. Smithwick, 12 Ir. Ch. Rep. 181, p. 2309.
Smoot v. Rea, 19 Md. 398, 399, 410, p. 662, 2768, 2777, 2778.
Smout v. Ilbery, 10 Mees. & W. 1, 10, p. 1577.
Smyth v. Ames, 16 U. S. 466, 516, 517, 518, 18 Sup. Ct. 418, 422, p. 367, 417, 456, 497.
Smyth v. Carlisle, 17 N. H. 417, 16 N. H. 464, p. 1803.
Smyth v. Griffin, 13 Sim. 245, p. 667, 1702, 2728.
Smyth v. Oliver, 31 Ala. 39, p. 2189.
Smythe v. Henry, 41 Fed. 715, p. 252.
Smythe v. New Orleans C. & B. Co., 34 Fed. 825, affirmed, 141 U. S. 656, 12 Sup. Ct. 113, p. 212, 270, 380.
Smythies, In re, [1903] 1 Ch. 259, p. 911.
Snavely v. Pickle, 29 Gratt. 27, p. 2380.
Sneed v. Bullock, 77 N. C. 282, p. 2678.
Sneed v. Sneed, Amb. 64, p. 1468.
Sneed's Heirs v. Atherton, 6 Dana, 276, 32 Am. Dec. 70, p. 2742.
Snelgrove v. Snelgrove, 4 Desaus. Eq. 274, 294, 300, p. 798, 800, 821, 848, 849, 855, 1315, 1393, 2736.
Snell v. Atlantic Ins. Co., 98 U. S. 85, p. 1482, 2725.
Snell v. Dwight, 120 Mass. 9, p. 543.
Snell v. Mitchell, 65 Me. 48, 50, p. 551, 662, 2767.
Snellgrove v. Baily, 3 Atk. 214, p. 2232, 2237.
Snelling v. American F. L. & T. Co., 107 Ga. 852, 73 Am. St. Rep. 160, 33 S. E. 634, p. 1838.
Snelling v. McIntyre, 6 Abb. N. C. 469, p. 2424.
Snelson v. Corbet, 3 Atk. 369, p. 2164.
Snelson v. Franklin, 6 Munf. 210, p. 1609, 1618.
Snider v. Lehnherr, 5 Oreg. 385, p. 2778, 2779.
Snider v. Snider, 3 Phila. 160, p. 1107.
Snider v. Udell Woodenwork Co., 74 Miss. 353, 20 South. 836, p. 1993.
Sniper v. Kelleher, 31 Wash. 286, 72 Pac. 67, 61 L. R. A. 506, p. 664, 1645, 1711.
Snodgrass v. Butler, 54 Miss. 45, p. 2646, 2648, 2649.
Snodgrass v. Hyder, 95 Tenn. 568, 32 S. W. 764, p. 2138, 2140.
Snodgrass v. Ricketts, 13 Cal. 359, p. 1095, 1354.
Snook v. Watts, 11 Beav. 105, p. 1726.
Snover v. Squire, (N. J. Eq.) 24 Atl. 365, p. 1215, 2312.
Snow v. Blount, 182 Mass. 489, 65 N. E. 845, p. 638, 656.
Snow v. Foley, 119 Mass. 102, p. 2218.

Snow v. Lake, 20 Fla. 656, 51 Am. Rep. 625, p. 1338.
Snow v. Pressey, 82 Me. 552, 20 Atl. 78, p. 2374.
Snow v. Williams, 16 Hun, 468, p. 2687.
Snowden v. Dales, 6 Sim. 524, p. 1841, 1842.
Snowden v. General Dispensary, 60 Md. 85, p. 415.
Snowden v. Snowden, 1 Brown Ch. 582, 3 P. Wms. 228, p. 700.
Snowden v. Tyler, 21 Nebr. 215, 31 N. W. 661, p. 1343.
Snowman v. Harford, 57 Me. 397, p. 2772.
Snyder v. Botkin, 37 W. Va. 355, 16 S. E. 591, p. 1020, 1025, 1269.
Snyder v. Crawford, 98 Pa. St. 414, p. 2454.
Snyder v. Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863, p. 1357, 1383, 1390, 1391.
Snyder v. Harding, (Wash.) 75 Pac. 812, p. 360.
Snyder v. Ives, 42 Iowa, 157, 159, 162, p. 1511, 2725, 2727.
Snyder v. Martin, 17 W. Va. 276, 41 Am. Rep. 670, p. 1269.
Snyder v. May, 19 Pa. St. 235, p. 1494.
Snyder v. Miller, 67 Iowa, 261, 25 N. W. 240, p. 821, 852.
Snyder v. Parker, 19 Wash. 276, 53 Pac. 59, 67 Am. St. Rep. 726, p. 2380, 2381.
Snyder v. Partridge, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130, p. 1167, 1197.
Snyder v. Pharo, 25 Fed. 398, 399, 400, p. 495.
Snyder v. Robinson, 35 Ind. 311, 9 Am. Rep. 738, p. 2410, 2411.
Snyder v. Snyder, 6 Mich. 470, p. 1403.
Snyder v. Snyder, 131 Mich. 658, 92 N. W. 353, p. 1782.
Snyder v. Snyder, 10 Pa. St. 423, p. 2144.
Snyder v. Spaulding, 57 Ill. 480, 484, p. 761, 2778.
Snyder v. Sponable, 1 Hill, 567, 7 Hill, 427, p. 1157.
Snyder v. Warbasse, 11 N. J. Eq. 463, p. 1544.
Snyder's Appeal, 92 Pa. St. 504, p. 1909, 2159.
Soames v. Edge, Johns. 669, p. 345.
Soames v. Robinson, 1 Mylne & K. 500, p. 2490.
Soar v. Ashwell, [1893] 2 Q. B. 390, p. 2008.
Soar v. Foster, 4 Kay & J. 152, p. 1996, 1997.
Socher's Appeal, 104 Pa. St. 609, p. 2036.
Société Générale de Paris v. Walker, 11 App. Cas. 20, affirming 14 Q. B. D. 424, p. 1213, 1218, 1223, 1256.
Society for Estab. Useful Manufactures v. Lehigh Valley R. R., 32 N. J. Eq. 329, p. 1436.
Society of Friends v. Haines, 47 Ohio St. 423, 25 N. E. 119, p. 2406, 2413.
Society of Orphan Boys v. New Orleans, 12 La. Ann. 62, p. 1974.
Society of Shakers v. Watson, 68 Fed. 730, 15 C. C. A. 632, 37 U. S. App. 141, p. 2467, 2474, 2475.
Sockett v. Wray, 4 Brown Ch. 483, p. 2156.
Soggins v. Heard, 31 Miss. 426, p. 1900.
Sohan v. Gibson, (Ky.) 80 S. W. 1173, p. 1665.
Sohier v. Burr, 127 Mass. 221, p 1943, 1954, 1958, 2302.
Sohier v. Eldredge, 103 Mass. 345, p. 2483.
Solberg v. Wright, 33 Minn. 224, 22 N. W. 381, p. 2395.
Solinger v. Earle, 82 N. Y. 393, 397, 399, p. 1646, 1708, 1712, 1719, 1790.
Solinger v. Earle, 45 N. Y. Sup. Ct. 80, 604, p. 1791.
Solinsky v. Bank, 82 Tex. 246, 17 S. W. 1050, p. 1227.
Sollory v. Leaver, L. R. 9 Eq. 22, p. 2659.
Solms v. McCullough, 5 Pa. St. 473, p. 1358.
Solomon v. Diefenthal, 46 La. Ann. 897, 15 South. 183, p. 751.
Solomon v. Solomon, (Nebr.) 92 N. W. 124, p. 1997.
Solomons v. Shaw, 25 S. C. 112, p. 565.
Solt v. Anderson, (Nebr.) 93 N. W. 205, p. 615.
Soltau v. De Held, 2 Sim., N. S., 133, p. 2683, 2684, 2687.

Somerby v. Buntin, 118 Mass. 279, 287, 19 Am. Rep. 459, p. 536, 2601, 2761, 2763.
Somers v. Craig, 9 Humph. 467, p. 2144.
Somers v. McCready, 96 Md. 437, 53 Atl. 1117, p. 1738.
Somerset, In re, [1894] 1 Ch. 231, p. 2069.
Somerset v. Cox, 33 Beav. 634, p. 1211.
Somersetshire etc. Co. v. Harcourt, 2 De Gex & J. 596, p. 1451.
Somerville v. Donaldson, 26 Minn. 75, p. 1640.
Somerville v. Trueman's Devisees, 4 Har. & McH. 43, 1 Am. Dec. 389, p. 2764.
Somes, In re, [1896] 1 Ch. 250, p. 1656.
Somes v. Brewer, 2 Pick. 184, 13 Am. Dec. 406, p. 1345.
Somes v. Skinner, 16 Mass. 348, p. 1775.
Somes v. Skinner, 3 Pick. 52, p. 1134.
Somes v. White, 65 Me. 542, 20 Am. Rep. 718, p. 554.
Sonley v. Clock Makers' Co., 1 Br. Ch. Cas. 81, Ames' Cas. on Trusts, 225, p. 1905.
Soohan v. Philadelphia, 33 Pa. St. 9, p. 1976.
Sooy v. State, 39 N. J. L. 135, p. 1622.
Sopwith v. Mangham, 30 Beav. 235, 239, p. 850, 851, 853, 855, 856.
Sorrel v. Carpenter, 2 P. Wms. 482, p. 1061, 1065.
Souder v. Morrow, 33 Pa. St. 83, p. 1127.
Souder's Appeal, 57 Pa. St. 498, 502, p. 225, 331, 349.
Soulard's Estate, In re, 141 Mo. 642, 43 S. W. 617, p. 1909.
Soule v. Shotwell, 52 Miss. 236, p. 1329.
Soulle v. Gerrard, Cro. Eliz. 525, Moore, 422, p. 1546.
Sourwine v. Claypool, 138 Pa. St. 126, 20 Atl. 840, p. 2240, 2242, 2243.
Sourwine v. Supreme Lodge, 12 Ind. App. 447, 452, 453, 54 Am. St. Rep. 531, 532, 536, 40 N. E. 646, p. 116, 118, 603, 616, 619.
South, Ex parte, 3 Swanst. 392, 393, p. 195, 2561, 2565.
Southall v. ———, 1 Younge, 308, p. 257.
Southampton Dock Co. v. Southampton etc. Board, L. R. 11 Eq. 254, p. 210, 211, 222, 302, 2700, 2800.
Southard v. Curley, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561, p. 1516.
Southard v. Morris Canal Co., 1 N. J. Eq. 519, 521, p. 2694.
Southard v. Piper, 36 Me. 84, p. 2193.
Southard v. Plummer, 36 Me. 64, p. 2193.
Southard v. Sutton, 68 Me. 575, p. 1434, 1435, 1441, 1444, 1445.
South Baltimore H. & I. Co. v. Smith, 85 Md. 537, 37 Atl. 27, p. 1106.
South Carolina R. Co. v. Steiner, 44 Ga. 546, p. 417, 455, 456, 2750.
South Chicago City R'y Co. v. Calumet Electric St. R'y Co., 171 Ill. 391, 49 N. E. 576, p. 669, 1689, 1712.
Southcomb v. Bishop of Exeter, 6 Hare, 213, 218, p. 2775.
South Eastern R'y v. Brogden, 3 Macn. & G. 8, p. 210, 211, 213, 2798, 2799.
Southerin v. Mendum, 5 N. H. 420, p. 2350, 2417.
Southerland v. Fremont, 107 N. C. 565, 12 S. E. 237, p. 1328, 1330.
Southerland v. Harper, 83 N. C. 200, p. 2706.
Southerland v. Southerland's Adm'r, 5 Bush 591, p. 2233, 2236, 2240, 2247.
Southern B. & L. Ass'n v. Anniston L. & T. Co., 101 Ala. 582, 29 L. R. A. 120, 15 South. 123, 46 Am. St. Rep. 138, p. 764.
Southern B. & L. Ass'n v. Brackett, (Tex. Civ. App.) 39 S. W. 619, p. 1103.
Southern B. & L. Ass'n v. Rodgers, 104 Tenn. 437, 58 S. W. 234, p. 1102, 1124.
Southern Comm. Sav. Bank v. Slattery's Adm'r, 166 Mo. 620, 66 S. W. 1066, p. 1175.
Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, p. 1564, 1582, 1591, 1594.
Southern Express Co. v. Western N. C. R. R. Co., 99 U. S. 191, p. 2663.
Southern F. & W. Co. v. Ozment, 132 N. C. 839, 44 S. E. 681, p. 1510, 1542.
Southern Home B. & L. Ass'n v. Riddle, (Ala.) 29 South. 667, p. 1366.

Southern Pac. R. Co. v. Goodrich, 57 Fed. 879, p. 503.
Southern Pine Co. v. Hall, 105 Fed. 84, 44 C. C. A. 363, p. 504.
Southern R'y Co. v. Gregg, 101 Va. 308, 43 S. E. 570, p. 2528.
Southern R'y Co. v. Hood, 126 Ala. 312, 28 South. 662, 85 Am. St. Rep. 32, p. 1452.
Southern Rock Is. Plow Co. v. Pitluk, (Tex. Civ. App.) 63 S. W. 354, p. 1062.
Southey v. Sherwood, 2 Mer. 435, 437, p. 2688.
South Fork Canal Co. v. Gordon, 6 Wall. 561, 568, p. 497, 512, 516.
Southmayd v. McLaughlin, 24 N. J. Eq. 181, p. 2695.
South Penn. Oil Co. v. Edgell, 48 W. Va. 348, 37 S. E. 596, 86 Am. St. Rep. 43, p. 757.
South Platte Land Co. v. Comm'rs of Buffalo County, 7 Nebr. 253, p. 2678.
Southouse v. Bate, 2 Ves. & B. 396, p. 1986.
South Wales R'y v. Wythes, 1 Kay & J. 186, 200, 5 De Gex, M. & G. 880, p. 2765, 2766.
South Wales etc. Co., In re, L. R. 2 Ch. Div. 763, p. 668, 1696.
Southwestern Mfg. Co. v. Hughes, 24 Tex. Civ. App. 637, 60 S. W. 684, p. 1103, 1115.
Southwick v. Morrell, 121 Mass. 520, p. 544, 2273.
Southworth v. Adams, 9 Biss. 523, 524, 4 Fed. 1, p. 510.
Soutter v. Miller, 15 Fla. 625, p. 1859, 2357.
Souverbye v. Arden, 1 Johns. Ch. 240, p. 1872.
Sowden v. Sowden, 1 Brown Ch. 582, 3 P. Wms. 228, note, p. 949, 950, 953.
Sowerby v. Fryer, L. R. 8 Eq. 417, p. 2682.
Sowles v. First Nat. Bank, 100 Fed. 552, p. 463, 499.
Spackman v. Ott, 65 Pa. St. 131, p. 1331, 1355.
Spader v. Davis, 5 Johns. Ch. 280, 20 Johns. 554, p. 2789.
Spader v. Lawler, 17 Ohio, 371, 49 Am. Dec. 463, p. 1105, 2388.
Spadone v. Manvel, 2 Daly, 263, p. 1161, 1163.
Spafford v. Warren, 47 Iowa, 47, p. 2200.
Spaight v. Cowne, 1 Hem. & M. 359, p. 1650.
Spain v. Hamilton, 1 Wall. 604, 624, p. 1212, 1216, 1704, 2562.
Spalding v. Alexander, 6 Bush, 160, p. 2778.
Spalding v. Hedges, 2 Pa. St. 240, p. 1590, 1594.
Spalding v. New Hampshire Fire Ins. Co., 71 N. H. 441, 52 Atl. 858, p. 1158.
Spalding v. St. Joseph's Industrial School, 107 Ky. 382, 21 Ky. Law. Rep. 1107, 54 S. W. 200, p. 1952, 1974, 1980.
Spalding v. Spalding, Cro. Cas. 185, p. 1545.
Spangler's Appeal, 64 Pa. St. 387, p. 2686.
Spann v. Stern's Adm'rs, 18 Tex. 556, p. 571, 588.
Sparhawk v. Bagg, 16 Gray, 583, p. 2349.
Sparhawk v. Cloon, 125 Mass. 263, p. 1844.
Sparhawk v. Sparhawk, 114 Mass. 356, p. 2106.
Sparhawk v. Union Pass. R'y, 54 Pa. St. 401, p. 2683.
Sparkes v. Cator, 3 Ves. 530, p. 917, 918.
Sparkman v. Supreme Council American Legion of Honor, 57 S. C. 16, 35 S. E. 391, p. 1155.
Sparks v. Company etc. of Liverpool Water Works, 13 Ves. 428, 433, 434, p. 764.
Sparks v. Hess, 15 Cal. 186, 194, p. 2499, 2530.
Sparks v. Pittman, 51 Miss. 511, p. 1489.
Sparks v. Sparks, 94 N. C. 527, p. 1712.
Sparks v. State Bank, 7 Blackf. 469, p. 1263, 1358.
Sparks v. Weedon, 21 Md. 156, p. 2209.
Sparks v. Woodstock Iron etc. Co., 87 Ala. 294, 6 South. 195, p. 630.
Sparling v. Parker, 9 Beav. 524, p. 2321.
Sparrow, In re, L. R. 5 Ch. 662, p. 2109.

Sparrow v. Josselyn, 16 Beav. 135, p. 2218.
Spaulding v. Backus, 122 Mass. 553, 23 Am. Rep. 391, p. 543.
Spaulding v. Brewster, 50 Barb. 142, p. 1385.
Spaulding v. Crane, 46 Vt. 292, p. 1411.
Spaulding v. Davis, 51 Vt. 77, p. 1706.
Spaulding v. Hallenbeck, 35 N. Y. 204, 39 Barb. 79, p. 2405.
Spaulding v. Preston, 21 Vt. 9, 50 Am. Dec. 68, p. 1707, 1708.
Spaulding v. Strang, 37 N. Y. 135, 38 N. Y. 9, p. 1858.
Speakman's Appeal, 71 Pa. St. 25, p. 2197.
Spear v. Grant, 16 Mass. 9, 15, p. 2011.
Spear v. Smith, 1 Denio, 465, p. 734.
Special Bank Comm'rs v. Cranston Sav. Bank, 12 R. I. 497, p. 2663.
Special Bank Comm'rs v. Franklin Sav. Inst., 11 R. I. 557, p. 2663.
Speck v. Dausman, 7 Mo. App. 165, p. 1701.
Speck v. Riggin, 40 Mo. 405, p. 974, 1147.
Spect v. Spect, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137, p. 2364.
Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 496, p. 1566, 1591, 1598.
Speed v. St. Louis etc. R. R. Co., 86 Fed. 325, p. 1828.
Speed's Ex'r v. Nelson's Ex'r, 8 B. Mon. 499, 507, p. 2271.
Speer v. Crawter, 2 Mer. 410, 417, p. 2737, 2738.
Speer v. Crawter, 17 Ves. 216, p. 2738.
Speer v. Evans, 47 Pa. St. 141, p. 1107, 1119, 1148.
Speer v. Speer, 14 N. J. Eq. 240, p. 2740.
Speight v. Gaunt, 22 Ch. Div. 727, on appeal, 9 App. Cas. (H. L.) 1, p. 2060, 2066.
Speights v. Peters, 9 Gill, 472, p. 2656.
Speiglemyer v. Crawford, 6 Paige, 254, p. 1563.
Speiser v. Phœnix Mut. Life Ins. Co., (Wis.) 97 N. W. 207, p. 1176.
Speke v. Walrond, Hoth. 155, p. 2739.
Spence, In re, 2 Ph. 247, 252, p. 2613.
Spence v. Harvey, 22 Cal. 337, 83 Am. Dec. 69, p. 1699.
Spence v. Mobile & M. R. Co., 79 Ala. 576, p. 981, 1226.
Spence v. Widney, (Cal.) 46 Pac. 463, p. 1934, 1944.
Spencer v. Ayrault, 10 N. Y. 202, p. 1402, 1405.
Spencer v. Birmingham R'y, 8 Sim. 193, 198, p. 2698.
Spencer v. Boardman, 118 Ill. 555, 9 N. E. 330, p. 2267.
Spencer v. Carr, 45 N. Y. 406, 6 Am. Rep. 112, p. 1434.
Spencer v. Credle, 102 N. C. 68, 78, 8 S. E. 901, p. 1087.
Spencer v. Higgins, 22 Conn. 521, p. 2208, 2214.
Spencer v. London etc. R'y, 8 Sim. 193, p. 2684.
Spencer v. St. Paul etc. R. R., 22 Minn. 29, p. 2194.
Spencer v. Spencer, 21 Beav. 548, p. 2213.
Spencer v. Spencer, 95 N. Y. 353, p. 2402, 2408.
Spencer v. Spencer, 11 Paige, 299, p. 2061, 2095.
Spencer v. Spencer's Ex'r, 50 Ala. 445, p. 2130.
Spencer v. Terrell, 17 Wash. 514, 50 Pac. 468, p. 1997.
Spencer v. Tilden, 5 Cow. 144, p. 742.
Spencer v. Topham, 22 Beav. 573, p. 1769.
Spencer v. Topham, 2 Jur., N. S., 865, p. 1159, 1174.
Spencer v. Waterman, 36 Conn. 342, p. 1412, 2441.
Spencer v. Weber, 26 App. Div. 285, 49 N. Y. Supp. 687, p. 2018.
Spencer v. Widney, (Cal.) 46 Pac. 463, p. 1972.
Spencer v. Wilson, L. R. 16 Eq. 501, p. 2326, 2327.
Spencer & Newbold's Appeal, 80 Pa. St. 317, 332, p. 1757, 1758.
Spencer Co., H. L. v. Koell, (Minn.) 97 N. W. 974, p. 1067.
Spencer's Appeal, 80 Pa. St. 317, p. 2086.
Spendlove v. Spendlove, Cam. & N. 36, p. 234.
Spering's Appeal, 60 Pa. St. 199, p. 2373.
Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684, p. 2063, 2066, 2114, 2122.

Sperling v. Rochfort, 16 Ch. Div. 18, p. 1986.
Spettigue v. Carpenter, 3 P. Wms. 361, p. 1653.
Spicer v. First Nat. Bank, 66 N. Y. Suppl. 902, 55 App. Div. 172, affirmed, 170 N. Y. 562, 62 N. E. 1100, p. 1302, 1303.
Spicer v. Hayward, Prec. Ch. 114, p. 667.
Spicer v. Robinson, 73 Ill. 519, p. 1384.
Spicer v. Spicer, 24 Beav. 365, p. 2172.
Spicer v. Waters, 65 Barb. 227, p. 1335.
Spielman v. Hunt, 36 N. J. Eq. 199, 206, p. 1051.
Spielmann v. Kliest, 36 N. J. Eq. 199, 202, 206, p. 1053, 1107, 1113, 1166, 1170.
Spiers v. Roberts, 73 Mich. 666, 41 N. W. 841, p. 1920.
Spiers v. Whitesell, 27 Ind. App. 204, 61 N. E. 28, p. 1335.
Spike v. Harding, L. R. 7 Ch. Div. 871, p. 2738.
Spiller v. Mande, 32 Ch. Div. 158, p. 1936.
Spiller v. Spiller, 3 Swanst. 556, p. 2671.
Spiller v. Wells, 96 Va. 598, 70 Am. St. Rep. 878, 32 S. E. 46, p. 220.
Spink v. Lewis, 3 Brown Ch. 355, p. 1986.
Spink v. McCall, 52 Iowa, 432, 3 N. W. 471, p. 2544.
Spinks v. Robins, 2 Atk. 491, 493, p. 908.
Spinner's Heirs, Matter of, 2 Dev. & B. Eq. 63, p. 2743.
Spinney v. Miller, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317, p. 2411.
Spinning v. Ohio etc. Tr. Co., 2 Disn. 336, p. 2662.
Spinning v. Sullivan, 48 Mich. 5, 11 N. W. 758, p. 1226, 1228.
Spire v. Smith, 1 Beav. 419, p. 886.
Spirett v. Willows, 3 De Gex, J. & S. 293, 302, 303, L. R. 1 Ch. 520, 522, 4 Ch. 407, p. 646, 1796, 1798, 1801, 1803, 2168, 2174.
Spirett v. Willows, 11 Jur., N. S., 70, p. 2146.
Splane v. Mitcheltree, 2 La. Ann. 265, p. 1146.
Spofford v. Bangor etc. R. R., 66 Me. 51, p. 548, 555, 2758.
Spofford v. Kirk, 97 U. S. 484, 24 L. ed. 1032, p. 2555.
Spofford v. Weston, 29 Me. 140, p. 981, 1101, 1146, 1357.
Spokes v. Banbury Board of Health, L. R. 1 Eq. 42, p. 2698.
Sponable v. Hanson, 87 Mich. 204, 49 N. W. 644, p. 1155.
Spong v. Spong, 3 Bligh, N. S., 84, p. 2490.
Spooner v. Lovejoy, 108 Mass. 529, 533, p. 1926.
Sporer v. McDermott, (Nebr.) 96 N. W. 232, p. 2473, 2474.
Sporle v. Barnaby, 10 Jur., N. S., 1142, p. 2067.
Sporrer v. Eifler, 1 Heisk. 633, 636, p. 644, 648, 649, 1704, 1705.
Spragg v. Binkes, 5 Ves. 583, 588, p. 193, 2547.
Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000, p. 2474.
Sprague v. Edwards, 48 Cal. 239, p. 1897.
Sprague v. Graham, 29 Me. 160, p. 2419.
Sprague v. Graham, 38 Me. 328, p. 650.
Sprague v. Shields, 61 Ala. 428, p. 2143, 2145, 2153, 2189.
Sprague v. Sprague, 13 R. I. 701, p. 1848.
Sprague v. Tyson, 44 Ala. 338, p. 2189.
Sprague v. West, 127 Mass. 471, p. 2642.
Sprague v. White, 73 Iowa, 670, 35 N. W. 751, p. 1031, 1080, 1081.
Sprague, A. & W. Mfg. Co. v. Hoyt, 29 Fed. 421, 428, p. 500.
Spraights v. Hawley, 39 N. Y. 441, 100 Am. Dec. 452, p. 1385.
Spread v. Morgan, 11 H. L. Cas. 588, p. 782, 850, 854, 857.
Sprigg v. Commonwealth Title Ins. & Tr. Co., 206 Pa. St. 548, 56 Atl. 33, p. 219.
Spring v. Pride, 10 Jur., N. S., 646, p. 2157.
Spring v. Raymond, (Mich.), 95 N. W. 1003, p. 1279.
Spring v. S. C. Ins. Co., 8 Wheat. 268, p. 2647, 2650.
Springer v. Arundel, 64 Pa. St. 218, p. 2159.

Springer v. Berry, 47 Me. 330, p. 1833, 2193.
Springer v. Walters, 34 Pa. St. 328, p. 2504.
Springer v. Young, 14 Oreg. 280, 12 Pac. 400, p. 178, 179.
Springfield & M. R. R. Co. v. Stewart, 51 Ark. 285, 10 S. W. 767, p. 2498, 2514.
Springfield Engine & T. Co. v. Donovan, 147 Mo. 622, 49 S. W. 500, p. 1756.
Springfield Homestead Ass'n v. Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358, p. 1031.
Springhead Spin. Co. v. Riley, L. R. 6 Eq. 551, p. 545, 2696.
Sprinkle v. Hayworth, 26 Gratt. 384, p. 1900, 2036.
Springs v. Harven, 3 Jones Eq. 96, p. 1489.
Springwell v. Allen, 2 East, 446, p. 1601.
Sproal v. Larsen, (Mich.) 101 N. W. 213, p. 2425.
Sprott v. United States, 20 Wall. 459, p. 1696.
Sproul v. Atchison Nat. Bank, 22 Kan. 336, p. 2142.
Sproul v. Standard Plate Glass Co., 201 Pa. St. 103, 50 Atl. 1003, p. 1175.
Sprye v. Porter, 7 El. & B. 58, 3 Jur., N. S., 330, p. 1702.
Spurgeon v. Collier, 1 Eden, 55, 61, p. 2141, 2370, 2379.
Spurgin v. Adamson, 62 Iowa, 661, 18 N. W. 293, p. 2435.
Spurgin v. Traub, 65 Ill. 170, p. 2729.
Spurlock v. Brown, 91 Tenn. 241, 18 S. W. 868, p. 1483.
Spurlock v. Sproule, 72 Mo. 503, p. 2059.
Spurlock v. Sullivan, 36 Tex. 511, p. 986, 1324, 1327.
Spurr v. Benedict, 99 Mass. 463, p. 1494.
Spurret v. Spiller, 1 Atk. 105, p. 1790.
Squair v. Lookout Mt. Co., 42 Fed. 729, p. 2128.
Squib v. Wyn, 1 P. Wms. 378, 381, p. 2547.
Squire v. Campbell, 1 Mylne & C. 459, 465, 467, 480, p. 1521, 1531, 2684.
Squire v. Compton, 2 Eq. Cas. Abr. 387, p. 2442.
Squire v. Dean, 4 Brown Ch. 326, p. 2147.
Squire v. Ford, 9 Hare, 47, 60, p. 1411.
Squire v. Harder, 1 Paige, 494, 19 Am. Dec. 446, p. 1990, 1991.
Squire v. Whitton, 1 H. L. Cas. 333, p. 1622.
Squires v. Ashford, 23 Beav. 132, p. 2171.
Squires v. Elwood, 33 Nebr. 126, 49 N. W. 939, p. 743.
Staats v. Bergen, 17 N. J. Eq. 554, 562. 563, p. 2080.
Stacey v. Walter, 125 Ala. 291, 28 South. 89, 82 Am. St. Rep. 235, p. 1505.
Stackpole v. Beaumont, 3 Ves. 89, 95, 96, p. 1680, 1681.
Stacy v. Pearson, 3 Rich. Eq. 148, 152, p. 259, 324, 326.
Stafford v. Ballou, 17 Vt. 329, p. 981, 1148, 1295.
Stafford v. Bryan, 1 Paige, 239, p. 290.
Stafford v. Fetters, 55 Iowa, 484, 8 N. W. 322, p. 1490, 2727.
Stafford v. Stafford, 1 De Gex & J. 193, 197, p. 1447, 1503.
Stafford v. Stafford, (Tex. Civ. App.) 71 S. W. 984, p. 2380.
Stafford v. Van Rensselaer, 9 Cow. 316, p. 2501, 2516.
Stafford Sav. Bank v. Underwood, 54 Conn. 2, 4 Atl. 248, p. 2152.
Stagg v. Beekman, 2 Edw. Ch. 89, p. 881, 882, 883.
Stagg v. Jackson, 1 N. Y. 206, p. 2310.
Staggers v. Matthews, 13 Rich. Eq. 142, 154, p. 2161.
Stahl v. Dehn, 72 Mich. 645, 40 N. W. 922, p. 2373.
Stahn v. Hall, 10 Utah, 400, 37 Pac. 285, p. 1022, 1148.
Staigg v. Atkinson, 144 Mass. 567, 12 N. E. 354, p. 824.
Staight v. Burn, L. R. 5 Ch. 163, p. 2687.
Stainback v. Junk Bros. L. & M. Co., (Tenn. Ch. App.) 39 S. W. 530, p. 1332.
Staines v. Burton, 17 Utah, 331, 53 Pac. 1015, 70 Am. St. Rep. 788, p. 1948, 1956, 1957, 1977.

Staines v. Shore, 16 Pa. St. 200, 55 Am. Dec. 492, p. 1693.
Stainton v. Chadwick, 3 Macn. & G. 575, p. 272.
Staley v. Hamilton, 19 Fla. 275, p. 2190.
Staley v. Howard, 7 Mo. App. 377, p. 2195.
Stall v. Wilbur, 77 N. Y. 158, p. 2208.
Stallcup v. Cronley's Trustee, 25 Ky. Law Rep. 1675, 78 S. W. 441, p. 2574.
Stallworth's Adm'r v. Farnham, 64 Ala. 259, p. 2256.
Stambaugh's Estate, In re, 135 Pa. St. 585, 19 Atl. 1058, p. 1831, 1846.
Stammers v. Halliley, 12 Sim. 42, p. 2225, 2226.
Stanard v. Eldridge, 16 Johns. 254, p. 2360.
Standard Button Fastening Co. v. Breed, 163 Mass. 10, 39 N. E. 346, p. 736.
Standard Oil Co. v. Hawkins, 74 Fed. 395, 20 C. C. A. 468, 46 U. S. App. 115, 33 L. R. A. 739, p. 849, 1499.
Standen v. Standen, 2 Ves. 589, p. 1548.
Standering v. Hall, L. R. 11 Ch. Div. 652, p. 2331.
Standish v. Dow, 21 Iowa, 363, p. 2758.
Stanford v. Hurlstone, L. R. 9 Ch. 116, 118, 119, p. 2684, 2695.
Stanger, In re, 35 Fed. 241, p. 1995, 2000.
Stanhilber v. Graves, 97 Wis. 515, 73 N. W. 48, p. 1271.
Stanhope v. Dodge, 52 Md. 483, p. 1860.
Stanhope v. Earl Verney, 2 Eden, 81, 85, p. 266, 1310.
Stanhope v. Manners, 2 Eden, 197, p. 724.
Staniland v. Staniland, 34 Beav. 536, p. 1921.
Staniland v. Willott, 3 Macn. & G. 664, 674–677, 680, p. 2232, 2244, 2246.
Stanley v. Beatty, 4 Ind. 134, p. 2392, 2396.
Stanley v. Colt, 5 Wall. 119, 168, p. 1829.
Stanley v. Earl of Shrewsbury, L. R. 19 Eq. 616, p. 2698.
Stanley v. Hamilton, (Tex. Civ. App.) 33 S. W. 601, p. 1342.
Stanley v. Leigh, 2 P. Wms. 686, 690, p. 1887.
Stanley v. Marshall, 206 Ill. 20, 69 N. E. 58, p. 1516, 1541.
Stanley v. Robinson, 1 Russ. & M. 527, p. 1731.
Stanley v. Schawalby, 162 U. S. 255, 16 Sup. Ct. 754, p. 1154.
Stanley v. Stanley, L. R. 7 Ch. Div. 589, p. 1609, 1613, 2159.
Stanley v. Stanley, 16 Ves. 491, p. 1885.
Stanley's Appeal, 8 Pa. St. 431, p. 1775.
Stanly v. Schwalby, 162 U. S. 255, 16 Sup. Ct. 754, p. 1343.
Stannard v. Vestry of St. Giles, L. R. 20 Ch. Div. 190, 196, p. 2695.
Stannard v. Whittlesey, 9 Conn. 559, p. 565.
Stanning v. Style, 3 P. Wms. 334, 336, p. 2205.
Stannis v. Nicholson, 2 Oreg. 332, p. 1148.
Stansbury v. Marks, 4 Dall. 130, p. 559.
Stansell v. Roberts, 13 Ohio, 148, 42 Am. Dec. 193, p. 1105, 1140, 1281, 1358.
Stansfield v. Habergham, 10 Ves. 273, 277, p. 1985, 2682.
Stanton v. Ala. etc. R. R., 2 Woods, 506, p. 2662.
Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282, p. 1688.
Stanton v. Embrey, 93 U. S. 548, p. 1700, 1702.
Stanton v. Embry, 46 Conn. 65, p. 2709.
Stanton v. Hall, 2 Russ. & M. 175, 180, 182, p. 646, 2143, 2171, 2172.
Stanton v. King, 8 Hun, 4, p. 2103, 2105.
Stanton v. Miller, 58 N. Y. 192, p. 2769.
Stanton v. Percival, 5 H. L. Cas. 257, 268, p. 2763.
Stanton v. Tattersall, 1 Smale & G. 529, p. 1508.
Stanton v. Wetherwax, 16 Barb. 259, p. 1727.
Stantons v. Thompson, 49 N. H. 272, p. 1400, 1402, 1403, 1406.

Stanwood v. Wishard, 128 Fed. 499, p. 1771.
Stapilton v. Stapilton, 1 Atk. 2, 2 Lead. Cas. Eq., and notes, 1675, 4th Am. ed., p. 1501.
Staples v. Fenton, 5 Hun, 172, p. 1028.
Staples v. Hawes, 39 App. Div. 548, 57 N. Y. Supp. 452, p. 1894.
Staples v. Parker, 41 Barb. 648, p. 748.
Staples v. Staples, 24 Gratt. (Va.) 225, p. 1755.
Staples v. White, 88 Tenn. (3 Pick.) 30, 12 S. W. 339, p. 1068.
Stapleton v. Stapleton, 14 Sim. 186, p. 1879.
Stapylton v. Neeley, (Fla.) 32 South. 868, p. 2054.
Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652, p. 2409, 2412.
Starbuck v. Farmers' Loan & Trust Co., 28 App. Div. 272, 51 N. Y. Supp. 58, p. 1910.
Star Fire Ins. Co. v. Palmer, 41 N. Y. Sup. Ct. 267, p. 1753, 2086.
Stark v. Hunton, 1 N. J. Eq. 216, 217, 224, 225, 227, p. 811, 820, 827, 830, 855.
Stark v. Olsen, 44 Nebr. 646, 63 N. W. 37, p. 1227, 1301.
Stark v. Starrs, 6 Wall. 402, 409, 410, p. 364, 2750, 2751.
Stark v. Wilder, 36 Vt. 752, p. 2764.
Stark's Ex'rs v. Littlepage, 4 Rand. 372, p. 664.
Starke v. Wilson, 65 Ala. 576, p. 2492, 2494.
Starkweather v. Am. Bible Soc., 72 Ill. 50, 22 Am. Rep. 133, p. 1940, 1965, 1966, 1973.
Starkweather v. Smith, 6 Mich. 377, p. 2194.
Starling v. Brown, 7 Bush, 164, p. 2648, 2649, 2651.
Starnes v. Newsom, 1 Tenn. Ch. 239, p. 2765, 2773.
Starr v. Ellis, 6 Johns. Ch. 393, p. 1400, 1402, 2729.
Starr v. Hamilton, 1 Deady, 268, Fed. Cas. No. 13,314, p. 2197.
Starr v. Moulton, 97 Ill. 525, p. 2050, 2051, 2103.
Starr v. Wright, 20 Ohio St. 97, p. 1833.
Stastny v. Pease, (Iowa) 100 N. W. 483, p. 2426.
State v. Adler, 1 Heisk. 543, 547, 548, p. 228, 460.
State v. Baird, 18 N. J. Eq. 194, 21 N. J. Eq. 384, 387, p. 2612, 2617.
State v. Bank of Commerce, 54 Nebr. 725, 75 N. W. 28, p. 2023.
State v. Benoist, 37 Mo. 500, p. 1858.
State v. Board of Com'rs of Wichita County, 59 Kan. 512, 53 Pac. 526, p. 1079.
State v. District Judge, 85 Minn. 215, 88 N. W. 742, p. 417.
State v. Donegan, 94 Mo. 66, 6 S. W. 693, p. 207, 209.
State v. Eau Claire, 40 Wis. 533, p. 2683.
State v. Foster, 5 Wyo. 199, 63 Am. St. Rep. 47, 38 Pac. 926, 29 L. R. A. 226, p. 2021, 2022.
State v. Frank's Adm'r, 51 Mo. 98, p. 1517, 2726.
State v. Fredlock, 52 W. Va. 232, 94 Am. St. Rep. 932, 43 S. E. 153, p. 353.
State v. Gambs, 68 Mo. 289, p. 2661.
State v. Gooch, 97 N. C. 186, 2 Am. St. Rep. 284, p. 2058.
State v. Gorman, 4 Houst. 624, p. 2190.
State v. Greensdale, 106 Ind. 364, 55 Am. Rep. 753, 6 N. E. 926, p. 2058.
State v. Gregory, 88 Ind. 110, p. 2057.
State v. Griffith, 2 Del. Ch. 392, p. 1967, 1973.
State v. Griffith, 63 Mo. 545, p. 1862.
State v. Guilford, 15 Ohio, 593, p. 2061, 2096.
State v. Hall, 70 Miss. 678, 13 South. 39, p. 764.
State v. Harney, 57 Miss. 863, p. 1735.
State v. Howarth, 48 Conn. 207, p. 2053.
State v. Hunter, 56 Ark. 159, 19 S. W. 496, p. 2104.
State v. Jones, 131 Mo. 194, 33 S. W. 23, p. 217.
State v. Kispert, 21 Wis. 387, p. 2719.
State v. Kittelle, 110 N. C. 560, 28 Am. St. Rep. 698, 15 L. R. A. 694, 15 S. E. 103, p. 1155.
State v. Laies, 52 Mo. 396, p. 1444.
State v. McBride, 76 Ala. 51, p. 764.

State v. Midland State Bank, 52 Nebr. 1, 66 Am. St. Rep. 484, 71 N. W. 1011, p. 2020, 2023.
State v. Neland, 30 Minn. 277, p. 847.
State v. North etc. R'y, 18 Md. 193, p. 2682.
State v. Paup, 13 Ark. 129, 56 Am. Dec. 303, p. 1483.
State v. Platt, 4 Harr. 154, p. 2099.
State v. Prewett, 20 Mo. 165, p. 1974.
State v. Purcell, 131 Mo. 312, 53 S. W. 13, p. 983.
State v. Quinn, 74 N. C. 359, p. 2799.
State v. Ragland, 75 N. C. 12, p. 2351.
State v. Reed, 4 Har. & McH. 6, p. 1698.
State v. Reigart, 1 Gill, 1, p. 1483.
State v. Roeper, 82 Mo. 57, p. 2080.
State v. Rottaken, 34 Ark. 144, p. 2259.
State v. Sioux City etc. R. R., 7 Nebr. 357, p. 2749.
State v. Snyder, 66 Tex. 687, 18 S. W. 106, 108, p. 117, 644.
State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145, p. 1689.
State v. Stigall, 22 N. J. L. 286, 289, p. 2612.
State v. Sunapee Dam Co., (N. H.) 55 Atl. 899, 912, p. 121, 343, 357, 374, 397.
State v. Superior Court of Kittitas County, 21 Wash. 564, 58 Pac. 1065, p. 2361.
State v. Titus, 17 Wis. 241, p. 2448.
State v. Tomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335, p. 2551.
State v. Warren, 28 Md. 338, p. 1961.
State v. Williamson, 118 Mo. 146, 23 S. W. 1054, 40 Am. St. Rep. 358, p. 2555.
State Bank v. Chapelle, 40 Mich. 447, p. 1859.
State Bank v. Cox, 11 Rich. Eq. 344, 78 Am. Dec. 458, p. 1244.
State Bank v. Frame, 112 Mo. 502, 20 S. W. 620, p. 1329.
State Bank v. Hutchinson, 62 Kan. 9, 61 Pac. 443, p. 1735.
State Bank v. Mathews, 45 Nebr. 659, 50 Am. St. Rep. 565, 63 N. W. 930, p. 1177, 2379, 2393, 2395.
State Bank v. Tweedy, 8 Blackf. 447, 46 Am. Dec. 486, p. 2392.
State Ins. Co. v. Gennett, 2 Tenn. Ch. 82, p. 2637, 2648.
State National Bank v. Fink, 86 Tex. 303, 24 S. W. 256, 40 Am. St. Rep. 833, p. 2555.
State National Bank v. Flathers, 45 La. Ann. 75, 40 Am. St. Rep. 216, 12 South. 243, p. 1228.
State of Mo. v. McKay, 43 Mo. 594, 598, 698, p. 222, 224, 331, 351.
State Sav. Bank v. Montgomery, 126 Mich. 327, 85 N. W. 879, p. 1177.
State Sav. Bank v. Scott, 10 Nebr. 83, p. 2195.
Staton v. Davenport, 95 N. C. 11, p. 1023.
Staub v. Williams, 5 Lea, 458, p. 1847.
Staus, Estate of, In re, Myrick's Prob. Rep. 5, p. 843.
Stead, In re, [1900] 1 Ch. 237, p. 2036.
Stead v. Clay, 1 Sim. 294, 4 Russ. 550, p. 2667, 2670.
Stead v. Mellor, L. R. 5 Ch. Div. 225, p. 1924, 1928.
Stead v. Nelson, 2 Beav. 245, p. 2149.
Stead v. Newdigate, 2 Mer. 521, p. 620, 1853, 2315.
Steadman v. Palling, 3 Atk. 423, p. 1785.
Steamboat Belfast v. Boon, 41 Ala. 50, 68, p. 1561.
Stearns v. Beckham, 31 Gratt. 379, p. 2729.
Stearns v. Gage, 79 N. Y. 102, 107, p. 1018.
Stearns v. Hubbard, 8 Me. 320, p. 550, 551.
Stearns v. Marsh, 4 Denio, 227, 47 Am. Dec. 248, p. 2463, 2464.
Stearns v. Perrin, 130 Mich. 456, 90 N. W. 297, p. 824.
Stearns v. Stearns, 16 Mass. 167, 171, p. 220, 2706.
Stebbins v. Eddy, 4 Mason, 414, p. 1560.
Stebbins v. Hall, 29 Barb. 524, p. 2404.
Stebbins v. Lardner, 2 S. Dak. 127, 48 N. W. 847, p. 1156.
Stebbins v. Petty, (Ill.) 70 N. E. 673, p. 1561, 1639.
Steckel v. Standley, 107 Iowa, 694, 77 N. W. 489, p. 2403.
Stedman v. Hart, Kay, 607, p. 1726.

Stedwell v. Anderson, 21 Conn. 139, p. 1489.
Steed v. Calley, 1 Keen, 620, p. 1727.
Steed v. Preece, L. R. 18 Eq. 192, p. 2320, 2326, 2619.
Steedman v. Poole, 6 Hare, 193, p. 1057, 2143, 2157.
Steedman v. Weeks, 2 Strob. Eq. 145, 49 Am. Dec. 660, p. 2743.
Steel v. Steel, 4 Allen, 417, p. 2349.
Steel v. Steel. 1 Ired. Eq. 452, p. 2139.
Steele v. Ashenfelter, 40 Nebr. 770, 59 N. W. 361, 42 Am. St. Rep. 694, p. 2583.
Steele v. Branch, 40 Cal. 3, p. 761, 762, 2778, 2779.
Steele v. Fish, 2 Minn. 153, p. 2749.
Steele v. Johnson, 96 Mo. App. 147, 69 S. W. 1065, p. 2409.
Steele v. Mansell, 6 Rich. 437, p. 1105.
Steele v. Sioux Valley Bank, 79 Iowa, 343, 44 N. W. 564, p. 1338.
Steele v. Steele's Adm'r, 64 Ala. 438, 38 Am. Rep. 15, p. 2103, 2487, 2494.
Steele v. Stewart, 1 Phill. Ch. 471, p. 278.
Steele v. Worthington, 2 Ohio, 182, p. 1665.
Steele's Appeal, 72 Pa. St. 101, p. 2796.
Steen v. Mark, 32 S. C. 286, 11 S. E. 93, p. 2428.
Steere v. Steere, 5 Johns. Ch. 1, 9 Am. Dec. 256, p. 1908.
Stees v. Kranz, 32 Minn. 313, 20 N. W. 241, p. 2596.
Steffen v. Smith, 159 Pa. St. 207, 28 Atl. 295, 33 Wkly. Notes Cas. 520, p. 2197.
Steffian v. Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823, p. 1328, 1330, 1372.
Steib v. Whitehead, 111 Ill. 247, p. 1843.
Stein v. McGrath, 128 Ala. 175, 30 South. 792, p. 1065.
Steinbach v. Brant, 79 Minn. 383, 82 N. W. 651, 79 Am. St. Rep. 494, p. 2584.
Steinbach v. Relief F. Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655, p. 2725.
Steiner v. Clisby, 95 Ala. 91, 10 South. 240, 11 South. 294, p. 1103.
Steinmeyer v. Steinmeyer, 55 S. C. 9, 33 S. E. 15, p. 1166, 2443, 2589.
Steinway's Estate, In re, 37 Misc. Rep. 705, 76 N. Y. Supp. 452, p. 2020.
Stenger Benev. Ass'n v. Stenger, 54 Nebr. 427, 74 N. W. 846, p. 2195.
Stent v. Bailis, 2 P. Wms. 220, p. 1634.
Stephen v. Beall, 22 Wall. 329, p. 1753.
Stephens v. Allen, 11 Oreg. 188, 3 Pac. 168, p. 2380.
Stephens v. Board of Education, 79 N. Y. 183, 35 Am. Rep. 511, p. 1643, 1649, 2016, 2019.
Stephens v. Bridges, 6 Madd. 66, p. 1395.
Stephens v. Casbacker, 8 Hun, 116, p. 2409.
Stephens v. Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328, p. 2049, 2446, 2449, 2453.
Stephens v. Green, [1895] 2 Ch. 148, p. 1210, 1214.
Stephens v. Hotham, 1 Kay & J. 571, p. 1666.
Stephens v. Howard, 32 N. J. Eq. 244, p. 2619.
Stephens v. James, 77 Ga. 139, 3 S. E. 160, p. 2265.
Stephens v. James, 1 Mylne & K. 627, p. 2614.
Stephens v. Keating, (Tex.) 17 S. W. 37, p. 1277.
Stephens v. Marshall, 23 Hun, 641, p. 2130.
Stephens v. Meek, 6 Lea, 226, p. 2794, 2795.
Stephens v. Olive, 2 Brown Ch. 90, p. 1680.
Stephens v. Ozbourne, 107 Tenn. 572, 64 S. W. 902, 89 Am. St. Rep. 957, p. 1667, 1671.
Stephens v. Powys, 1 De Gex & J. 24, p. 1547.
Stephens v. Shannon, 43 Ark. 464, p. 2498, 2516.
Stephens v. Stephens, 1 De Gex & J. 62, 3 Drew. 697, p. 785, 809, 811, 816.
Stephens v. Venables, 30 Beav. 625, p. 1229.
Stephens v. Venables, 31 Beav. 124, p. 1387.
Stephens v. Weldon, 151 Pa. St. 520, 25 Atl. 28, p. 1297.
Stephen's Ex'rs' Appeal, 38 Pa. St. 9, p. 2504.

Stephenson v. Davis, 56 Me. 73, p. 548.
Stephenson v. Dowson, 3 Beav. 342, 347, 349, p. 2206.
Stephenson v. Haines, 16 Ohio St. 478, p. 1281.
Stephenson v. Rice, 12 W. Va. 575, p. 2529.
Stephenson v. Short, 92 N. Y. 433, p. 1969.
Stephenson v. Taverners, 9 Gratt. 389, p. 2793.
Stephenson v. Wilson, 2 Vern. 325, p. 307, 1476, 1510.
Sterling v. Sterling, 77 Minn. 12, 79 N. W. 525, p. 1838.
Sternberger v. McGovern, 56 N. Y. 12, 20, 21, p. 94, 231, 343, 355, 2782.
Sternberger v. Ragland, 57 Ohio St. 148, 48 N. E. 811, p. 1105, 1133, 1277.
Sterne v. Beck, 1 De Gex, J. & S. 595, 600, 601, 11 Week. Rep. 791, p. 724, 726.
Stern, Jr., & Bros. Co., H. v. Wing, (Mich.) 97 N. W. 791, p. 2014.
Sterry v. Arden, 1 Johns. Ch. 261, 270, 12 Johns. 536, p. 1805, 1806.
Stetson v. Cook, 39 Mich. 750, p. 1146, 2749.
Stetson v. Gulliver, 2 Cush. 494, 497, p. 1101.
Stettheimer v. Killip, 75 N. Y. 282, p. 1509.
Steuart v. Meyer, 54 Md. 454, p. 652.
Stevens v. Bagwell, 15 Ves. 139, p. 1697, 1702.
Stevens v. Beekman, 1 Johns. Ch. 318, p. 2693.
Stevens v. Benning, 6 De Gex, M. & G. 223, p. 2554.
Stevens v. Brennan, 79 N. Y. 254, p. 1385.
Stevens v. Brown, 3 Vt. 420, 23 Am. Dec. 215, p. 1120.
Stevens v. Chadwick, 10 Kan. 406, 15 Am. Rep. 348, p. 2528.
Stevens v. Church, 41 Conn. 369, p. 2401, 2402, 2787.
Stevens v. Cooper, 1 Johns. Ch. 425, 7 Am. Dec. 499, p. 1507, 2440, 2454.
Stevens v. Dennett, 51 N. H. 324, 330, 333, p. 1418, 1429, 1435, 1436, 1438, 1441, 1444.
Stevens v. Ely, 1 Dev. Eq. 497, p. 1986.
Stevens v. Goodenough, 26 Vt. 676, p. 981, 998.
Stevens v. King, [1904] 2 Ch. 30, p. 2228.
Stevens v. Ludlum, 46 Minn. 160, 24 Am. St. Rep. 210, 48 N. W. 771, 13 L. R. A. 270, p. 1424, 1440.
Stevens v. Magee, 81 Miss. 644, 33 South. 73, p. 1034, 1049.
Stevens v. Morse, 47 N. H. 532, p. 1114.
Stevens v. Perrier, 12 Kan. 297, p. 1692.
Stevens v. Praed, 2 Ves. Jr. 519, p. 307, 1476.
Stevens v. Rainwater, 4 Mo. App. 292, p. 2501, 2514.
Stevens v. Reed, 112 Mass. 515, p. 2193.
Stevens v. Shannahan, 160 Ill. 330, 43 N. E. 350, p. 1099.
Stevens v. Shippen, 28 N. J. Eq. 487, p. 1933, 1945, 1954, 1961, 1975.
Stevens v. Stevens, 1 Ashm. 190, p. 1212, 1222.
Stevens v. Stevens, 70 Me. 92, p. 1997, 2001.
Stevens v. Stevens, 5 Thomp. & C. 87, p. 2233, 2236, 2240, 2241, 2247.
Stevens v. Vancleve, (Den ex dem.) 4 Wash. C. C. 262, 267, 268, p. 1727.
Stevens v. Warren, 101 Mass. 564, p. 2303.
Stevens v. Watson, 4 Abb. App. 302, p. 1261, 1264, 1266, 1270, 1271, 2470, 2471.
Stevens v. Williams, 12 N. H. 246, p. 320, 526, 527.
Stevenson, In re, 3 Paige, 420, p. 2045, 2108.
Stevenson v. Anderson, 2 Ves. & B. 407, p. 2649.
Stevenson v. Black, 1 N. J. Eq. 338, p. 2396, 2397, 2705.
Stevenson v. Buxton, 37 Barb. 13, p. 345.
Stevenson v. Campbell, 185 Ill. 527, 57 N. E. 414, p. 1032.
Stevenson v. Lesley, 70 N. Y. 512, p. 1896.
Stevenson v. Maxwell, 2 N. Y. 408, 415, p. 2777.
Stevenson v. Newnham, 13 Com. B. 285, p. 1385.
Stevenson v. Texas R'y Co., 105 U. S. 703, p. 1273, 1280.

Stevenson Brewing Co., David v. Iba, 155 N. Y. 224, 49 N. E. 677, p. 1255, 1304.
Steward v. Winters, 4 Sand. Ch. 587, p. 2673, 2765.
Steward, D. M., Mfg. Co. v. Steward, 109 Tenn. 288, 70 S. W. 809, p. 2085.
Stewart, Estate of, 74 Cal. 98, 15 Pac. 445, p. 841, 843, 855.
Stewart, In re, 1 Smale & G. 32, 39, p. 2319.
Stewart v. Alliston, 1 Mer. 26, 32, p. 1590, 2600, 2766.
Stewart v. Austin, L. R. 3 Eq. 299, 306, p. 1580.
Stewart v. Barrow, 7 Bush, 368, p. 2347.
Stewart v. Brown, 2 Serg. & R. 461, p. 1993.
Stewart v. Clark, 13 Met. 79, p. 1101.
Stewart v. Crosby, (Tex. Civ. App.) 26 S. W. 138, p. 1028, 1324, 1356.
Stewart v. Drasha, 4 McLean, 563, p. 257, 274.
Stewart v. Duffy, 116 Ill. 47, 6 N. E. 424, p. 1764.
Stewart v. East India Co., 2 Vern. 380, p. 264.
Stewart v. Fellows, 128 Ill. 480, 20 N. E. 657, p. 2101.
Stewart v. Freeman, 22 Pa. St. 120, 123, p. 1107, 1276, 1381.
Stewart v. Huff, 19 Iowa, 557, p. 1100.
Stewart v. Hutchins, 6 Hill, 143, p. 2474.
Stewart v. Inglehart, 7 Gill & J. 132, 28 Am. Dec. 202, p. 664.
Stewart v. Ives, 1 Smedes & M. 197, p. 2501.
Stewart v. Lay, 45 Iowa, 604, p. 2662.
Stewart v. Lehigh Val. R. R., 38 N. J. L. 505, p. 2085.
Stewart v. McLaughlin, 11 Colo. 458, 18 Pac. 619, p. 2478, 2542.
Stewart v. McMartin, 5 Barb. 438, p. 2736.
Stewart v. McSweeney, 14 Wis. 468, p. 1098, 1120.
Stewart v. Madden, 153 Pa. St. 445, 34 Am. St. Rep. 713, 25 Atl. 803, p. 2065.
Stewart v. Matheny, 66 Miss. 21, 5 South. 587, 14 Am. St. Rep. 538, p. 1051, 1439.
Stewart v. Mix, 30 La. Ann. pt. 2, 1036, p 1434.
Stewart v. Mumford, 80 Ill. 192, p. 215.
Stewart v. Parnell, 147 Pa. St. 523, 23 Atl. 838, 29 Wkly. Notes Cas. 537, p. 667, 1676, 1708.
Stewart v. Platt, 101 U. S. 731, p. 1331.
Stewart v. Robinson, 115 N. Y. 336, 22 N. E. 160, 163, 4 L. R. A. 410, p. 2104.
Stewart v. Rogers, 25 Iowa, 395, 95 Am. Dec. 794, p. 1801.
Stewart v. Sanderson, L. R. 10 Eq. 26, p. 2068, 2070.
Stewart v. Scott, 54 Ark. 187, 15 S. W. 463, p. 2345.
Stewart v. Smith, 36 Minn. 82, 30 N. W. 430, 1 Am. St. Rep. 651, p. 1281, 1282.
Stewart v. Stewart, 31 Ala. 207, p. 335, 580.
Stewart v. Stewart, 6 Clark & F. 911, 969, p. 1501, 1508.
Stewart v. Stewart, 7 Johns. Ch. 229, p. 2162.
Stewart v. Stewart, 31 N. J. Eq. 398, p. 827.
Stewart v. Stewart, 90 Wis. 516, 48 Am. St. Rep. 949, 63 N. W. 886, p. 2424.
Stewart v. Stokes, 33 Ala. 494, 73 Am. Dec. 429, p. 1469.
Stewart v. Wheeling & L. E. R. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438, p. 1089.
Stewart v. Wood, 63 Mo. 252, p. 192, 2536.
Stewart v. Wyoming C. R. Co., 128 U. S. 383, 9 Sup. Ct. 101, p. 1609.
Stewart's Adm'r v. Stewart's Heirs, 31 Ala. 207, p. 2255, 2258.
Stewart's Estate, In re, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723, p. 1931, 1937, 1947, 1957, 1978.
Stichter v. Cox, 52 Nebr. 532, 72 N. W. 848, p. 2408.
Stickney v. Crane, 35 Vt. 89, p. 1858.
Stickney v. Goudy, 132 Ill. 213, 23 N. E. 1034, p. 224.
Stidham v. Matthews, 29 Ark. 650, 659, 660, p. 1050, 1052, 1055, 1144.

Stiefel v. New York Novelty Co., 43 N. Y. Supp. 1012, 14 App. Div. 371, p. 343.
Stikeman v. Dawson, 1 De Gex & S. 90, p. 1448.
Stiles v. Cowper, 3 Atk. 692, p. 304, 1388.
Stiles v. Japhet, 84 Tex. 91, 19 S. W. 450, p. 1115, 2143.
Still v. Buzzell, 60 Vt. 478, 12 Atl. 209, p. 2428.
Still v. Mayor etc., 27 Ga. 502, 504, p. 2503.
Still v. Ruby, 35 Pa. St. 373, p. 1833.
Still v. Spear, 45 Pa. St. 168, p. 1846.
Stilley v. Folger, 14 Ohio, 610, 646, p. 825.
Stillings v. Stillings, (N. H.) 42 Atl. 271, p. 1020.
Stillman v. Stillman, 21 N. J. Eq. 126, p. 1409.
Stillson v. Stevens, (Tex. Civ. App.) 23 S. W. 322, p. 1215, 2563.
Stillwell v. Adams, 29 Ark. 346, p. 2190.
Stillwell v. McDonald, 39 Mo. 282, p. 1271, 1279.
Stilwell v. Carpenter, 2 Abb. N. C. 238, p. 1642.
Stilwell v. Wilkins, Jacob, 280, 282, p. 1666, 1667, 2657.
Stimson v. Fries, 2 Jones Eq. 156, p. 1856.
Stinchfield v. Milliken, 71 Me. 567, p. 2369, 2380.
Stinde v. Ridgway, 55 How. Pr. 301, p. 2300.
Stiner v. Stiner, 58 Barb. 643, p. 1728.
Stinson v. Connecticut M. L. Ins. Co., 174 Ill. 125, 51 N. E. 193, 66 Am. St. Rep. 262, p. 2400.
Stinson v. Dousman, 20 How. 461, 464, p. 494.
Stirling, In re, 11 Phila. 150, p. 2159.
Stirling v. Forrester, 3 Bligh, 575, p. 2794.
Stites v. Thompson, 98 Wis. 329, 73 N. W. 774, p. 2406, 2413.
Stites v. Wiedner, 35 Ohio St. 555, p. 1550.
Stitt v. Little, 63 N. Y. 427, p. 1577.
Stitzer v. Whittaker, (Nebr.) 91 N. W. 713, p. 2056.
Stivens v. Summers, 68 Ohio St. 421, 67 N. E. 884, p. 1105, 1129.
Stiver v. Heirs of Stiver, 8 Ohio, 217, p. 2285.
Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290, p. 1489, 2725.
Stockbridge Iron Co. v. Hudson R. Iron Co., 102 Mass. 45, p. 1516, 1517.
Stocken v. Stocken, 4 Mylne & C. 95, 98, p. 1679, 2618.
Stocken v. Stocken, 4 Sim. 152, p. 873, 879.
Stocker v. Brockelbank, 3 Macn. & G. 250, p. 2675.
Stockett v. Taylor, 3 Md. Ch. 537, p. 981.
Stockley v. Stockley, 1 Ves. & B. 23, 29, 30, 31, p. 1487, 1499, 1508, 2781.
Stocks v. Dobson, 4 De Gex, M. & G. 11, p. 1224, 1226.
Stocks v. Van Leonard, 8 Ga. 511, p. 1648.
Stockton v. Anderson, 40 N. J. Eq. 486, 488, 4 Atl. 642, p. 132, 163, 206, 235.
Stockton v. National Bank of Jacksonville, (Fla.) 34 South. 897, p. 1034, 1049, 1099, 1144.
Stockton v. Williams, 1 Doug. (Mich.) 546, p. 2749.
Stockton v. Wooley, 20 Ohio St. 184, p. 825.
Stockwell v. Fitzgerald, 70 Vt. 468, 41 Atl. 504, p. 419, 455.
Stockwell v. McHenry, 107 Pa. St. 237, 52 Am. Rep. 475, p. 1108, 1119.
Stockwell v. Mutual Life Ins. Co., 140 Cal. 198, 98 Am. St. Rep. 25, 73 Pac. 833, p. 2483.
Stoddard v. Cutcompt, 41 Iowa, 329, p. 852, 855.
Stoddard v. Denison, 7 Abb. Pr., N. S., 309, p. 188, 2462.
Stoddard v. Hart, 23 N. Y. 556, p. 1482.
Stoddard v. Johnson, 13 Hun, 606, p. 2492, 2493.
Stoddard v. Myers, 8 Ohio, 203, p. 1074.
Stoddard v. Rotton, 5 Bosw. 378, p. 1410.
Stoddart v. Burge, 53 Cal. 394, p. 2748, 2751.
Stoffel v. Schroeder, 62 Mo. 147, p. 1343.

Stokes, In re, [1892] 67 L. T. 223, p. 2222.
Stokes v. Hodges, 11 Rich. Eq. 135, p. 1105.
Stokes v. Holden, 1 Keen, 145, 152, 153, p. 193, 2547.
Stokes v. Knarr, 11 Wis. 389, p. 2710.
Stokes v. Pillow, 64 Ark. 1, 40 S. W. 580, p. 822.
Stokes v. Prance, [1898] 1 Ch. 212, p. 2066, 2087.
Stokes v. Riley, 121 Ill. 166, 11 N. E. 877, p. 982, 992, 1051, 1099, 1127.
Stokes v. Scott Co., 10 Iowa, 166, p. 406.
Stokes v. Sprague, 110 Iowa, 89, 81 N. W. 195, p. 1911.
Stokes's Appeal, 80 Pa. St. 337, p. 2054.
Stokes's Trusts, In re, L. R. 13 Eq. 333, p. 2106, 2109.
Stoll v. Wellborn, (N. J. Eq.) 56 Atl. 894, p. 1566.
Stone, In re, 138 Mass. 476, p. 1851.
Stone v. Anderson, 26 N. H. 506, 518, p. 320, 526, 527, 2791.
Stone v. Bartlett, 46 Me. 439, p. 550.
Stone v. Bevans, 88 Minn. 127, 97 Am. St. Rep. 506, 92 N. W. 520, p. 2129
Stone v. Bishop, 4 Cliff. 593, p. 1837, 1838, 1912.
Stone v. City & Co. Bank, L. R. 3 C. P. D. 282, p. 1574.
Stone v. Clay, 19 Ky. Law Rep. 2029. 45 S. W. 80, p. 2077.
Stone v. Compton, 5 Bing. N. C. 142, 6 Scott, 846, p. 1622.
Stone v. Connelly, 58 Ky. (1 Met.) 652, 71 Am. Dec. 499, p. 1074.
Stone v. Covell, 29 Mich. 359, p. 1583.
Stone v. Denny, 4 Met. 151, p. 1559, 1582, 1583.
Stone v. Elliott, 11 Ohio St. 252, 260, p. 1079.
Stone v. Ellis, 9 Cush. 55, p. 758.
Stone v. Godfrey, 5 De Gex, M. & G. 76, 90, p. 1478, 1488, 1491, 1509, 1788.
Stone v. Gr. West. Oil Co., 41 Ill. 85, p. 1438.
Stone v. Griffin, 34 Vt. 400, p. 1978.
Stone v. Hackett, 12 Gray, 227, p. 634, 1871, 1872, 2590.
Stone v. Hale, 17 Ala. 557, 52 Am. Dec. 185, p. 1489.
Stone v. Kahle, 22 Tex. Civ. App. 185, 54 S. W. 375, p. 1051.
Stone v. King, 7 R. I. 358, 84 Am. Dec. 557, p. 1872.
Stone v. Lickorish, [1891] 2 Ch. 363, p. 2098.
Stone v. Lidderdale, 2 Anstr. 533, p. 2554.
Stone v. Locke, 46 Me. 445, p. 550.
Stone v. Manning, 103 Tenn. 232, 52 S. W. 990, p. 1999.
Stone v. Marshall Oil Co., 188 Pa. St. 614, 41 Atl. 748, 1119, p. 271.
Stone v. Perkins, 85 Fed. 616, 620, p. 495.
Stone v. Pratt, 41 Conn. 285, p. 565.
Stone v. Pratt, 25 Ill. 25, 34, p. 662, 2767, 2771.
Stone v. Seymour, 15 Wend. 19, 24, p. 2432.
Stone v. Simmons, (W. Va.) 48 S. E. 841, p. 2293.
Stone v. Stone, 32 Conn. 142, p. 215, 218.
Stone v. Stone, L. R. 5 Ch. 74, p. 2068, 2089.
Stone v. Tyree, 30 W. Va. 687, 5 S. E. 878, p. 1066, 1068.
Stone v. Westcott, 18 R. I. 685, 29 Atl. 838, p. 1847.
Stone v. Wetmore, 42 Ga. 601, p. 2678.
Stone v. Wilbern, 83 Ill. 105, p. 1728, 2729.
Stonehewer v. Thompson, 2 Atk. 440, p. 2436.
Stone, Petitioner, 138 Mass. 476, p. 1851.
Stonesifer v. Kilbourn, 122 Cal. 659, 55 Pac. 587, p. 1019.
Stoney v. Shultz, 1 Hill Eq. 465, 27 Am. Dec. 429, p. 2447.
Stony Creek Lumber Co. v. Fields, (Va.) 45 S. E. 797, p. 736.
Stoppelkamp v. Mangeot, 42 Cal. 325, p. 2252.
Storer v. Great W. R'y, 2 Younge & C. Ch. 48, p. 2766.
Storey v. Lennox, 1 Mylne & C. 523, 525, p. 282, 284.
Storm v. McGrover, 70 App. Div. 33, 74 N. Y. Supp. 1032, p. 1996.
Storms v. Storms, 3 Bush, 77, p. 2796.
Storrs v. Barker, 6 Johns. Ch. 166, 168, 10 Am. Dec. 316, p. 1194, 1195, 1294, 1428, 1434, 1440, 1482, 1503.

Storrs v. Pensacola & A. R. R. Co., 29 Fla. 617, 634, 11 South. 226, 231, p. 366.
Storrs v. St. Luke's Hospital, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211, p. 2268.
Storrs v. Scougale, 48 Mich. 387, 400, 12 N. W. 502, p. 1782.
Stortlez v. Chapline, (Ark.) 70 S. W. 465, p. 1028.
Story v. Conger, 36 N. Y. 673, 93 Am. Dec. 546, p. 1487, 1541.
Story v. Gammell, (Iowa) 94 N. W. 982, p. 1542, 1570.
Story v. Johnson, 2 Younge & C. 586, p. 2741, 2742.
Story v. Lord Windsor, 2 Atk. 630, 631, p. 615, 1201, 1323, 1347, 1353, 1393.
Story v. Norwich etc. R. R., 24 Conn. 94, p. 2764.
Story v. Salomon, 71 N. Y. 420, p. 1676.
Stothoff v. Reed, 32 N. J. Eq. 213, p. 2089.
Stott v. Franey, 20 Oreg. 410, 26 Pac. 271, 23 Am. St. Rep. 132, p. 194, 2584.
Stott v. Milne, 25 Ch. Div. 710, p. 2101.
Stouffer v. Harlan, (Kan.) 74 Pac. 611, p. 2364.
Stourton v. Stourton, 8 De Gex, M. & G. 760, p. 2618.
Stout v. Cook, 37 Ill. 283, p. 2756.
Stout v. Hart, 6 N. J. Eq. 414, 418, p. 2207, 2209, 2214.
Stout v. Hyatt, 13 Kan. 232, p. 1341.
Stout v. Philippi Mfg. & Merc. Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843, 853-878, p. 1066, 1072, 1084.
Stout v. Phœnix Assur. Co., (N. J. Eq.) 56 Atl. 691, p. 346.
Stout v. Smith, 98 N. Y. 25, 50 Am. Rep. 632, p. 1773.
Stoutz v. Rouse, 84 Ala. 309, 4 South. 170, p. 2370, 2371.
Stovall v. Judal, 74 Miss. 747, 21 South. 614, p. 1020, 1024.
Stovall v. McCutcheon, 107 Ky. 577, 92 Am. St. Rep. 373, 54 S. W. 969, 47 L. R. A. 287, p. 384, 451.
Stovall v. Odell, 10 Tex. Civ. App. 169, 30 S. W. 66, p. 1273, 1280.
Stover v. Eycleshimer, 4 Abb. App. 309, 46 Barb. 84, p. 2574.
Stover v. Mitchell, 45 Ill. 213, p. 1508.
Stover v. Poole, 67 Me. 217, 218, p. 551, 553.
Stover, Heirs of, v. Bounds, Heirs of, 1 Ohio St. 107, p. 2370, 2478.
Stow v. Bozeman's Ex'rs, 29 Ala. 397, p. 350, 1563.
Stow v. Kimball, 28 Ill. 93, p. 701, 958, 2024.
Straat v. Uhrig, 53 Mo. 482, p. 1985.
Strachan, In re, [1895] 1 Ch. 441, p. 282.
Strachan v. Brander, 1 Eden, 303, 18 Ves. 127, 128, p. 1702.
Strahan v. Sutton, 3 Ves. 249, p. 827, 828.
Straight v. Harris, 14 Wis. 509, 513, p. 1130, 2453.
Stranahan v. Richardson, 75 Minn. 402, 78 N. W. 110, p. 1910.
Strang v. Allen, 44 Ill. 428, p. 2428, 2435.
Strang v. Messinger, 148 Ill. 431, 36 N. E. 617, p. 2000.
Strange v. Bell, 11 Ga. 103, p. 2635, 2637.
Strange v. Brennan, 15 Sim. 346, p. 1702, 2555.
Strange v. Fooks, 4 Giff. 408, p. 2096, 2796.
Strasburgh R. R. Co. v. Echternacht, 21 Pa. St. 220, 60 Am. Dec. 49, p. 560, 2764.
Stratford v. Powell, 1 Ball & B. 1, p. 854, 856.
Stratheden and Campbell, In re Lords, [1894] 3 Ch. 265, p. 1948.
Stratton v. Best, 1 Ves. 285, p. 789.
Stratton v. Edwards, 174 Mass. 374, 54 N. E. 886, p. 1901.
Stratton v. Gildersleeve, 41 Atl. 1117 (N. J.), p. 1881.
Stratton v. Gold, 40 Miss. 778, 781, p. 192, 2520, 2522, 2525.
Stratton v. Grymes, 2 Vern. 357, p. 1682.
Stratton v. Physio-Medical College, 149 Mass. 508, 14 Am. St. Rep. 442, 21 N. E. 874, 5 L. R. A. 33, p. 1947, 1963, 1965, 1979.
Strauch v. May, 80 Minn. 343, 83 N. W. 156, p. 1161.
Straus v. Bodeker's Ex'r, 86 Va. 543, 10 S. E. 570, p. 1281.

Straus v. Kerngood, 21 Gratt. 584, p. 1288.
Strause v. Josephthal, 77 N. Y. 622, p. 2418.
Strauss v. Phillips, 189 Ill. 9, 59 N. E. 560, affirming 91 Ill. App. 373, p. 2267.
Strauss's Appeal, 49 Pa. St. 353, p. 2504.
Streatfield v. Streatfield, Cas. t. Talb. 176, 1 Lead. Cas. Eq., 4th Am. ed., 503, 510, 541, p. 655, 775, 782, 793, 846, 857.
Streeper v. Williams, 48 Pa. St. 450, p. 727, 729, 732, 742.
Street v. Anderton, 4 Brown Ch. 414, p. 2657.
Street v. Lynch, 38 Ga. 631, p. 2005.
Street v. Rigby, 6 Ves. 815, 821, p. 256, 2772.
Streeter v. Rush, 25 Cal. 67, p. 737, 748.
Strelley v. Pearson, L. R. 15 Ch. Div. 113, 116, p. 2695.
Strelly v. Winson, 1 Vern. 297, p. 2800.
Strenna v. Montgomery, 86 Ala. 340, 5 So. 115, p. 433.
Stretch v. Gowdey, 3 Tenn. Ch. 565, p. 2663.
Strettel v. Ballou, 3 McCrary, 46, 9 Fed. 256, p. 500.
Stribblehill v. Brett, 2 Vern. 445, p. 1678.
Strickland v. Aldridge, 9 Ves. 516, 519, p. 1654, 2035.
Strickland v. Kirk, 51 Miss. 795, 797, p. 1019, 1023, 1024, 1045, 1147.
Strickland v. Strickland, 6 Beav. 77, p. 2734.
Strickland v. Summerville, 55 Mo. 164, p. 2526.
Strickland v. Symans, 26 Ch. Div. 245, Ames' Cas. on Trusts, 418, p. 2103.
Strickland v. Turner, 7 Ex. 208, p. 1477.
Strickland v. Vance, 99 Ga. 531, 27 S. E. 152, 59 Am. St. Rep. 241, p.
Striker v. Mott, 2 Paige, 387, 389, 22 Am. Dec. 646, p. 2740.
Stringer v. Gardiner, 4 De Gex & J. 468, p. 1548.
Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052, p. 1071, 1729, 1737, 1739, 1746, 1747.
Stringfellow v. Ivie, 73 Ala. 209, p. 2498, 2508.
Striplin v. Ware, 36 Ala. 87, p. 2612.
Strobel v. Kerr Salt Co., 164 N. Y. 303, 79 Am. St. Rep. 643, 51 L. R. A. 687, 58 N. E. 142, p. 397, 453.
Strobel's Estate, 11 Phila. 122, p. 2108.
Strobis v. Ferge, (Wis.) 78 N. W. 426, p. 1224.
Strode v. Blackburne, 3 Ves. 222, p. 1310, 1314.
Strohauer v. Voltz, 42 Mich. 444, p. 2404, 2406, 2412, 2415.
Strohm v. Good, 113 Ind. 93, 14 N. E. 901, p. 2499, 2516.
Strong v. Clem, 12 Ind. 37, 74 Am. Dec. 200, p. 2736.
Strong v. Converse, 8 Allen, 557, 85 Am. Dec. 732, p. 1409, 1410, 2404.
Strong v. Ellsworth, 26 Vt. 366, p. 1388, 1437.
Strong v. Grannis, 26 Barb. 122, p. 1736.
Strong v. Ingram, 6 Sim. 197, p. 886.
Strong v. Lynn, 38 Minn. 315, 37 N. W. 448, p. 1339.
Strong v. Mitchell, 19 Vt. 644, p. 2794.
Strong v. Nat. Mech. Bkg. Ass'n, 45 N. Y. 718, p. 2463.
Strong v. Smith, 3 McLean, 362, p. 1114.
Strong v. Strong, 126 Ill. 301, 18 N. E. 665, p. 2499.
Strong v. Strong, 102 N. Y. 73, 5 N. E. 799, p. 1647.
Strong v. Tompkins, 8 Johns. 98, p. 2460.
Strong v. Van Deursen, 23 N. J. Eq. 369, p. 1284.
Strong v. Williams, 12 Mass. 389, 7 Am. Dec. 81, p. 872, 873, 874, 876, 877.
Stronge v. Hankes, 4 De Gex, M. & G. 186, 4 De Gex & J. 632, p. 1294.
Strong's Appeal, In re, 68 Conn. 527, 27 Atl. 395, p. 1942, 1955, 1973.
Strother's Adm'r v. Mitchell's Ex'rs, 80 Va. 149, p. 894, 908.
Stroud v. Bailey, 3 Grant Cas. 310, p. 1683.
Stroud v. Casey, 27 Pa. St. 471, p. 2440.
Stroud v. Pace, 35 Ark. 100, p. 2498, 2512, 2514.

Stroud's Heirs v. Barnett, 3 Dana, 391, p. 2271.
Stroughill v. Anstey, 1 De Gex, M. & G. 635, p. 2048.
Stroup v. Raymond, 183 Pa. St. 279, 38 Atl. 626, 63 Am. St. Rep. 758, p. 1667, 1672.
Strubher v. Belsey, 79 Ill. 307, p. 212, 575, 580, 2299.
Struman v. Robb, 37 Iowa, 311, p. 2722.
Strusburgh v. Mayor etc., 87 N. Y. 452, p. 2728.
Strusburgh v. New York, 87 N. Y. 452, p. 2679.
Struthers v. Kendall, 41 Pa. St. 214, 218. 80 Am. Dec. 610, p. 1326, 1331.
Struthers v. Pearce, 51 N. Y. 357, p. 2028.
Strutt's Estate, In re, L. R. 16 Eq. 629, p. 2053.
Struve v. Childs, 63 Ala. 473, p. 1644.
Stuart v. Bair, 8 Baxt. 141, p. 2678.
Stuart v. Bute, 11 Sim. 442, p. 283.
Stuart v. City of Easton, 74 Fed. 854, 21 C. C. A. 146, 39 U. S. App. 238, p. 1948.
Stuart v. Harrison, 52 Iowa, 511, p. 2500, 2513.
Stuart v. Hauser, (Idaho) 72 Pac. 719, 727, p. 1748.
Stuart v. Kissam, 2 Barb. 493, p. 2144.
Stuart v. Lord Kirkwall, 3 Madd. 387, p. 2185.
Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289, p. 2755, 2757.
Stuart v. Sears, 119 Mass. 143, p. 1550.
Stub v. Leis, 7 Watts, 43, p. 1502.
Stubbin's Adm'r v. Briggs, 24 Ky. Law Rep. 230, 68 S. W. 392, p. 2007.
Stubbs v. Leavitt, 30 Ala. 352, p. 2709.
Stubbs v. Sargon, 2 Beav. 496, p. 2173.
Stubbs v. Sargon, 2 Keen, 255, 3 Mylne & C. 507, p. 1908, 1910, 1985, 1986.
Stubinger v. Frey, 116 Ga. 396, 42 S. E. 713, p. 1768, 1770.
Stucky v. Stucky, 30 N. J. Eq. 546, p. 1989.
Studabaker v. White, 31 Ind. 211, 99 Am. Dec. 628, p. 728, 737.
Studebaker Bros. Mfg. Co. v. Hunt, (Tex. Civ. App.) 38 S. W. 1134, p. 1864.
Stults v. Brown, 112 Ind. 370, 2 Am. St. Rep. 190, 14 N. E. 230, p. 192, 2536.
Stump v. Findlay, 2 Rawle, 168, 174, 19 Am. Dec. 632, p. 782, 787, 857.
Stump v. Gaby, 2 De Gex, M. & G. 623, 630, p. 624, 1627, 1784, 1808, 2006.
Stumph v. Guard of Pfeiffer, 58 Ind. 472, p. 2130.
Sturch v. Young, 5 Beav. 557, p. 2653.
Sturge v. Starr, 2 Mylne & K. 195, p. 1384.
Sturge v. Sturge, 12 Beav. 229, 244, p. 1494, 1499, 1502, 1671.
Sturges v. Bridgman, L. R. 11 Ch. Div. 852, p. 2687.
Sturgis, In re, 164 N. Y. 485, 58 N. E. 646, p. 1944, 1961, 1976.
Sturgis v. Champneys, 5 Mylne & C. 97, 101, 102, 105, p. 639, 645, 2166, 2167, 2170.
Sturgis v. Corp, 13 Ves. 190, p. 2148, 2158.
Sturgis v. Paine, 146 Mass. 354, 16 N. E. 21, p. 1929.
Sturgis v. Work, 122 Ind. 134, 22 N. E. 996, 17 Am. St. Rep. 349, p. 1549.
Sturtevant v. Ford, 4 Maule & G. 101, p. 1246.
Sturtevant v. Jaques, 14 Allen, 523, 526, p. 1986, 2771.
Sturtevant v. State, 15 Nebr. 459, 48 Am. Rep. 349, 19 N. W. 617, p. 2616.
Stuyvesant v. Hall, 2 Barb. Ch. 151, 158, p. 1080, 1081, 1088, 1129, 1132, 2447, 2454, 2455.
Stuyvesant v. Hone, 1 Sand. Ch. 419, p. 1080, 1081, 1088, 1129, 2455.
Stuyvesant v. Mayor etc., 11 Paige, 414, p. 2761, 2765, 2766.
Stuyvesant v. Peckham, 3 Edw. Ch. 579, p. 277.
Styers v. Robbins, 76 Ind. 547, p. 2726.
Styles v. Guy, 1 Macn. & G. 422, 430, p. 2061, 2071, 2095.
Suart v. Welch, 4 Mylne & C. 305, p. 2643, 2646.
Such v. Bank of State of New York, 127 Fed. 450, p. 1640.
Sudlow v. Dutch etc. R'y Co., 21 Beav. 43, p. 764.
Suessenguth v. Bingenheimer, 40 Wis. 370, p. 1560, 1563, 1566.
Suffern v. Butler, 19 N. J. Eq. (4 C. E. Green) 202, p. 1668.

Suffield v. Brown, 9 Jur., N. S., 999, 33 L. J. Ch. 249, 10 Jur., N. S., 111, 33 L. J. Ch. 256, p. 1014.
Suggitt's Trusts, In re, L. R. 3 Ch. 215, p. 2168, 2174.
Suisse v. Lowther, 2 Hare, 424, 429-438, p. 885, 888, 893, 894, 908.
Suit v. Woodhall, 113 Mass. 391, p. 1152, 1172.
Sullings v. Sullings, 9 Allen, 234, p. 2765, 2769, 2775.
Sullivan v. Andoe, 4 Hughes, 290, 299, 6 Fed. 641, 647, 650, p. 508, 511, 2294.
Sullivan v. Blackwell, 28 Miss. 737, p. 1773, 1775.
Sullivan v. Bruhling, 66 Wis. 472, 29 N. W. 211, p. 1894.
Sullivan v. Finnegan, 101 Mass. 447, p. 2753, 2754, 2756.
Sullivan v. Jones & Laughlin Steel Co., (Pa. St.) 57 Atl. 1065, p. 383.
Sullivan v. Lawler, 72 Ala. 74, p. 323.
Sullivan v. Phillips, 110 Ind. 320, 11 N. E. 300, p. 398.
Sullivan v. Portland R. R., 94 U. S. 806, 811, p. 1647, 1789.
Sullivan v. Sullivan, 39 App. Div. 99, 56 N. Y. Supp. 693, p. 1868.
Sullivan v. Sullivan, 4 Hun, 198, p. 2740.
Sullivan v. Sullivan, 161 N. Y. 554, 56 N. E. 116, p. 1868.
Sullivan v. Sweeney, 111 Mass. 366, p. 2584.
Sullivan v. Tuck, 1 Md. Ch. 59, p. 2764, 2765.
Sullivan v. Visconti, (N. J. Eq.) 53 Atl. 598, p. 2550.
Sullivan Timber Co. v. City of Mobile, 110 Fed. 186, p. 360, 376.
Sully v. Nebergall, 30 Iowa, 339, p. 852.
Sulphine v. Dunbar, 55 Miss. 255, p. 1434, 1454.
Summers v. Brice, 36 S. C. 204, 15 S. E. 374, p. 1328.
Summers v. Darne, 31 Gratt. 791, p. 1268.
Summers v. Griffiths, 35 Beav. 27, p. 1667, 1671.
Summers v. Higley, 191 Ill. 193, 60 N. E. 969, p. 1834.
Summers v. Kilgus, 14 Bush, 449, p. 2527.
Summers v. Reynolds, 95 N. C. 404, p. 2058.
Sumner v. Powell, 2 Mer. 30, affirmed on appeal, 1 Turn. & R. 423, p. 684, 2608.
Sumner v. Rhoda, 14 Conn. 135, p. 1098, 1114.
Sumner v. Sawtelle, 8 Minn. 309, p. 2004.
Sumner v. Seaton, 47 N. J. Eq. 103, 19 Atl. 884, p. 1439.
Sumner v. Waugh, 56 Ill. 531, 539. p. 1188, 1190, 1257, 1304, 1314, 1380, 2448.
Sumwalt v. Tucker, 34 Md. 89, p. 2348.
Sun Ins. Co. v. White, 123 Cal. 196, 55 Pac. 902, p. 1073, 1076.
Sun Printing and Pub. Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, p. 731.
Sunday Lake Min. Co. v. Wakefield, 72 Wis. 204, 39 N. W. 136, p. 752, 758.
Sunset Telephone & T. Co. v. City of Eureka, 122 Fed. 961, p. 271.
Superior Cons. Land Co. v. Nichols, 81 Wis. 656, 51 N. W. 878, p. 2534.
Superintendent etc. v. Heath, 15 N. J. Eq. 22, p. 2561, 2563.
Supervisors v. Decker, 30 Wis. 624, 626-630, p. 94, 231, 355, 588.
Supervisors v. Deyoe, 77 N. Y. 219. 225, p. 226, 419, 420.
Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586, p. 1244.
Supreme Tent Knights of Maccabees v. Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137, p. 1444.
Surcome v. Penniger, 3 De Gex, M. & G. 571, p. 2781.
Susquehanna Ins. Co. v. Perrine, 7 Watts & S. 348, p. 1523.
Suter v. Hilliard, 132 Mass. 412, 42 Am. Rep. 444, p. 1943, 1956, 1978.
Suter v. Matthews, 115 Mass. 253, p. 149, 217, 535. 540, 541, 1637, 1643.
Sutherland v. Brush, 7 Johns. Ch. 17, 22, 11 Am. Dec. 383, p. 2094.
Sutherland v. Cooke, 1 Coll. C. C. 498, p. 2322.
Sutherland v. Reeve, 151 Ill. 384, 38 N. E. 130, p. 1224, 1225, 1234, 1237, 1242, 1649.

Sutherland v. Sutherland, 69 Ill. 481, p. 823, 2725.
Sutherland v. Sutherland, 102 Iowa, 535, 63 Am. St. Rep. 477, 71 N. W. 424, p. 829.
Sutphen v. Cushman, 35 Ill. 186, 197, p. 2317.
Sutphen v. Fowler, 9 Paige, 280, p. 155, 1833, 2633, 2761.
Sutton v. Aiken, 62 Ga. 733, p. 1827, 1837, 1893.
Sutton v. Head, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410, p. 2596.
Sutton v. Howard, 33 Ga. 536, p. 735.
Sutton v. Mason, 38 Mo. 120, p. 2350.
Sutton v. Schonwald, 86 N. C. 198, 41 Am. Rep. 455, p. 2612, 2620.
Sutton v. Sutton, 26 S. C. 33, 1 S. E. 19, p. 2421, 2423, 2424.
Sutton v. Sutton, 39 Tex. 549, p. 1325.
Sutton v. Wilders, L. R. 12 Eq. 373, p. 1625, 2089.
Suydam v. North West Ins. Co., 51 Pa. St. 394, p. 2789.
Swabey v. Swabey, 15 Sim. 106, p. 1400, 1402.
Swaggerty v. Neilson, 8 Baxt. 32, p. 1550.
Swain v. Stockton S. & L. Soc., 78 Cal. 600, 21 Pac. 365, 12 Am. St. Rep. 118, p. 2424.
Swaine v. Perine, 5 Johns. Ch. 482, 490, 9 Am. Dec. 318, p. 820, 1412, 2442, 2443, 2734, 2735, 2736.
Swaisland v. Dearsley, 29 Beav. 430, p. 1518, 1519, 1539.
Swan v. Benson, 31 Ark. 728, p. 2498, 2516.
Swan v. British Austr. Co., 7 Com. B., N. S., 400, 448, 7 Hurl. & N. 603, 2 Hurl. & C. 175, p. 1422, 1442.
Swan v. Chorpenning, 20 Cal. 182, p. 1692, 1699.
Swan v. Ligan, 1 McCord Eq. 227, p. 1323.
Swan v. Moore, 14 La. Ann. 833, p. 1146.
Swan v. North Br. etc. Co., 2 Hurl. & C. 171, 181, 183, p. 1422, 1584.
Swan v. North British etc. Co., 7 Hurl & N. 603, p. 1650.
Swan v. Swan, 8 Price, 518, p. 2480, 2742.
Swan v. Yaple, 35 Iowa, 248, p. 2417, 2419.
Swann v. Fonnereau, 3 Ves. 41, p. 2309.
Swann v. Garrett, 71 Ga. 566, p. 2331.
Swannock v. Lyford, Amb. 6, p. 2436.
Swarey v. De Montigny, 37 N. Y. Supp. 503, p. 1058.
Swarthout v. Curtis, 5 N. Y. 301, 55 Am. Dec. 345, p. 981.
Swarts v. Narragansett Electric Lighting Co., (R. I.) 59 Atl. 111, p. 2552.
Swarts v. Stees, 2 Kan. 236, 85 Am. Dec. 588, p. 1271.
Swartwout v. Burr, 1 Barb. 495, p. 1834.
Swartzer v. Gillett, 1 Chand. 207, 209, 210, p. 667, 1703.
Swartz's Ex'rs v. Leist, 13 Ohio St. 419, p. 2391.
Swasey v. Am. Bible Soc., 57 Me. 523, p. 1961, 1974.
Swasey v. Antram, 24 Ohio St. 87, p. 2197.
Swasey v. Emerson, 168 Mass. 118, 46 N. E. 426, 60 Am. St. Rep. 368, p. 1299, 1300.
Swayze v. Schuyler, 50 N. J. Eq. 75, 45 Atl. 347, p. 2391.
Swearingen v. Reed, 2 Tex. Civ. App. 364, 21 S. W. 383, p. 1103, 1125.
Sweatman v. City of Deadwood, 9 S. Dak. 380, 69 N. W. 582, p. 1322.
Sweatman v. Edmunds, 28 S. C. 62, 5 S. E. 165, p. 1022, 1039.
Sweazy v. Kammer, 51 Iowa, 642, 2 N. W. 506, p. 2200.
Swedesboro L. & B. Ass'n v. Gaus, (N. J. Eq.) 55 Atl. 82, p. 1499.
Sweeney v. Bixler, 69 Ala. 539, p. 1330.
Sweeney v. Grape Sugar Co., 30 W. Va. 443, 40 S. E. 431, 8 Am. St. Rep. 88, p. 2013.
Sweeney v. Pratt, 70 Conn. 274, 39 Atl. 182, 66 Am. St. Rep. 101, p. 1154.
Sweeney v. Sampson, 5 Ind. 465, p. 1974.
Sweeney v. Warren, 127 N. Y. 426, 28 N. E. 413, 24 Am. St. Rep. 468, p. 2325.
Sweeney v. Williams, 36 N. J. Eq. 627, p. 220, 460, 462.
Sweet, In re, 20 R. I. 557, 40 Atl. 502, p. 1152.
Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574, p. 1051, 1053, 1056, 1398.

Sweet v. Jacocks, 6 Paige, 355, 31 Am. Dec. 252, p. 1659.
Sweet v. Jeffries, 67 Mo. 420, p. 2080, 2085.
Sweet v. Parker, 22 N. J. Eq. 453, p. 290, 2369, 2376, 2380.
Sweet v. Redhead, 76 Ill. 374, p. 2787.
Sweet v. Southcote, 2 Brown Ch. 66, p. 1346.
Sweet v. Stevens, 23 Ky. Law Rep. 407, 63 S. W. 41, p. 1995.
Sweet v. Tinslar, 52 Barb. 271, p. 1702, 1712.
Sweetapple v. Bindon, 2 Vern. 536, Ames' Cas. on Trusts, 379, p. 620, 1849, 1886, 2317.
Sweeting v. Sweeting, 33 L. J. Ch. 211, p. 1848.
Sweetman v. Edmunds, 28 S. C. 58, 5 S. E. 165, p. 1315.
Sweetman v. Sweetman, 2 I. R. Eq. 141, p. 853.
Sweetzer v. Atterbury, 100 Pa. St. 18, p. 1304, 1305, 1344, 1374.
Sweetzer v. Jones, 35 Vt. 317, 82 Am. Dec. 639, p. 2401.
Sweetzer's Appeal, 71 Pa. St. 264, p. 2369, 2373, 2376, 2380.
Sweezey v. Collins, 40 Iowa, 540, p. 1438.
Swenson v. Seale, (Tex. Civ. App.) 28 S. W. 143, p. 1325, 1329.
Swepson v. Johnston, 84 N. C. 449, p. 1286, 2771, 2775.
Swift v. Beneficial Soc., 73 Pa. St. 362, p. 1935, 1944.
Swift v. Castle, 23 Ill. 209, p. 2155.
Swift v. Dean, 6 Johns. 523, p. 290.
Swift v. Dederick, 106 Ga. 35, 31 S. E. 788, p. 1076.
Swift v. Dewey, 20 Nebr. 107, 29 N. W. 254, p. 353.
Swift v. Kraemer, 13 Cal. 526, 73 Am. Dec. 603, p. 1409.
Swift v. Larrabee, 31 Conn. 225, 237, 239, p. 426, 565.
Swift v. Nash, 2 Keen, 20, p. 2219.
Swift v. Railway etc. Ass'n, 96 Ill. 309, p. 2585.
Swift v. State Lumber Co., 71 Wis. 482, 37 N. W. 441, p. 2369, 2379.
Swift v. Swift, 4 De Gex, J. & S. 710, p. 2616.
Swift v. Wenman, L. R. 10 Eq. 15, p. 2162.
Swift v. Williams, 68 Md. 236, 11 Atl. 835, p. 2018.
Swift v. Winterbotham, L. R. 8 Q. B. 244, p. 1567, 1574.
Swift's Ex'rs v. Eaton Beneficial Soc., 73 Pa. St. 362, p. 1976.
Swigert v. Bank etc., 17 B. Mon. 268, 290, p. 1109.
Swimm v. Bush, 23 Mich. 99, p. 1585.
Swinburne v. Swinburne, 28 N. Y. 568, p. 2016, 2030, 2032.
Swinfen v. Swinfen, 29 Beav. 199, 204, 211, p. 1400, 1402, 1403, 1405, 2057, 2058.
Swingle v. Brown, (Tenn. Ch. App.) 48 S. W. 347, p. 352.
Swint v. Carr, 76 Ga. 322, 2 Am. St. Rep. 44, p. 1735.
Switzer v. Gardner, 41 Mich. 164, p. 2761.
Swoope's Appeal, 27 Pa. St. 58, p. 896, 909.
Swope v. Jordan, 107 Tenn. 166, 64 S. W. 52, p. 1706, 2401.
Swope v. Missouri Trust Co., 26 Tex. Civ. App. 133, 62 S. W. 947, p. 354, 644.
Swoyer's Appeal, 5 Pa. St. 377, p. 2077.
Sydney & S. M. B. & L. I. Ass'n, Lim. v. Lyons, [1894] App. Cas. 260, (Privy Council) p. 1141.
Sydnor v. Roberts, 13 Tex. 598, 65 Am. Dec. 84, p. 1384.
Sykes v. Beadon, L. R. 11 Ch. Div. 170, 183, 193, 196, 197, p. 668, 673, 674, 1696, 1712, 1713.
Sykes v. Betts, 87 Ala. 537, 6 South. 428, p. 2529, 2534.
Sykes v. Boone, 132 N. C. 199, 95 Am. St. Rep. 619, 43 S. E. 645, p 1899.
Sykes v. Meacham, 103 Mass. 285, p. 545, 2273.
Sykes v. Sheard, 33 Beav. 114, p. 2310.
Sykes's Trusts, In re, 2 Johns. & H. 415, p. 2158, 2183.
Sylvester Co. v. St. Louis, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649, p. 390, 452.
Symes v. Hughes, L. R. 9 Eq. 475, 479, p. 1659, 1715, 1835, 1985, 1986.
Symonds v. Wilkes, 11 Jur., N. S., 659, p. 2158.
Symons v. Rutter, 2 Vern. 227, p. 2305.

Synnot v. Simpson, 5 H. L. Cas. 121, 133, p. 1855.
Sypher v. McHenry, 18 Iowa, 232, p. 1772.
Syracuse Chilled Plow Co. v. Wing, 85 N. Y. 421, p. 2143.
Syracuse Savings Bank v. Holden, 105 N. Y. 415, 11 N. E. 950, p. 1890, 1894.

T.

T———, In re, L. R. 15 Ch. Div. 78, p. 2053, 2056, 2068.
Tabb v. Williams, 4 Jones Eq. 352, p. 2790.
Tabler v. Wiseman, 2 Ohio St. 207, p. 2740.
Tabor v. Brooks, L. R. 10 Ch. Div. 273, p. 2050.
Tabor v. Foy, 56 Iowa, 539, 9 N. W. 897, p. 1226, 1227, 1297.
Tabor v. Michigan etc. Ins. Co., 44 Mich. 324, p. 2730.
Tabor v. Tabor, 98 Ky. 173, 32 S. W. 414, p. 2167.
Tact v. Crawford, 1 McCord, 265, p. 1105.
Taff Val. R'y v. Nixon, 1 H. L. Cas. 109, 110, 221, p. 1634, 2799.
Taft v. Marsily, 120 N. Y. 474, 24 N. E. 926, p. 2585.
Taft v. Smith, (Mass.) 70 N. E. 1031, p. 2066.
Taft v. Stow, 167 Mass. 363, 45 N. E. 752, p. 1905.
Taft v. Taft, 130 Mass. 461, p. 1911, 1920.
Tagg v. Tenn. Nat. Bank, 9 Heisk. 479, p. 1153, 1156, 1168, 1170, 1177.
Taggart v. Taggart, 1 Schoales & L. 84, p. 1887.
Tailby v. Official Receiver, 13 App. Cas. (H. L.) 523, reversing 18 Q. B. Div. 25, and restoring 17 Q. B. Div. 88, p. 2580, 2584.
Tainter v. Clark, 5 Allen, 66, p. 1978.
Tainter v. Cole, 102 Mass. 162, p. 543.
Tait v. Lathbury, L. R. 1 Eq. 174, p. 2049.
Taite's Case, L. R. 3 Eq. 795, p. 1780.
Talbert v. Singleton, 42 Cal. 390, 395, 396, p. 93, 1524, 2722.
Talbot v. Earl of Shrewsbury, 4 Mylne & C. 672, p. 2617.
Talbot v. Marshfield, L. R. 3 Ch. 622, p. 2048, 2052, 2056, 2059.
Talbot v. Rountree, 3 Ill. App. 275, p. 2486, 2489.
Talbot v. Shrewsbury, Prec. Ch. 394, p. 873.
Talbot v. Stainforth, 1 Johns. & H. 484, p. 1743.
Talbot v. Wilkins, 31 Ark. 411, 422, p. 585, 2796.
Talbot J. Taylor & Co. v. Southern Pac. Co., 122 Fed. 147, p. 2128.
Talcott v. Brackett, 5 Ill. App. 60, p. 1429, 1435.
Taliaferro v. Baltimore First Nat. Bank, 71 Md. 209, 17 Atl. 1036, 72 Md. 169, 19 Atl. 364, p. 1244.
Taliaferro v. Brown, 11 Ala. 702, p. 335, 580, 2258.
Talieferro v. Barnett, 37 Ark. 511, p. 2522, 2523, 2525, 2527.
Talkin v. Anderson, (Tex.) 19 S. W. 852, p. 760.
Talley v. Courtney, 1 Heisk. 715, p. 2726.
Talley v. Curtain, 54 Fed. 43, 8 U. S. App. 347, p. 507.
Talleyrand v. Boulanger, 3 Ves. 447, p. 1734.
Tallmadge v. East River Bank, 26 N. Y. 105, p. 1200.
Tallman v. Ely, 6 Wis. 244, p. 2362.
Tallman v. Franklin, 14 N. Y. 584, p. 2769.
Tallman v. Hoey, 89 N. Y. 537, p. 2561.
Tallman v. Jones, 13 Kan. 438, p. 2192.
Tallman v. Wood, 26 Wend. 9, 19, p. 1886.
Tally v. Smith, 1 Cold. 290, p. 1668.
Talmadge v. Interstate B. & L. Assn., 105 Ga. 550, 31 S. E. 618, p. 1055.
Talmadge v. Pell, 7 N. Y. 328, p. 1721.
Talmage v. Pell, 9 Paige, 410, p. 261.
Tamm v. Lavalle, 92 Ill. 263, p. 2770.
Tancre v. Reynolds, 35 Minn. 476, 29 N. W. 171, p. 1770.
Tancred's Settlement, In re, [1903] 1 Ch. 715, p. 794.
Tankard v. Tankard, 79 N. C. 54, 56, p. 1019, 1021, 1036, 1045.
Tankard v. Tankard, 84 N. C. 286, p. 1022, 1045, 1198, 2039.
Tanner v. Elworthy, 4 Beav. 487, p. 1182.
Tanner v. European Bank, L. R. 1 Ex. 261, p. 2646, 2651.

Tanner v. Florence, 1 Ch. Cas. 259, p. 1053.
Tanner v. Hicks, 4 Smedes & M. 294, p. 2477, 2501.
Tanner v. Niles, 1 Barb. 560, p. 2740.
Tanner v. Skinner, 11 Bush, 120, p. 1901, 1903, 2130.
Tanner v. Smith, 10 Sim. 410, p. 1788.
Tanner v. Wise, 3 P. Wms. 294, 296, p. 2763.
Tanqueray-Willaume, In re, L. R. 20 Ch. Div. 465, p. 2490.
Tantum v. Arnold, 42 N. J. Eq. 63, 6 Atl. 316, p. 1709.
Tantum v. Coleman, 26 N. J. Eq. 128, p. 1448.
Tantum v. Green, 21 N. J. Eq. 364, p. 983, 2788.
Tanyhill v. Pepperl, (Nebr.) 96 N. W. 1005, p. 2380.
Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288, p. 81, 1905, 2339, 2354, 2382, 2385, 2386, 2387.
Tapley v. Tapley, 115 Ga. 109, 41 S. E. 235, p. 2018.
Tapling v. Jones, 11 H. L. Cas. 290, p. 2685.
Tappan v. Aylesworth, 13 R. I. 582, p. 1782.
Tappan v. Deblois, 45 Me. 122, 131, p. 552, 553, 1961, 1974.
Tappan v. Evans, 11 N. H. 311, 325, p. 320, 526, 527, 2791.
Tappan's Appeal, 52 Conn. 412, p. 1972.
Tarbell v. Durant, 61 Vt. 516, 17 Atl. 44, p. 2451.
Tarbell v. Tarbell, 10 Allen, 278, p. 2765.
Tarbell v. Vermont Mut. Fire. Ins. Co., 63 Vt. 53, 22 Atl. 533, p. 1159.
Tarbell v. West, 86 N. Y. 280, p. 1095, 1133.
Tarbors v. Micks, 118 N. C. 162, 24 S. E. 729, p. 1273.
Tarbox v. Grant, 56 N. J. Eq. 199, 39 Atl. 378, p. 1864, 1910.
Tardereau v. Smith, 3 Ky. (Hardin) 175, 3 Am. Dec. 727, p. 742.
Tardiffe v. Schrughan, cited 1 Brown Ch. 422, p. 2510.
Tardy v. Creasy, 81 Va. 553, 59 Am. Rep. 676, p. 1689.
Tardy v. Morgan, 3 McLean, 358, p. 519, 520, 2632, 2633.
Tarr v. Williams, 4 Md. Ch. 68, p. 2154.
Tarrant v. Backus, 63 Conn. 277, 28 Atl. 46, p. 1843.
Tarsey's Trust, In re, L. R. 1 Eq. 561, p. 2145.
Tarver v. Tarver, 9 Pet. 174, p. 1635.
Tarver v. Torrance, 81 Ga. 261, 12 Am. St. Rep. 311, 6 S. E. 177, p. 2056.
Tash v. Adams, 10 Cush. 252, p. 696, 1450, 1788.
Tasker v. Ford, 64 N. H. 279, 8 Atl. 823, p. 237.
Tasker v. Small, 3 Mylne & C. 63, p. 2434.
Tate v. Bush, 62 Miss. 145, p. 2501.
Tate v. Clement, 176 Pa. St. 550, 35. Atl. 214, p. 1051, 1056.
Tate v. Hilbert, 2 Ves. 111, 120, 4 Brown Ch. 286, p. 2232, 2242, 2244.
Tate v. Kramer, 1 Tex. Civ. App. 427, 23 S. W. 255, p. 1338, 1342, 1344.
Tate v. Leithead, Kay, 658, p. 2234, 2235.
Tate v. Liggatt, 2 Leigh, 84, p. 1806.
Tate v. Pensacola, Gulf L. & D. Co., 37 Fla. 439, 20 South. 542, 53 Am. St. Rep. 251, p. 1021, 1039, 1197.
Tate v. Security Trust Co., 63 N. J. Eq. 559, 52 Atl. 313, p. 695, 1165, 1305.
Tate v. Stooltzfoos, 16 Serg. & R. 35, 16 Am. Dec. 546, p. 1115.
Tate v. Tate, 1 Dev. & B. Eq. 22, p. 2736.
Tate v. Williamson, L. R. 2 Ch. 55, 60, 61, 1 Eq. 528, 536, p. 1613, 1616, 1671, 1748, 1752, 1773, 1782.
Tatum v. Holliday, 59 Mo. 422, p. 1861.
Tatum v. McLellan, 50 Miss. 1, p. 1757, 2086.
Taunton v. Morris, L. R. 8 Ch. Div. 453, 11 Ch. Div. 779, p. 2168, 2171, 2173.
Taussig v. Hart, 49 N. Y. 301, p. 1761, 1764.
Tauton v. Groh, 4 Abb. App. 358, p. 2651.
Tayler v. Great Indian etc. R'y, 4 De Gex & J. 559, 573, 574, p. 1253, 1645, 1650.
Tayleur, In re, L. R. 6 Ch. 416, p. 295, 2303.

Tayloe v. Bond, Busb. Eq. 5, p. 2300, 2302.
Tayloe v. Callaway, 7 Tex. Civ. App. 461, 27 S. W. 934, p. 1164, 1372.
Tayloe v. Johnson, 63 N. C. 381, p. 2306, 2316.
Tayloe v. Merchants' etc. Ins. Co., 9 How. 390, p. 2764.
Taylor, Ex parte, 8 De Gex, M. & G. 254, p. 1725.
Taylor v. Adams, 115 Ill. 570, 4 N. E. 837, p. 2346.
Taylor v. Ashton, 11 Mees. & W. 401, p. 1575, 1577.
Taylor v. Baker, 5 Price, 306, p. 1001.
Taylor v. Baldwin, 10 Barb. 626, p. 2518.
Taylor v. Barker, 30 S. C. 238, 9 S. E. 115, p. 1771.
Taylor v. Bassett, 3 N. H. 294, p. 2440.
Taylor v. Bates, 5 Cow. 376, p. 1254, 1256.
Taylor v. Benham, 5 How. 234, 269, p. 604, 615, 621, 1835, 2094.
Taylor v. Blanchard, 13 Allen, 370, 90 Am. Dec. 203, p. 1688, 1690.
Taylor v. Boardman, 24 Mich. 287, p. 1772.
Taylor v. Boyd, 3 Ohio, 337, 352, 17 Am. Dec. 603, p. 1071, 2631.
Taylor v. Brown, 112 Ga. 758, 38 S. E. 66, p. 1881.
Taylor v. Brown, 31 N. J. Eq. 163, p. 1435.
Taylor v. Buttrick, 165 Mass. 547, 52 Am. St. Rep. 530, 43 N. E. 507, p. 1864.
Taylor v. Calloway, 7 Tex. Civ. App. 461, 27 S. W. 934, p. 2517.
Taylor v. Carroll, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 479, p. 1069.
Taylor v. Carpenter, 2 Sand. Ch. 603, 11 Paige, 292, 42 Am. Dec. 114, p. 2691.
Taylor v. Carpenter, 3 Story, 458, 2 Wood. & M. 1, p. 2691.
Taylor v. Cartwright, L. R. 14 Eq. 167, 176, p. 907, 2056, 2058, 2088.
Taylor v. Clark, 56 Ga. 309, p. 2103.
Taylor v. Clark, 1 Hare, 161, p. 2321.
Taylor v. Coenen, L. R. 1 Ch. Div. 636, p. 1801.
Taylor v. Collins, 51 Wis. 123, p. 2677.
Taylor v. Cornelius, 60 Pa. St. 187, p. 2383.
Taylor v. Corporation of St. Helens, L. R. 6 Ch. Div. 264, p. 2686.
Taylor v. Crompton, Bunb. 95, p. 257.
Taylor v. Crook, 136 Ala. 354, 34 South. 905, p. 2318.
Taylor v. Davis, 3 Beav. 388, p. 2684.
Taylor v. Deverell, 43 Kan. 469, 23 Pac. 628, p. 1529.
Taylor v. Dickinson, 15 Iowa, 483, p. 2060.
Taylor v. Dodd, 58 N. Y. 335, p. 2487, 2493.
Taylor v. Dwyer, 131 Ala. 91, 32 South. 509, p. 652.
Taylor v. Eckersley, L. R. 2 Ch. Div. 302, p. 2659.
Taylor v. Eckersley, L. R. 5 Ch. Div. 740, p. 2660.
Taylor v. Eckford, 11 Smedes & M. 21, p. 2534.
Taylor v. Ely, 25 Conn. 250, p. 1436.
Taylor v. Embry, 16 B. Mon. 340, p. 2749.
Taylor v. Evans, 16 Tex. Civ. App. 409, 41 S. W. 877, p. 1163.
Taylor v. Evans, (Tex. Civ. App.) 29 S. W. 172, p. 1170.
Taylor v. Fleet, 1 Barb. 471, 475, p. 1560, 1570, 1588.
Taylor v. Fleming, cited in Freem. 23, p. 680.
Taylor v. Foster's Adm'r, 22 Ohio St. 255, p. 2483.
Taylor v. George, 2 Ves. & B. 378, p. 1925.
Taylor v. Gillies, 59 N. Y. 331, 17 Am. Rep. 333, p. 2691.
Taylor v. Gilman, 25 Vt. 411, p. 1507.
Taylor v. Gitt, 10 Pa. St. 428, p. 1257.
Taylor v. Glens Falls Ins. Co., (Fla.) 32 South. 887, p. 1510, 1541.
Taylor v. Guest, 58 N. Y. 262, p. 1588, 1603.
Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304, p. 1102, 1122, 1342.
Taylor v. Harwell, 65 Ala. 1, p. 2487, 2494.
Taylor v. Haygarth, 14 Sim. 8, p. 1848, 1986.
Taylor v. Heming, 4 Beav. 235, p. 261.
Taylor v. Henry, 48 Md. 550, 30 Am. Rep. 486, p. 1872, 1877.
Taylor v. Holmes, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. ed. 179, p. 2128.

Taylor v. Huber's Ex'r, 13 Ohio St. 288, p. 2285.
Taylor v. Huck, 65 Tex. 238, p. 2473.
Taylor v. Hunter, 5 Humph. 569, p. 2502.
Taylor v. Jones, 2 Atk. 600, p. 1793.
Taylor v. Kelly, 3 Jones Eq. 240, p. 1021, 1036.
Taylor v. Lanier, 3 Murph. 98, 9 Am. Dec. 599, p. 918.
Taylor v. Lindsay, 14 R. I. 518, p. 1848.
Taylor v. London and County Banking Co., [1901] 2 Ch. 231, 254, 259, 260ff, p. 1167, 1196, 1254, 1290, 1296, 1297, 1372, 1377.
Taylor v. Louisville & N. R. Co., 88 Fed. 350, 359, 60 U. S. App. 185, 31 C. C. A. 537, p. 418, 456, 497.
Taylor v. Luther, 2 Sum. 228, Fed. Cas. No. 13,796, p. 1535, 1659, 1660
Taylor v. Lynch, 5 Gray, 49, p. 2553, 2561, 2567.
Taylor v. McKinney, 20 Cal. 618, p. 2499.
Taylor v. Manners, L. R. 1 Ch. 48, p. 634.
Taylor v. Marcella, 1 Woods, 302, p. 742, 746.
Taylor v. Maris's Ex'rs, 5 Rawle, 51, p. 1129, 1130.
Taylor v. Meads, 4 De Gex, J. & S. 597, 604–607, p. 2133, 2134, 2149.
Taylor v. Midland R'y Co., 28 Beav. 287, 8 H. L. Cas. 751, p. 543, 2784.
Taylor v. Mississippi Mills, 47 Ark. 247, 1 S. W. 283, p. 1271, 1621.
Taylor v. Mitchell, 58 Kan. 194, 48 Pac. 859, p. 1051, 1055.
Taylor v. Mosely, 57 Miss. 544, p. 1020, 2030.
Taylor v. Neville, 3 Atk. 384, p. 2764.
Taylor v. Obee, 3 Price, 83, p. 1782.
Taylor v. Page, 6 Allen, 86, p. 1227, 2419.
Taylor v. Pearce, 71 Ill. App. 525, p. 383.
Taylor v. Pine Bluff, 34 Ark. 603, p. 407.
Taylor v. Plumer, 3 Maule & S. 562, 574, 576, p. 2029.
Taylor v. Porter, 7 Mass. 355, p. 2440.
Taylor v. Portington, 7 De Gex, M. & G. 328, p. 2769.
Taylor v. Pugh, 1 Hare, 608, 614, p. 2165.
Taylor v. Reese, 44 Miss. 89, p. 461.
Taylor v. Reynolds, 53 Cal. 686, p. 2794.
Taylor v. Richardson, 2 Drew. 16, p. 1544.
Taylor v. Roberts, 3 Ala. 83, 86, p. 2096.
Taylor v. Robinson, 7 Allen, 253, p. 540.
Taylor v. Rundell, Craig & P. 104, 1 Phill. Ch. 222, p. 283, 287.
Taylor v. Russell, [1891] 1 Ch. 9, p. 1291.
Taylor v. Russell, [1892] App. Cas. 244, 259, p. 1290, 1377.
Taylor v. Salmon, 4 Mylne & C. 134, p. 1760, 2129.
Taylor v. Sayles, 57 N. H. 465, p. 1901.
Taylor v. Short's Adm'r, 27 Iowa, 361, 1 Am. Rep. 280, p. 2454.
Taylor v. Smith, 24 App. Div. 519, 49 N. Y. Supp. 41, p. 721.
Taylor v. Staples, 8 R. I. 170, 176, 5 Am. Rep. 558, p. 1872.
Taylor v. Stearns, 18 Gratt. 244, 278, p. 1859.
Taylor v. Stibbert, 2 Ves. 437, 440, p. 1001, 1018, 1019, 1025, 1053, 1293.
Taylor v. Taylor, 1 Atk. 386, p. 2001.
Taylor v. Taylor, 136 Cal. 92, 68 Pac. 482, p. 1997.
Taylor v. Taylor, 3 De Gex, M. & G. 190, p. 2305, 2326.
Taylor v. Taylor, 10 Hare, 475, p. 2213.
Taylor v. Taylor, 8 How. 183, 201, p. 1739, 1751, 1777, 1778.
Taylor v. Taylor, L. R. 17 Eq. 324, p. 2488.
Taylor v. Taylor, L. R. 20 Eq. 155, p. 908.
Taylor v. Taylor, 74 Me. 582, p. 552, 1637.
Taylor v. Taylor, 6 Sim. 246, p. 2489.
Taylor v. Taylor, 88 Tex. 47, 29 S. W. 1057, p. 1167.
Taylor v. Taylor, 1 Younge & C. 727, p. 819, 837.
Taylor v. The Marcella, 1 Woods, 302, p. 742, 746.
Taylor v. Thomas, 5 N. J. Eq. 331, p. 1111.
Taylor v. Thompson, 42 Ill. 9, p. 409.
Taylor v. Times Newspaper Co., 82 Minn. 523, 85 Am. St. Rep. 473, 86 N. W. 760, p. 728, 732.

Taylor v. Tompkins, 2 Heisk. 89, p. 2800.
Taylor v. Trustees, 34 N. J. Eq. 101, p. 1946, 1975.
Taylor v. U. S. B. & L. Ass'n's Assignee, 22 Ky. L. Rep. 560, 60 S. W. 927, p. 1062.
Taylor v. Weston, 77 Cal. 534, 20 Pac. 62, p. 1190.
Taylor v. Wheeler, 2 Vern. 564, p. 1468.
Taylor v. Williams, 45 Mo. 80, p. 2768.
Taylor v. Young, 56 Mich. 285, 22 N. W. 799, p. 1155, 1772.
Taylor & Co. v. Southern Pac. Co., 122 Fed. 147, p. 2128.
Taylor Orphan Asylum, In re, 36 Wis. 534, p. 1771.
Taylour v. Rochfort, 2 Ves. Sr. 281, p. 1740.
Taymon v. Mitchell, 1 Md. Ch. 496, p. 1567, 1583.
Tazewell v. Smith's Adm'rs, 1 Rand. 313, 320, 10 Am. Dec. 533, p. 621, 2310.
Teal v. Woodworth, 3 Paige, 470, p. 2739.
Team v. Baum, 47 S. C. 410, 25 S. E. 275, 58 Am. St. Rep. 893, p. 2361.
Tear v. Mathews, Wright, 371, p. 2758.
Teasdale v. Braithwaite, L. R. 5 Ch. Div. 630, p. 1925.
Teasdale v. Teasdale, Sel. Cas. Ch. 59, p. 1388.
Tebbs v. Carpenter, 1 Madd. 290, p. 2072.
Tecumseh Nat. Bank v. Russell, 50 Nebr. 277, 69 N. W. 673, p. 1245. 1333, 2030.
Tedder v. Steele, 70 Ala. 347, p. 2475, 2498, 2512.
Teele v. Bishop of Derry, 168 Mass. 341, 47 N. E. 422, 60 Am. St. Rep. 401, 38 L. R. A. 629, p. 1940, 1965, 1966, 1979.
Tefft v. Munson, 57 N. Y. 97, p. 1134.
Tegarden v. La Marchel, 129 Fed. 487, p. 495.
Telegraph v. Lee, (Iowa) 98 N. W. 364, p. 2126.
Telegraph Co. v. Davenport, 97 U. S. 369, p. 543, 1253, 1382, 2784.
Telford v. Barney, 1 Iowa, 575, 501, p. 2060.
Telford v. Metrop. Board of Works, L. R. 13 Eq. 574, p. 2673, 2676.
Telford v. Oakley, 1 Hempst. 197, p. 515.
Teller v. Hill, (Colo. App.) 72 Pac. 811, p. 1273, 1828.
Tempest, In re, L. R. 1 Ch. 485, p. 2108.
Tempest v. Lord Camoys, 21 Ch. Div. 571, p. 1890.
Tempest v. Tempest, 7 De Gex, M. & G. 470, 473, p. 2217.
Temple v. Ferguson, 110 Tenn. 84, 100 Am. St. Rep. 791, 72 S. W. 455, p. 1850, 2160.
Temples v. Equitable Mortgage Co., 100 Ga. 503, 28 S. E. 232, 62 Am. St. Rep. 326, p. 1446.
Temples v. Temples, 70 Ga. 480, p. 1288.
Templeton v. Brown, 86 Tenn. 50, 5 S. W. 441, p. 2140, 2141, 2142.
Templeton v. Russell, [1893] 1 Q. B. 435, p. 396.
Tenant v. Brown, 1 Cas. Ch. 180, p. 1921.
Tenant v. City of Glasgow Bank, L. R. 4 App. Cas. 615, 621, p. 1574.
Tenant v. Elliott, 1 Bos. & P. 3, p. 673, 1713.
Ten Broeck v. Orchard, 74 N. C. 409, p. 2715, 2722.
Ten Broek v. Fidelity Co., 88 Ky. 242, 10 S. W. 798, p. 2100.
Ten Eick v. Simpson, 1 Sand. Ch. 244, p. 2501.
Ten Eyck v. Keokuk, 15 Iowa, 486, p. 406.
Ten Eyck v. Sjoburg, 68 Iowa, 625. 27 N. W. 785, p. 383, 451.
Ten Eyck v. Witbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809, p. 1323, 1324.
Tenham, Lord, v. Herbert, 2 Atk. 483, p. 362, 363, 393, 455.
Tennant v. Braie, Toth. 141, p. 1681.
Tennant v. Stoney, 1 Rich. Eq. 222, 44 Am. Dec. 213, p. 1856, 2144.
Tennant v. Tennant, 43 W. Va. 547, 27 S. E. 334, p. 1910, 2037.
Tennant v. Trenchard, L. R. 4 Ch. 537, p. 1755, 2103.
Tennant v. Watson, 58 Ark. 252, 24 S. W. 495, p. 1276, 1381.
Tennent v. Batley, 18 Kan. 324, p. 2791.

Tennessee Coal, I. & R. Co. v. Gardner, 131 Ala. 599, 32 South. 622, p. 1133.
Tennessee Mfg. Co. v. James, 91 Tenn. (7 Pickle) 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211, p. 736, 762.
Tenney v. Miner's D. Co., 7 Cal. 335, p. 2686.
Tenney v. Simpson, 37 Kan. 353, 15 Pac. 187, p. 1996, 2005.
Tenney v. State Bank, 20 Wis. 152, p. 345, 355, 2782.
Tenny v. Simpson, 37 Kan. 579, 15 Pac. 512, p. 1902, 1909, 1984, 1995.
Teoli v. Nardolillo, 23 R. I. 87, 49 Atl. 489, p. 667, 1712.
Terbell v. Lee, 40 Fed. 40, p. 1647.
Ter-Hoven v. Kerns, 2 Pa. St. 96, p. 2388.
Terrell v. Andrew Co., 44 Mo. 309, p. 1119, 1122.
Terrell v. Higgs, 1 De Gex & J. 388, p. 2713.
Terrett v. Town of Sharon, 34 Conn. 105, p. 407, 408.
Terry v. Bank of Cape Fear, 20 Fed. 773, 775, p. 508.
Terry v. Cutler, 14 Tex. Civ. App. 520, 39 S. W. 152, p. 1103, 1113.
Terry v. Durand Land Co., 112 Mich. 665, 71 N. W. 525, p. 2411.
Terry v. Fitzgerald, 32 Gratt. 843, p. 1862, 2107.
Terry v. Hammonds, 47 Cal. 32, p. 2190.
Terry v. Hopkins, 1 Hill Eq. 1, p. 2166.
Terry v. Keaton, 58 Ala. 667, p. 2498.
Terry v. Rosell, 32 Ark. 478, p. 2345, 2786.
Tesson v. Atlantic Ins. Co., 40 Mo. 33, 36, 93 Am. Dec. 293, p. 1517, 1524, 1541.
Teutonia Ins. Co. v. Howell, 21 Ky. L. Rep. 1245, 54 S. W. 852, p. 1158.
Tevis v. Hammersmith, 31 Ind. App. 281, 66 N. E. 79, 912, p. 2124.
Tewart v. Lawson, L. R. 18 Eq. 490, p. 2655.
Tewksbury v. Spruance, 75 Ill. 187, p. 1761.
Texas & P. R'y Co. v. Vaughn, 16 Tex. Civ. App. 403, 40 S. W. 1065, p. 1231.
Texas & St. L. R'y Co. v. Rust, 19 Fed. 239, p. 739.
Texas Consol. C. & M. Ass'n v. Dublin C. & M. Co., (Tex. Civ. App.) 38 S. W. 404, p. 1103, 1114.
Texas Land Co. v. Turman, 53 Tex. 619, p. 2704.
Texas Moline Plow Co. v. Kingman Texas Impl. Co., (Tex. Civ. App.) 80 S. W. 1042, p. 2022.
Texas Tram & Lumber Co. v. Gwin, 29 Tex. Civ. App. 1, 67 S. W. 892, 68 S. W. 721, p. 1058.
Thacher v. Phinney, 7 Allen, 146, p. 1800.
Thacker v. Key, L. R. 8 Eq. 408, p. 955.
Thacker v. Morris, 52 W. Va. 220, 43 S. E. 141, 94 Am. St. Rep. 923, p. 2380.
Thackeray v. Parker, 1 N. R. 567, p. 2742.
Thackrah v. Haas, 119 U. S. 501, 7 Sup. Ct. 311, p. 1636, 1639, 1732.
Thackwell v. Gardiner, 5 De Gex & S. 58, p. 2148.
Thalimer v. Brinkerhoff, 20 Johns. 386, p. 1703, 2555.
Thames v. Caldwell, 60 Ala. 644, p. 2498, 2512.
Tharp v. Lee, 25 Tex. Civ. App. 439, 62 S. W. 93, p. 760.
Tharpe v. Dunlap, 4 Heisk. 674, 686, p. 692, 1064, 1075, 1148, 2520.
Thatcher v. Omans, 3 Pick. 521, 528, p. 1829.
Thayer v. Campbell, 9 Mo. 277, 280, p. 2419.
Thayer v. Cramer, 1 McCord Eq. 395, p. 2361.
Thayer v. Daniels, 113 Mass. 129, p. 1212.
Thayer v. Dewey, (Mass.) 69 N. E. 1074, p. 2065.
Thayer v. Finnegan, 134 Mass. 62, 45 Am. Rep. 285, p. 2492.
Thayer v. Mayo, 34 Me. 142, p. 552.
Thayer v. New Bedford R. R., 125 Mass. 253, p. 2683.
Thayer v. Smith, 9 Met. 469, p. 540.
Thayer v. Torry, 37 N. J. L. 339, p. 2405.
The Distilled Spirits, 11 Wall. 356, p. 1168, 1171, 1172.
The Edward Lee, 3 Ben. 114, Fed. Cas. No. 4,292, p. 2574, 2585.
Theed v. Debenham, L. R. 2 Ch. Div. 165, p. 2687.

The Elmbank, 72 Fed. 610, p. 195, 1211, 1212, 1322, 1323, 1327, 2546, 2560, 2563, 2585.
The General Smith, 4 Wheat. 438, 4 L. ed. 609, p. 2483.
The Holladay Case, 27 Fed. 849, p. 983.
The King v. Ex'rs of Sir John Deccombe, Cro. Jac. 512, Ames' Cas. on Trusts, 353, p. 1848.
Thellusson v. Liddard, [1900] 2 Ch. 635, p. 1398.
Thellusson v. Woodford, 4 Madd. 420, p. 943.
Thellusson v. Woolford, 13 Ves. 209, 211, 220, 221, 444, p. 775, 783, 787, 798, 800, 803, 806.
The Queen v. Saddlers' Co., 10 H. L. Cas. 431, p. 1651.
Therasson v. Hickok, 37 Vt. 454, p. 1858.
The Telegraph v. Lee, (Iowa) 98 N. W. 364, p. 2126.
Theus v. Dugger, 93 Tenn. 41, 23 S. W. 135, p. 2198.
Theyken v. Howe Mach. Co., 109 Pa. St. 95, p. 1297.
Thiedemann v. Goldschmidt, 1 De Gex, F. & J. 4, 10, p. 2669.
Thiel Detective Service Co. v. McClure, 130 Fed. 55, p. 508.
Thiery v. Chalmers, Guthrie & Co., [1900] 1 Ch. 80, p. 2626..
Third Ave. R. R. Co. v. Mayor etc. of New York, 54 N. Y. 159, 162, 163, p. 162, 388, 452, 2705.
Third Nat. Bank v. Atlantic City, 126 Fed. 413, p. 1207, 1210, 1211, 1212, 2584.
Third Nat. Bank v. Guenther, 123 N. Y. 568, 25 N. E. 986, 20 Am. St. Rep. 780, p. 2201.
Third Nat. Bank v. Mylen, 76 Fed. 385, p. 418, 456, 497.
Third Nat. Bank v. Western & A. R. Co., 114 Ga. 890, 40 S. E. 816, p. 1229.
Thistle v. Buford, 50 Mo. 278, p. 1445.
Thom's Ex'rs v. Thom, 95 Va. 413, 28 S. E. 583, p. 2055.
Thomas v. Adams, 30 Ill. 37, p. 2788.
Thomas v. American Freehold L. & M. Co., 47 Fed. 550, 553, 12 L. R. A. 681, 686, p. 500, 501.
Thomas v. Bartow, 48 N. Y. 193, 200, p. 1789.
Thomas v Bennet, 2 P. Wms. 343, p. 876, 2163.
Thomas v. Blackemore, 5 Yerg. 113, 124, p. 1102.
Thomas v. Bridges, 73 Mo. 530, p. 2501, 2513, 2516.
Thomas v. Brownsville etc. R. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. ed. 1018, p. 2084.
Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L. R. A. 222, p. 1034, 1048.
Thomas v. Council Bluffs Canning Co., 92 Fed. 422, 34 C. C. A. 428, p. 441.
Thomas v. Cronise, 16 Ohio, 54, p. 1708, 1710.
Thomas v. Dering, 1 Keen, 729, p. 2050, 2770.
Thomas v. Evans, 105 N. Y. 614, 12 N. E. 571, 59 Am. Rep. 519, p. 2481.
Thomas v. Folwell, 2 Whart. 11, 16, 30 Am. Dec. 230, p. 2154.
Thomas v. Grand Gulf Bank, 9 Smedes & M. 201, p. 1114.
Thomas v. Harkness, 13 Bush, 23, p. 2139, 2142.
Thomas v. Holmes Co., 67 Miss. 754, 7 South. 552, p. 2376.
Thomas v. Howell, L. R. 18 Eq. 198, p. 1935, 1939.
Thomas v. James, 32 Ala. 723, p. 2694.
Thomas v. Jameson, 77 Cal. 91, 19 Pac. 177, p. 1995, 1996.
Thomas v. Kelsey, 30 Barb. 268, p. 1270.
Thomas v. Kennedy, 24 Iowa, 397, 95 Am. Dec. 740, p. 1038, 2752.
Thomas v. Merry, 113 Ind. 88, 15 N. E. 244, p. 1906.
Thomas v. Moore, 120 Mich. 535, 79 N. W. 812, p. 416.
Thomas v. Murphy, 87 Minn. 358, 91 N. W. 1097, p. 1618.
Thomas v. Oakley, 18 Ves. 184, p. 2692, 2693.
Thomas v. Powell, 2 Cox, 394, p. 1510.
Thomas v. Pullis, 56 Mo. 211, p. 1435.
Thomas v. Raymond, 4 S. C. 347, p. 2727.
Thomas v. Rector, 23 W. Va. 26, p. 2494.
Thomas v. Roberts, 3 De Gex & S. 758, p. 2616.

Thomas v. Sheppard, 2 McCord Eq. 36, 16 Am. Dec. 632, p. 1728.
Thomas v. Standiford, 49 Md. 181, p. 1993, 2000, 2024.
Thomas v. Thomas, 27 Beav. 537, p. 2215.
Thomas v. Thomas, 62 Miss. 531, p. 1995, 2000.
Thomas v. Tyler, 3 Younge & C. 255, 261, 262, p. 245, 263.
Thomas v. Van Meter, 164 Ill. 304, 45 N. E. 405, p. 987.
Thomas v. Watts, 9 Md. 526, note, p. 229, 461, 465.
Thomas v. White, 2 Ohio St. 540, p. 2750.
Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808, p. 1746.
Thomas v. Williams, L. R. 14 Ch. Div. 864, 871, 872, p. 2696.
Thomas v. Wood, 1 Md. Ch. 296, p. 2306.
Thomason v. Fannin, 54 Ga. 361, p. 1470, 1642.
Thomas's Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170, p. 2231, 2237, 2240, 2242.
Thomas's Appeal, 30 Pa. St. 378, p. 2539.
Thomaston Bank v. Stimpson, 21 Me. 195, p. 548, 549, 550.
Thompson v. Allen, 103 Pa. St. 44, 49 Am. Rep. 116, p. 2142.
Thompson v. Andrus, 73 Mich. 551, 41 N. W. 683, p. 1691.
Thompson v. Baker, 141 U. S. 648, 12 Sup. Ct. 89, p. 1065.
Thompson v. Berry, 3 Johns. Ch. 394, 398, p. 461, 465.
Thompson v. Bertram, 14 Iowa, 476, p. 2405, 2407.
Thompson v. Betts, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235, p. 821, 889.
Thompson v. Blanchard, 4 N. Y. 303, p. 1331.
Thompson v. Borg, (Minn.) 95 N. W. 896, p. 1020, 1440, 1452.
Thompson v. Boyd, 21 N. J. L. 58, 22 N. J. L. 543, p. 1406.
Thompson v. Brown, 4 Johns. Ch. 619, 627, 628, 631, p. 148, 331, 334, 576, 2066, 2077, 2283.
Thompson v. Burra, L. R. 16 Eq. 592, 601, p. 785, 819, 837.
Thompson v. Cartwright, 2 De Gex, J. & S. 10, 33 Beav. 178, p. 1174, 1175.
Thompson v. Central Ohio R. R. Co., 6 Wall. 134, 19 L. ed. 765, p. 494, 495, 496, 514.
Thompson v. Cheesman, 15 Utah, 43, 48 Pac. 477, p. 2413.
Thompson v. Clydesdale Bank, [1893] A. C. 282, p. 2058.
Thompson v. Cochran, 7 Humph. 72, 46 Am. Dec. 68, p. 2736.
Thompson v. Comm'rs, 79 N. Y. 54, p. 2434.
Thompson v. Corby, 27 Beav. 649, p. 1941.
Thompson v. Corrie, 57 Md. 197, p. 2500, 2511.
Thompson v. Dawson, 3 Head, 384, p. 2515.
Thompson v. Dearborn, 107 Ill. 87, p. 2407.
Thompson v. Dulles, 5 Rich. Eq. 370, p. 1833, 2779.
Thompson v. Dunn, L. R. 5 Ch. 573, p. 263, 271, 283.
Thompson v. Egbert, 17 N. J. L. 459, p. 827.
Thompson v. Ela, 58 N. H. 490, p. 1510.
Thompson v. Engle, 4 N. J. Eq. 271, p. 226, 289, 2746.
Thompson v. Erie R. R., 9 Abb. Pr., N. S., 212, 230, p. 293.
Thompson v. Falk, 1 Drew. 21, p. 282.
Thompson v. Field, 38 Mo. 320, p. 2392, 2394.
Thompson v. Finch, 8 De Gex, M. & G. 560, 563, 564, 22 Beav. 316, p. 2061, 2095.
Thompson v. Fisher, L. R. 10 Eq. 207, p. 1886.
Thompson v. Griffin, Craig & P. 317, 320, p. 2619.
Thompson v. Hardman, 6 Johns. Ch. 436, p. 2743.
Thompson v. Heffernan, 4 Dru. & War. 285, p. 2235, 2242.
Thompson v. Heffner's Ex'rs, 11 Bush, 353, p. 2525.
Thompson v. Henry, 85 Mo. 451, p. 1198.
Thompson v. Heywood, 129 Mass. 401, p. 1640.
Thompson v. Hill, 3 Yerg. 167, p. 220, 2706.

Thompson v. Hoop, 6 Ohio St. 480, p. 825.
Thompson v. Hudson, L. R. 10 Eq. 497, p. 2432.
Thompson v. Hudson, L. R. 4 H. L. 1, 15, reversing L. R. 2 Eq. 612, L. R. 2 Ch. 255, p. 720, 723, 2048.
Thompson v. Kyle, 39 Fla. 582, 63 Am. St. Rep. 193, 23 South. 12, p. 2191.
Thompson v. Lambert, 44 Iowa, 239, p. 1722.
Thompson v. Lapsley, (Minn.) 96 N. W. 788, p. 992.
Thompson v. Lee, 31 Ala. 292, p. 1583.
Thompson v. Lynch, 29 Cal. 189, p. 2754, 2756.
Thompson v. McDonald, 2 Dev. & B. Eq. 463, p. 2284.
Thompson v. McGill, Freem. (Miss.) 401, p. 2518.
Thompson v. McKay, 41 Cal. 221, 230, p. 1895, 1897.
Thompson v. Maddux, 117 Ala. 468, 23 South. 157, p. 1226.
Thompson v. Meek, 3 Sneed, 271, p. 2710.
Thompson v. Murphy, 10 Ind. App. 464, 37 N. E. 1094, p. 1843.
Thompson v. Orser, 105 Ga. 482, 30 S. E. 626, p. 2265.
Thompson v. Perkins, 3 Mason, 232, p. 2030.
Thompson v. Pioche, 44 Cal. 508. 516, p. 1045, 1048. 1096, 1144, 1357.
Thompson v. Remsen, 27 Misc. Rep. 279, 58 N. Y. Supp. 424, p. 1838.
Thompson v. Scott, 1 Ill. App. 641, p. 2191.
Thompson v. Shakespeare. 1 De Gex, F. & J. 399, p. 176. 1935.
Thompson v. Sheppard, 85 Ala. 611, 5 South. 334, p. 1051, 1055.
Thompson v. Simpson, 1 Dru. & War. 459, p. 1093.
Thompson v. Simpson, 2 Jones & L. 110, p. 1386, 1448.
Thompson v. Smith, 1 Madd. 395. p. 2669.
Thompson v. Smith, 106 N. C. 357, 11 S. E. 273, p. 2196.
Thompson v. Speirs, 13 Sim. 469, p. 1211. 1214.
Thompson v. Stanhope, Amb. 737, p. 2689.
Thompson v. Thompson, 21 Barb. 107, p. 1727.
Thompson v. Thompson, 1 Coll. C. C. 381, 395, p. 1942.
Thompson v. Thompson, 2 Strob. Eq. 48, p. 785.
Thompson v. Thompson, (Tenn. Ch. App.) 54 S. W. 145, p. 2040.
Thompson v. Thompson, 16 Wis. 91, 94, p. 179, 2008.
Thompson v. Tod, 1 Pet. C. C. 380, p. 1606.
Thompson v. Toland, 48 Cal. 99, p. 1247, 1253, 1382, 1897.
Thompson v. Towne, 2 Vern. 319, p. 2223.
Thompson v. Valley R. R. Co., 132 U. S. 73, 10 Sup. Ct. 29, 33 L. ed. 256, p. 2583.
Thompson v. Webster, 4 Drew. 628, p. 1801.
Thompson v. Westbrook, 56 Tex. 268, p. 1355.
Thompson v. Whipple, 5 R. I. 144, p. 717, 753.
Thompson v. Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795, p. 274, 321, 323.
Thompson v. White, 48 Conn. 509, p. 2796.
Thompson v. Woolf, 8 Oreg. 454, p. 2750.
Thompson & Lively v. Mann, 53 W. Va. 432, 44 S. E. 246, p. 2292.
Thompson Co., Edward, v. American Law Book Co., (C. C. A.) 122 Fed. 923, p. 663.
Thompson-Houston Elect. Co. v. Capitol Elect. Co., 65 Fed. 341, 12 C. C. A. 643, p. 1175.
Thompson Nat. Bank v. Corwine, 89 Fed. 774, affirmed, 95 Fed. 54, p. 1331.
Thompson's Appeal, 107 Pa. St. 559, p. 386.
Thompson's Appeal, 22 Pa. St. 16, p. 2022.
Thompson's Estate, In re, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508, p. 2090.
Thompson's Ex'r v. Brown, 25 Ky. L. Rep. 371, 75 S. W. 210, p. 1943, 1980.
Thomson v. Batty, 2 Strange, 777, p. 2245, 2246.
Thomson v. Ebbets, Hopk. Ch. 272, p. 2639.

Thomson v. Locke, 66 Tex. 383, 389, citing text. §§ 242, 253, 254, 258, p. 354, 386, 387.
Thomson v. Shirley, 69 Fed. 484, p. 2361.
Thomson v. Simpson, L. R. 5 Ch. 659, p. 2567, 2568.
Thomson v. Smith, 64 N. H. 412, 13 Atl. 639, p. 2101.
Thomson v. Smith, 63 N. Y. 301, p. 615, 621, 2535, 2777.
Thomson v. Thomson, 7 Ves. 470, p. 668, 673, 1711, 1713.
Thomson v. Wilcox, 7 Lans. 376, p. 1127.
Thomson's Ex'rs v. Norris, 20 N. J. Eq. 489, p. 1934, 1944, 1952, 1975.
Thor v. Oleson, 125 Ill. 365, 17 N. E. 780, p. 1439.
Thorington v. Thorington, 82 Ala. 489, 1 South. 716, p. 2619.
Thorley's Cattle Food Co. v. Massam, L. R. 14 C. H. Div. 763, reversing L. R., 6 Ch. Div. 582, p. 2696.
Thorn v. Comm'rs etc., 32 Beav. 490, p. 2765.
Thorn v. Dill, 50 Tex. 145, p. 2502.
Thorn v. Helmer, 4 Abb. App. 408, p. 1560.
Thorn v. Newman, 3 Swanst. 603, p. 1398.
Thorn v. Newsom, 64 Tex. 161, 53 Am. Rep. 747, p. 1342.
Thorn v. Sutherland, 123 N. Y. 236, 25 N. E. 362, p. 2360.
Thorn v. Williams, 1 Car. Law Rep. 362, p. 570.
Thorn & Hunkins Lime & Cement Co. v. Citizens' Bank, 158 Mo. 172, 59 S. W. 109, p. 150, 739, 740.
Thornber v. Wilson, 3 Drew. 245, 4 Drew. 350, p. 1939.
Thornbrough v. Baker, 2 Lead. Cas. Eq., 4th Am. ed., 1969–1977, 2006, p. 2434, 2456.
Thornburg v. Bowen, 37 W. Va. 538, 16 S. E. 825, p. 1347.
Thorndell v. Morrison, 25 Pa. St. 326, p. 2197.
Thorndike v. Hunt, 3 De Gex & J. 563, 570, 571, p. 694, 1184, 1187, 1188, 1373, 1376.
Thorndike v. Locke, 98 Mass. 340, p. 536.
Thorndike v. Norris, 24 N. H. 454, p. 2417.
Thorne v. Cann, [1895] App. Cas. 11, p. 1402.
Thorne v. Deas, 4 Johns. 84, p. 2045.
Thorne v. Mosher, 20 N. J. Eq. 257, p. 1445.
Thornett v. Haines, 15 Mees. & W. 367, 372, p. 1693, 1694.
Thorneycroft v. Crockett, 2 H. L. Cas. 239, 256, p. 2432.
Thornhill v. Burthe, 29 La. Ann. 639, p. 1124.
Thornhill v. Evans, 2 Atk. 330, p. 1734.
Thornhill v. Hall, 2 Clark & F. 22, p. 2569.
Thornton v. Ellis, 15 Beav. 193, p. 2322.
Thornton v. Finch, 4 Giff. 505, p. 2436.
Thornton v. Hawley, 10 Ves. 129, p. 2310.
Thornton v. Howe, 8 Jur., N. S., 663, p. 1939.
Thornton v. Knox's Ex'r, 6 B. Mon. 74, p. 1055, 1145, 2500, 2511.
Thornton v. Ogden, 32 N. J. Eq. 723, p. 1738, 1779.
Thornton v. Pigg, 24 Mo. 249, p. 2399.
Thornton v. Ramsden, 4 Giff. 519, p. 1451.
Thornton v. Stewart, 7 Leigh, 128, p. 1463.
Thornton v. Thornton, 31 Gratt. 212, p. 2130, 7800.
Thornton, Town of, v. Gilman, 67 N. H. 392, 39 Atl. 900, p. 1774, 1776.
Thorp v. Gordon, (Tex. Civ. App.) 43 S. W. 323, p. 2040.
Thorp v. Keokuk etc. Co., 48 N. Y. 253, p. 2407, 2414.
Thorp v. McCullum, 1 Gilm. 614, 625, 630, p. 1468, 1469.
Thorp v. Merrill, 21 Minn. 336, p. 1124.
Thorp v. Pettit, 16 N. J. Eq. 488, p. 2775.
Thorp v. Smith, 63 N. J. Eq. 70, 51 Atl. 437, p. 1729, 1739.
Thorpe v. Brumfitt, L. R. 8 Ch. 650, 655, 656, p. 2687, 2746.
Thorpe v. Durbon, 45 Iowa, 192, p. 1261, 1264.
Thorpe v. Holdsworth, L. R. 7 Eq. 139, p. 1261. 2539, 2728.
Thorpe v. Jackson, 2 Younge & C. 553, 561, p. 683, 2606.

Thorpe v. Macauley, 5 Madd. 218, 229, 230, 231, p. 257, 258, 298.
Thrall v. Lathrop, 30 Vt. 307, 73 Am. Dec. 306, p. 1437.
Thrasher v. Doig, 18 Fla. 809, p. 462, 2190.
Threadgill v. Bickerstaff, 87 Tex. 520, 24 S. W. 757, p. 1342.
Threefoot Bros. & Co. v. Hillman, 130 Ala. 244, 30 South. 513, 89 Am. St. Rep. 39, p. 2446.
Throckmorton v. Price, 28 Tex. 605, 91 Am. Dec. 334, p. 1117, 1118.
Throop v. Grain Cleaner Co. v. Smith, 110 N. Y. 83, 17 N. E. 671, p. 2570.
Thrupp v. Collett, 26 Beav. 125, p. 1943.
Thruston v. Minke, 32 Md. 487, 571, p. 2685, 2740, 2743.
Thum v. Wolstenholme, 21 Utah, 446, 61 Pac. 537, p. 1994, 2031.
Thurber v. Blanck, 50 N. Y. 80, p. 2791.
Thurber v. La Roque, 105 N. C. 301, 11 S. E. 460, p. 1994, 1995, 1997, 2002, 2196.
Thurlough v. Dresser, 98 Me. 161, 56 Atl. 654, p. 1124.
Thurman v. Burt, 53 Ill. 129, p. 1734.
Thurman v. Stoddard, 63 Ala. 336, p. 2498, 2516.
Thurmond v. Clark, 47 Ga. 500, p. 1482.
Thurmond v. Reese, 3 Ga. 449, 46 Am. Dec. 440, p. 2789.
Thurston, In re, 57 Wis. 104, 15 N. W. 126, p. 2090.
Thurston v. Clifton, 21 Beav. 447, p. 848.
Thurston v. Percival, 1 Pick. 415, p. 1703, 2555.
Thwaites v. Foreman, 1 Coll. C. C. 409, p. 2225, 2226.
Thynn v. Thynn, 1 Vern. 286, 296, p. 1635, 1653, 2035.
Thynne, Lady, v. Earl of Glengall, 2 H. L. Cas. 131, 153, 154, 1 Keen, 769, p. 868, 873, 875, 903, 906, 917, 918, 922.
Tibbetts v. Cate, 66 N. H. 550, 22 Atl. 559, p. 752, 755.
Tibbits v. Tibbits, Jacob, 317, p. 782, 857.
Tibbitts v. Tibbitts, 19 Ves. 656, 663, p. 851, 855, 1924.
Tibbs v. Morris, 44 Barb. 138, p. 2376.
Tice v. Annin, 2 Johns. Ch. 125, p. 2424, 2704.
Tichener, In re, 35 Beav. 317, p. 1213.
Tichenor v. Brewer, 98 Ky. 349, 33 S. W. 86, p. 1943, 1980.
Tichenor v. Dodd, 4 N. J. Eq. 454, p. 2402, 2405.
Tichenor v. Knapp, 6 Oreg. 205, p. 2750.
Tichenor v. Tichenor, 41 N. J. Eq. 39, 2 Atl. 778, p. 2218.
Tidd, In re, [1893] 3 Ch. 154, p. 1916.
Tidd v. Lister, 10 Hare, 140, 157, 3 De Gex, M. & G. 857, 869, 870, p. 646, 655, 2170, 2171, p. 2786.
Tidd v. Lister, L. R. 11 Ch. 779, 780, 781, p. 2171.
Tidd v. Lister, 5 Madd. 429, Ames' Cas. on Trusts, 465, p. 1851.
Tiemeyer v. Turnquist, 85 N. Y. 516, 39 Am. Rep. 674, p. 2201.
Tierman's Ex'rs v. Security Bldg. & L. Ass'n, 152 Mo. 135, 53 S. W. 1072, p. 2023.
Tiernan v. Beam, 2 Ohio, 383, 15 Am. Dec. 557, p. 2502, 2519.
Tiernan v. Gibney, 24 Wis. 190, p. 2769.
Tiernan v. Hamman, 16 Ill. 400, p. 726, 733.
Tiernan v. Jackson, 5 Pet. 580, 598, p. 195, 2562.
Tiernan v. Rescaniere's Adm'rs, 10 Gill & J. 217, p. 2642.
Tiernan v. Roland, 15 Pa. St. 430, 451, 452, p. 782, 845, 857.
Tiernan v. Thurman, 14 B. Mon. 224, p. 2500, 2514.
Tierney v. Wood, 19 Beav. 330, Ames' Cas. on Trusts, p. 1879, 1903.
Tiffin v. Tiffin, 1 Vern. 1, p. 1397.
Tifft v. Porter, 8 N. Y. 516, p. 2206, 2209, 2216, 2217.
Tift v. Buffalo, 1 Thomp. & C. 150, p. 434, 438.
Tifton, T. & G. Ry. Co. v. Bedgood, 116 Ga. 945, 43 S. E. 257, p. 2552.
Tilden v. Green, 130 N. Y. 29, 28 N. E. 880, 27 Am. St. Rep. 487, 14 L. R. A. 33, p. 1835, 1929, 1953, 1969.
Tilden v. Mayor etc., 56 Barb. 340, p. 2755, 2757.
Tildesley v. Lodge, 3 Smale & G. 543, p. 1201, 1202, 1293, 1347, 1375.

Tilford v. Torrey, 53 Ala. 120, p. 1993, 2030.
Tilleny v. Wolverton, 50 Minn. 419, 52 N. W. 909, p. 1157.
Tillery v. Wren, 86 N. C. 217, p. 1665.
Tilley v. Thomas, L. R. 3 Ch. 61, 67, 69, 72, p. 2767, 2778.
Tillinghast v. Bradford, 5 R. I. 205, p. 1847.
Tillinghast v. Champlin, 4 R. I. 173, 204, 215, 67 Am. Dec. 510, p. 973, 977, 986, 1148.
Tillinghast v. Coggeshall, 7 R. I. 383, p. 1886, 1887.
Tillinghast v. Wheaton, 8 R. I. 536, 5 Am. Rep. 621, 94 Am. Dec. 126, p. 2233, 2237, 2247.
Tillison v. Ewing, 87 Ala. 350, 6 South. 276, p. 1637.
Tillman v. Murrell, 120 Ala. 239, 24 South. 712, p. 1907, 1994.
Tillman v. Stewart, 104 Ga. 687, 69 Am. St. Rep. 192, 30 S. E. 949, p. 2437.
Tillman v. Thomas, 87 Ala. 321, 13 Am. St. Rep. 42, 6 South. 151, p. 1007.
Tillmes v. Marsh, 67 Pa. St. 507, p. 1472, 2737.
Tillotson v. Gesner, 33 N. J. Eq. 313, p. 2770.
Tillotson v. Mitchell, 111 Ill. 518, p. 1021, 1039.
Tillott, In re, L. R. [1892] 1 Ch. 86, Ames' Cas. on Trusts, 468, p. 2053.
Tilly v. Peers, 10 Ves. 301, p. 1665.
Tilt, In re, 74 L. T. 163, p. 2547.
Tilton v. Cofield, 93 U. S. 163, p. 1065, 1074.
Tilton v. Davidson, 98 Me. 55, 56 Atl. 215, p. 1837, 1851.
Tilton v. Hunter, 24 Me. 29, p. 1132.
Tilton v. Nelson, 27 Barb. 595, p. 1435, 1445.
Tilton v. Stein, 87 Ill. 122, p. 2778, 2779.
Tilton v. Tilton, 9 N. H. 385, 389, 390, p. 524, 1521, 1525, 1528, 1534, 2780, 2781.
Timberlake v. Parrish's Executors, 5 Dana, 345, 346, p. 789, 821, 832, 896, 935, 938.
Timmerman v. Dever, 52 Mich. 34, 17 N. W. 230, 50 Am. Rep. 240, p. 1691.
Timms v. Shannon, 19 Md. 296, 81 Am. Dec. 632, p. 1297, 2344.
Timson v. Ramsbottom, 2 Keen, 35, p. 1213.
Tindal v. Drake, 51 Ala. 574, p. 1828.
Tindall v. Harkinson, 19 Ga. 448, p. 1591, 1594.
Tindall v. Peterson, (Nebr.) 99 N. W. 659, p. 2440, 2442.
Tingley v. Cutler, 7 Conn. 291, p. 727, 742.
Tinkham v. Borst, 31 Barb. 407, p. 2011.
Tinkham v. Heyworth, 31 Ill. 519, p. 1914.
Tinney v. Stebbins, 28 Barb. 290, p. 2743.
Tinsley v. Rice, 105 Ga. 285, 31 S. E. 174, p. 1069.
Tinsley v. Tinsley, 52 Iowa, 14, p. 2500, 2513, 2515.
Tipping v. Clarke, 2 Hare, 383, 389, p. 284.
Tipping v. Eckersley, 2 Kay & J. 264, 270, 273, p. 2673.
Tipping v. Tipping, 1 P. Wms. 729, p. 2164.
Tipping v. St. Helen's etc. Co., L. R. 1 Ch. 66, p. 2687.
Tisdale v. Brabrook, 102 Mass. 374, p. 2750.
Tisdale v. Insurance Co. of North America, (Miss.) 36 South. 568, p. 413, 432.
Tisdale v. Jones, 38 Barb. 523, p. 2757.
Tison v. Mattair, 8 Fla. 107, p. 2190.
Titchenell v. Jackson, 26 W. Va. 460, p. 1873, 1899.
Titcomb v. Morrill, 10 Allen, 15, p. 1989.
Titcomb v. Potter, 11 Me. 218, p. 555.
Tittenson v. Peat, 3 Atk. 529, p. 264.
Titterington v. Hooker, 58 Mo. 593, p. 2278.
Title Guarantee Co. v. Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454, p. 1400, 1402.
Titsworth v. Stout, 49 Ill. 78, 95 Am. Dec. 577, p. 1407, 1408.
Titus v. Great West. T. Co., 61 N. Y. 237, p. 1625.
Titus v. McLanahan, 2 Del. Ch. 200, p. 2209.
Titus v. Rochester G. Ins. Co., 97 Ky. 567, 31 S. W. 127, 53 Am. St. Rep. 427, p. 1494.

Titus v. United States, 20 Wall. 475, p. 1696.
Titus's Adm'r v. Titus, 26 N. J. Eq. 111, p. 2224, 2226.
Tobey v. Co. of Bristol, 3 Story, 800, 820, 823, p. 2771, 2772.
Tobey v. Foreman, 79 Ill. 489, p. 2776.
Tobey v. McAllister, 9 Wis. 463, p. 2503.
Tobias v. Ketchum, 32 N. Y. 319, 326, 327-331, p. 820, 1909, 1917, 1918.
Tobler v. Austin, 22 Tex. Civ. App. 99, 53 S. W. 706, p. 728, 737.
Todd, In re, 19 Beav. 582, p. 2172.
Todd v. Campbell, 32 Pa. St. 250, p. 2377.
Todd v. Grove, 33 Md. 188, p. 1671, 1739, 1751, 1779.
Todd v. Hartley, 2 Met. (Ky.) 206 p. 1804.
Todd v. Lee, 15 Wis. 365, 16 Wis. 480, p. 2200.
Todd v. Meding, (N. J. Eq.) 38 Atl. 349, p. 1231.
Todd v. Moorhouse, L. R. 19 Eq. 69, p. 2483.
Todd v. Munson, 53 Conn. 579, 4 Atl. 99, p. 1900.
Todd v. Outlaw, 79 N. C. 235, p. 1087, 1088.
Todd v. Rich, 2 Tenn. Ch. 107, p. 2656.
Todd v. Taft, 7 Allen, 371, p. 2764.
Tode v. Gross, 127 N. Y. 480, 24 Am. St. Rep. 475, 28 N. E. 469, 13 L. R. A. 652, p. 1691.
Tohier v. Burr, 127 Mass. 221, p. 1978.
Tohier v. St. Paul's Church, 12 Met. 250, p. 1979.
Toker v. Toker, 31 Beav. 629, p. 1670.
Toker v. Toker, 3 De Gex, J. & S. 487, p. 1738.
Toland v. Corey, 6 Utah, 392, 24 Pac. 190, p. 982, 1028, 1148.
Toland v. Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100, p. 85, 2259, 2261, 2300.
Tolar v. Tolar, 1 Dev. Eq. 460, 18 Am. Dec. 598, p. 1872.
Tolbert v. Horton, 31 Minn. 518, 18 N. W. 647, p. 1052, 1357.
Toldervy v. Colt, 1 Younge & C. 621, p. 2657.
Tolerton v. Williard, 30 Ohio St. 579, p. 1076.
Toll v. Davenport, 74 Mich. 386, 42 N. W. 63, p. 1383.
Tolland Ins. Co. v. Underwood, 50 Conn. 493, p. 1843.
Tolle v. Alley, 24 S. W. 113, (Ky.) p. 1119, 1294.
Tollemache, In re, [1903] 1 Ch. 457, 955, p. 2071.
Tollet v. Tollet, 2 P. Wms. 489, 1 Lead. Cas. Eq., 4th Am. ed., 365, p. 960, 961, 1461, 1467, 1468.
Tolman v. Tolman, 1 App. D. C. 299, p. 2176, 2177.
Tolson v. Collins, 4 Ves. 483, p. 872, 879.
Tolson v. Sheard, L. R. 5 Ch. Div. 19, p. 2048, 2056.
Tolson v. Tolson, 10 Gill & J. 159, p. 1926, 1929.
Tombes v. Elers, 1 Dick. 88, p. 2621.
Tombler v. Palestine Ice Co., 17 Tex. Civ. App. 596, 43 S. W. 896, p. 1223.
Tombs v. Roch, 2 Coll. C. C. 490, p. 2222.
Tomkins v. Tomkins, 11 N. J. Eq. 512, 514, p. 2708, 2709.
Tomkyns v. Blane, 28 Beav. 423, p. 794.
Tomkyns v. Ladbroke, 2 Ves. Sr. 593, p. 856.
Tomlinson, Ex parte, 3 De Gex, F. & J. 745, p. 2098.
Tomlinson v. Bury, 145 Mass. 346, 14 N. E. 137, 1 Am. St. Rep. 464, p. 2208.
Tomlinson v. Lindley, 2 Ind. 569, p. 290.
Tomlison v. Leigh, 11 Jur., N. S., 962, p. 1515.
Tompkins v. Anthom, 4 Sand. Ch. 97, p. 1393.
Tompkins v. Craig, 93 Fed. 885, 2 Ames' Cas. Eq. Jur. 87, p. 371, 377.
Tompkins v. Fonda, 4 Paige, 448, p. 2736, 2788.
Tompkins v. Hollister, 60 Mich. 470, 27 N. W. 651, p. 1495, 1750.
Tompkins v. Hyatt, 28 N. Y. 347, p. 1788, 1789.
Tompkins v. Mitchell, 2 Rand. 428, p. 2504.
Tompkins v. Powell, 6 Leigh, 576, p. 1344.
Tompkins v. Seely, 29 Barb. 212, p. 2426.

Tompkins v. Tompkins, 18 S. C. 1, p. 2094.
Tompkins v. Wiltberger, 56 Ill. 385, 391, p. 2448.
Tompkins v. Wyman, 116 Mass. 558, p. 2750.
Tompkins Co. v. Catawba Mills, 82 Fed. 780, 783, p. 505.
Toms v. Owen, 52 Fed. 417, p. 509.
Toms v. Williams, 41 Mich. 552, p. 1894, 1896, 1911.
Tomson v. Judge, 3 Drew. 306, p. 1738, 1751, 1767.
Toney v. Spragins, 80 Ala. 541, p. 788, 809, 812.
Tongue v. Morton, 6 Har. & J. 21, p. 1065.
Tongue v. Nutwell, 31 Md. 302, p. 653.
Tongue v. Nutwell, 17 Md. 212, 229, 79 Am. Dec. 649, p. 798, 800.
Tonnins v. Prout, 1 Dick. 387, p. 2670.
Tooke v. Hardeman, 7 Ga. 20, p. 821, 826.
Tooke v. Hastings, 2 Vern. 97, p. 950, 952, 2473.
Tooker v. Sloan, 30 N. J. Eq. 394, p. 1735.
Tool Co. v. Norris, 2 Wall. 45, p. 1699.
Toole v. Toole, 107 Ga. 472, 33 S. E. 686, p. 1323.
Toombs v. Con. Poe Min. Co., 15 Nev. 444, p. 2508.
Toops v. Snyder, 70 Ind. 554, p. 2725.
Tooth v. Hallett, L. R. 4 Ch. 242, p. 1229, 2566, 2567.
Topham v. Duke of Portland, 1 De Gex, J. & S. 517, 569, 11 H. L. Cas. 32, p. 1657.
Topham v. Morecraft, 8 El. & B. 972, p. 1879.
Toplitz v. Bauer, 49 N. Y. Supp. 840, 26 App. Div. 125, p. 341.
Topp v. White, 12 Heisk. 165, p. 155, 2633.
Topp v. Williams, 7 Humph. 569, p. 212, 2737.
Topping v. Windly, 99 N. C. 4, 5 S. E. 14, p. 2052, 2099.
Toronto General Trust Co. v. Chicago etc. R. R. Co., 123 N. Y. 37, 25 N. E. 198, p. 1918.
Torrance v. Bolton, L. R. 8 Ch. 118, 14 Eq. 124, p. 1569, 1583.
Torrance v. Bolton, L. R. 14 Eq. 124, p. 2536.
Torre v. Torre, 1 Smale & G. 518, p. 1887.
Torrence v. Davidson, 92 N. C. 437, 53 Am. Rep. 419, p. 2057.
Torrence v. Shedd, 112 Ill. 466, p. 1703.
Torrey v. Bank of Orleans, 9 Paige, 649, 7 Hill, 260, p. 2410, 2451.
Torrey v. Camden etc. R. R., 18 N. J. Eq. 293, p. 148, 215, 2694.
Torrey v. Torrey, 55 N. J. Eq. 410, 36 Atl. 1084, p. 2281, 2298, 2299.
Torr's Estate, 2 Rawle, 552, p. 559.
Toulmin v. Heideberg, 32 Miss. 268, p. 2749.
Toulmin v. Price, 5 Ves. 235, 238, 239, p. 462, 463, 1463.
Toulmin v. Steere, 3 Mer. 210, 224, p. 1401.
Toupin v. Peabody, 162 Mass. 473, 39 N. E. 280, p. 1101, 1146.
Tourle v. Rand, 2 Brown Ch. 650, p. 1295.
Tourville v. Naish, 3 P. Wms. 306, 307, 316, p. 1201, 1292, 1323, 1333, 1347.
Tower v. Divine, 37 Mich. 443, p. 1403.
Towers v. Davys, 1 Vern. 480, p. 644.
Towers v. Moor, 2 Vern. 98, p. 683, 2609.
Towle v. Delano, 144 Mass. 95, 10 N. E. 769, p. 2054.
Towle v. Hoit, 14 N. H. 61, p. 2440.
Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195, p. 1693.
Towle v. Nesmith, 69 N. H. 212, 42 Atl. 900, p. 1943, 1956, 1958, 1961, 1975.
Towle v. Swasey, 106 Mass. 100, p. 2207, 2224.
Towle v. Towle, 114 Mass. 167, p. 2193.
Towler v. Houston, 1 Nev. 469, 472, p. 2607.
Towles v. Fisher, 77 N. C. 437, p. 1446.
Towles v. Roundtree, 10 Fla. 299, p. 904, 906.
Townend v. Townend, 1 Giff. 201, p. 2032.
Towner v. Lucas, 13 Gratt. 705, 714, p. 1507, 1517.
Towner v. McClelland, 110 Ill. 542, p. 1227, 1298.
Townley v. Bedwell, 6 Ves. 194, p. 1945.

Townley v. Bedwell, 14 Ves. 591, p. 2310, 2314.
Townley v. Shelborne, Bridg. 35, p. 2091, 2093.
Town v. Gensch, 101 Wis. 445, 76 N. W. 1096, 77 N. W. 893, p. 1052, 1056.
Town of Clinton v. Town of Westbrook, 38 Conn. 9, p. 2346.
Town of Glastonbury v. McDonald, 44 Vt. 453, p. 310, 312.
Town of Mount Zion v. Gillman, 14 Fed. 123, p. 366.
Town of Salem v. Edgerly, 33 N. H. 46, 50, p. 2411, 2440, 2447, 2455.
Town of Springport v. Teutonia Sav. Bank, 75 N. Y. 397, 401, p. 381, 419, 456, 2729, 2730, 2746.
Town of Venice v. Woodruff, 62 N. Y. 462, 20 Am. Rep. 495, p. 381, 420, 2730.
Town of Verona v. Peckham, 66 Barb. 103, p. 2097.
Town of Wellsborough v. N. Y. & C. R. R., 76 N. Y. 182, p. 2729, 2730.
Town of Woodbury v. Bruce, 59 Vt. 424, 11 Atl. 52, p. 982.
Townsend v. Blanchard, 117 Iowa, 36, 90 N. W. 519, p. 1033, 1048.
Townsend v. Carus, 3 Hare, 257, 261, p. 126, 1933, 1940.
Townsend v. Crowdy, 8 Com. B., N. S., 477, p. 1477, 1511.
Townsend v. Little, 109 U. S. 510, 3 Sup. Ct. 357, p. 1038.
Townsend v. Mayor etc., 77 N. Y. 542, p. 2728, 2755, 2757.
Townsend v. Radcliffe, 44 Ill. 446, p. 2266, 2267.
Townsend v. Stearns, 32 N. Y. 209, p. 1858.
Townsend v. Townsend, 4 Cold. 70, 94 Am. Dec. 185, p. 2288.
Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. ed. 383, p. 2536.
Townsend v. Westcott, 2 Beav. 340, p. 1797, 1800.
Townsend v. Whitney, 75 N. Y. 425, 15 Hun, 93, p. 2793, 2796.
Townsend v. Work, 79 Hun, 381, 29 N. Y. Supp. 791, p. 1086.
Townsend B. & C. Co. v. Allen, 62 Kan. 311, 62 Pac. 1008, 84 Am. St. Rep. 388, 52 L. R. A. 323, p. 2577.
Townsend, Marquis of, v. Stangroom, 6 Ves. 328, 333, p. 1513.
Townsend Sav. Bank v. Munson, 47 Conn. 390, p. 2407, 2409.
Townsend's Contract, In re, [1895] 1 Ch. 716, p. 2046.
Townshend v. Frommer, 125 N. Y. 446, 26 N. E. 805, p. 1890, 1895.
Townshend v. Mostyn, 26 Beav. 72, p. 886, 888.
Townshend v. Thompson, 139 N. Y. 159, 34 N. E. 891, p. 2361, 2364.
Townshend, Lord, v. Windham, 2 Ves. Sr. 1, 7, p. 1800, 2163.
Townshend's Peerage Cases, 10 Clark & F. 289, p. 295.
Township of Boomer v. French, 40 Iowa, 601, p. 1648.
Towson v. Moore, 173 U. S. 17, 19 Sup. Ct. 332, p. 1779.
Trabue v. Bankhead, 2 Tenn. Ch. 412, p. 1257.
Tracey v. Sacket, 1 Ohio St. 54, 59 Am. Dec. 610, p. 1729.
Tracey v. Shumate, 22 W. Va. 474, 499, p. 789, 821, 822.
Tracy v. Colby, 55 Cal. 67, p. 1640, 1753, 1754, 2032.
Tracy v. Craig, 55 Cal. 91, p. 1753, 1954, 2032.
Tracy v. Herrick, 25 N. H. 381, 394, p. 527, 528.
Tracy v. Keith, 11 Allen, 214, p. 2188, 2193.
Tracy v. Kelley, 52 Ind. 535, p. 2005, 2030.
Tracy v. Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394, p. 1415, 1452.
Tracy v. Talmage, 14 N. Y. 162, 167, 210, 67 Am. Dec. 132, p. 671, 673, 1713, 1719, 1720, 1721.
Trader v. Jarvis, 23 W. Va. 100, p. 2477.
Trader v. Lowe, 45 Md. 1, p. 2193.
Tradesman Pub. Co. v. Knoxville C. W. Co., 95 Tenn. 634, 32 S. W. 1097, 49 Am. St. Rep. 943, 31 L. R. A. 593, p. 2014.
Tradesman's Bank v. Merritt, 1 Paige, 302, p. 2017.
Trafford v. Boehm, 3 Atk. 440, 444, p. 2071, 2333.
Trafton v. Black, 187 Ill. 36, 58 N. E. 292, p. 1940, 1949, 1974.

Traill v. Baring, 4 De Gex, J. & S. 318, 326, 328, 329, 330, p. 1567, 1568, 1579, 1583, 1584, 1634, 2707, 2730.
Traip v. Gould, 15 Me. 82, p. 321, 326, 532, 551.
Tram Lumber Co. v. Hancock, 70 Tex. 314, 7 S. W. 724, p. 1342.
Traphagen v. Burt, 67 N. Y. 30, p. 2004.
Traphagen v. Hand, 36 N. J. Eq. 384, p. 2501, 2516.
Traphagen v. Irwin, 18 Nebr. 195, 24 N. W. 684, p. 1102, 1133, 1362.
Trapnall v. Brown, 19 Ark. 39, 49, p. 1658, 1659.
Trapnall v. Hill, 31 Ark. 345, p. 2799.
Trash v. Wood, 4 Mylne & C. 324, 328, p. 168, 1848.
Trask v. Green, 9 Mich. 358, p. 2004.
Trask v. Sturgess, 31 Misc. Rep. 195, 63 N. Y. Supp. 1084, p. 1839.
Travelers' Ins. Co. v. Brown, (Ala.) 35 South. 463, p. 755.
Travers v. Blundell, L. R. 6 Ch. Div. 436, p. 1543.
Travers v. Dorr, 60 Minn. 173, 62 N. W. 269, p. 2407, 2408.
Trawick v. Davis, 85 Ala. 342, 5 South. 83, p. 2255.
Treadwell v. Brown, 41 N. H. 12, p. 529, 531.
Treadwell v. Brown, 44 N. H. 551, p. 263, 530.
Treadwell v. Cordis, 5 Gray, 341, 348, 359, p. 535, 538, 2046.
Treadwell v. McKeon, 7 Baxt. 201, p. 2032.
Treadwell v. Torbert, 119 Ala. 279, 24 South. 54, 72 Am. St. Rep. 918, p. 667, 1703, 1712.
Treasurer v. Commercial etc. Co., 23 Cal. 390, p. 2764.
Treat v. Russell, (C. C. A.) 128 Fed. 847, p. 1514.
Treat's Appeal, 30 Conn. 113, p. 1973.
Tredegar, Lord, v. Windus, L. R. 19 Eq. 607, p. 2704.
Tredway v. McDonald, 51 Iowa, 663, 2 N. W. 567, p. 1065, 1088.
Trefts v. King, 18 Pa. St. 157, 160, p. 974, 977, 981, 986.
Trego v. Skinner, 42 Md. 426, p. 2788.
Tregonwell v. Sydenham, 3 Dow. 194, 210, p. 1988.
Trelawny v. Booth, 2 Atk. 307, p. 615.
Tremain's Case, 1 Strange, 168, p. 2617.
Treman v. Allen, 15 Hun, 4, p. 1446.
Tremont Nail Co., Ex parte, 16 Bank. Reg. 448, Fed Cas. No. 14,168, p. 2568.
Trench v. Harrison, 17 Sim. 111, p. 958.
Trenchard v. Wanley, 2 P. Wms. 167, p. 1634.
Trenholm v. Morgan, 28 S. C. 268, 5 S. E. 721, p. 2234, 2246.
Trentman v. Eldridge, 98 Ind. 525, p. 1259, 1345.
Trenton Banking Co. v. Duncan, 86 N. Y. 221, p. 1427.
Trenton Banking Co. v. Sherman, 24 Alb. L. J. 390, p. 1434.
Trenton Bank. Co. v. Woodruff, 2 N. J. Eq. 117, p. 2139.
Trenton Pass. Ry. Co. v. Wilson, (N. J. Eq.) 40 Atl. 597, reversing 55 N. J. Eq. 273, 37 Atl. 476, p. 652.
Trenton v. Pothen, 46 Minn. 298, 24 Am. St. Rep. 225, 49 N. W. 129, p. 1069, 1161.
Trethowan, In re, L. R. 5 Ch. Div. 559, p. 2539.
Trevanion v. Mosse, 1 Vern. 246, p. 1393.
Trevelyan v. Charter, 4 L. J. Ch. 209, p. 1765.
Trevor v. Trevor, 1 P. Wms. 622, p. 1887.
Trevor's Case, 2 P. Wms. 191, p. 2547.
Trexler v. Miller, 6 Ired. Eq. 248, p. 1544, 1635.
Tribette v. Illinois Cent. R. Co., 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, 1 Keener Cas. Eq. Jur. 148, 2 Ames' Cas. Eq. Jur. 74, p. 400, 427.
Tribou v. Tribou, 96 Me. 305, 52 Atl. 795, p. 1663, 1672, 1721, 1782.
Tribune Ass'n v. Sun etc. Ass'n, 7 Hun, 175, p. 2678.
Trice v. Comstock, 115 Fed. 765, p. 662.
Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176, p. 660, 1333, 1764, 1765, 2027.
Trigg v. Hitz, 17 Abb. Pr. 436, p. 2636, 2647.

Trigg v. Read, 5 Humph. 529, 42 Am. Dec. 447, p. 1509.
Trigg v. Vermillion, 113 Mo. 230, 20 S. W. 1047, p. 1101, 1284.
Trigge v. Levallée, 15 Moore P. C. C. 270, 276, p. 1476, 1501, 1509.
Trim v. Brightman, 168 Pa. St. 395, 31 Atl. 1071, p. 1944, 1977.
Trimble v. Boothby, 14 Ohio, 109, 45 Am. Dec. 526, p. 1069, 1082.
Trimble v. James, 40 Ark. 393, 401, p. 2258.
Trimble v. Reid, 19 Ky. L. Rep. 604, 41 S. W. 319, p. 1579.
Trimble v. Reis, 37 Pa. St. 448, p. 2197.
Trimble v. State, 145 Ind. 154, 44 N. E. 260, 57 Am. St. Rep. 163, p. 1446.
Trimleston, Lord, v. Hamill, 1 Ball. & B. 377, 385, p. 2430.
Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623, p. 2360, 2362, 2399.
Trimmer v. Bayne, 7 Ves. 508, 516, p. 902, 910, 911, 933, 937, 947.
Trimmer v. Danby, 25 L. J. Ch. 424, p. 2243.
Trinity House Corp'n v. Burge, 2 Sim. 411, p. 275.
Tripe v. Marcy, 39 N. H. 439, p. 1127, 2350.
Triplett v. Romine's Adm'r, 33 Gratt. 651, p. 2199.
Tripp v. Boardman, 49 Iowa, 410, p. 2662.
Tripp v. Brownell, 12 Cush. 376, p. 2553, 2567.
Tripp v. Cook, 26 Wend. 143, p. 643.
Tripp v. Riley, 15 Barb. 333, p. 2743.
Tripp v. Vincent, 3 Barb. Ch. 613, p. 2468.
Triquet v. Thornton, 13 Ves. 345, p. 2332.
Trist v. Child, 21 Wall. 441, 22 L. ed. 623, p. 1692, 1699, 2568.
Trith v. Roe, 23 Ga. 139, p. 2704.
Tritton v. Foote, 2 Brown Ch. 636, p. 2761.
Tritt's Adm'r v. Colwell's Adm'r, 31 Pa. St. 228, p. 2144.
Troll v. Carter, 15 W. Va. 567, p. 1899, 2034, 2038.
Trompczynski v. Struck, 105 Wis. 437, 81 N. W. 650, p. 1285.
Troost v. Davis, 31 Ind. 34, 39, p. 585, 2430.
Trorlicht v. Weizenecker, 1 Mo. App. 482, p. 2233, 2238, 2242, 2246, 2247.
Trotter v. Blocker, 6 Port. 269, p. 335, 580, 2302.
Trotter v. Erwin, 27 Miss. 772, p. 2501.
Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137, p. 1410, 2404, 2405, 2407, 2413.
Trotter v. Mutual Reserve Fund Life Ass'n, 9 S. Dak. 596, 62 Am. St. Rep. 887, 70 N. W. 843, p. 2288.
Trotter v. Smith, 59 Ill. 240, p. 1769.
Trotter v. Trotter, 77 Ill. 510, p. 2176.
Trough's Estate, 75 Pa. St. 115, p. 1872.
Troup v. Rice, 49 Miss. 248, p. 2276.
Troup v. Wood, 4 Johns. Ch. 228, p. 1692.
Trout v. Lucas, 54 N. J. Eq. 361, 35 Atl. 153, p. 1449.
Troutbeck v. Boughey, L. R. 2 Eq. 534, p. 2143, 2149.
Troutman v. De Boissiere Odd Fellows' Orphans H. & I. S. Ass'n, 66 Kan. 1, 71 Pac. 287, reversing (Kan.) 64 Pac. 33, p. 1935, 1974.
Troup's Case, 29 Beav. 353, p. 2605.
Trow v. Lovett, 122 Mass. 571, p. 540.
Trow v. Shannon, 78 N. Y. 446, p. 1872.
Trowbridge v. Horan, 78 N. Y. 439, p. 2678.
Trower v. Elder, 77 Ill. 452, p. 743.
Trower v. Newcome, 3 Mer. 704, p. 1590, 1591, 1592.
Troy v. Walter, 87 Ala. 233, 6 South. 54, p. 1034, 1049, 1276.
Troy & B. R. R. v. Boston etc. R'y, 86 N. Y. 107, p. 2746.
Troy City Bank v. Wilcox, 24 Wis. 671, p. 1037, 1345.
Troy Wagon Co. v. Hutton, 53 W. Va. 154, 44 S. E. 135, p. 1103.
Truan v. Keiffer, 31 Ala. 136, p. 1444.
Trubee's Trusts, In re, [1892] 3 Ch. 55, p. 1834.
Trucks v. Lindsey, 18 Iowa, 504, p. 2374.
True v. Haley, 24 Me. 297, p. 550.
Truebody v. Jacobson, 2 Cal. 269, p. 2499.
Truesdale v. Ford, 37 Ill. 210, p. 1019, 1021, 1036, 1045, 1142, 1145.

Truitt v. Truitt, 38 Ind. 16, p. 1065, 1075.
Trull v. Bigelow, 16 Mass. 406, 8 Am. Dec. 144, p. 1136, 1346, 1359.
Trull v. Eastman, 3 Met. 121, 123. 37 Am. Dec. 126, p. 1742, 1745, 2472.
Trull v. Skinner, 17 Pick. 213, p. 2371.
Trull v. Trull, 13 Allen, 407, p. 2080.
Trulock v. Robey, 15 Sim. 265, 2 Phill. Ch. 395, p. 2428.
Truluck v. Peeples, 3 Ga. 446, p. 1345.
Truly v. Wanzer, 5 How. 141, p. 2703, 2708.
Truman v. Redgrove, L. R. 18 Ch. Div. 547, p. 2658, 2677.
Trumbo v. Fulk, (Va.) 48 S. E. 525, p. 1984, 1992, 1997, 1998.
Trumbull v. Hewitt, 65 Conn. 60, 31 Atl. 492, p. 1624.
Trumpower v. Marcy, 92 Mich. 529, 52 N. W. 999, p. 1046.
Trunkey v. Van Sant, 176 N. Y. 535, 68 N. E. 946, p. 1909.
Truscott v. King, 6 Barb. 346, 6 N. Y. 147, p. 1095, 2387.
Trusdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391, p. 1542.
Trust v. Delaplaine, 3 E. D. Smith, 219, p. 1693.
Trustees of Amherst College v. Ritch, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305, p. 2037.
Trustees of Brookhaven v. Smith, 118 N. Y. 634, 23 N. E. 1002, 7 L. R. A. 755, p. 1441.
Trustees of Columbia College v. Lynch, 70 N. Y. 440, 449–452, 26 Am. Rep. 615, p. 767, 1200.
Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365, p. 2596, 2673.
Trustees of Cory Univ. Soc. v. Beatty, 28 N. J. Eq. 570, p. 1933, 1939, 1960, 1975.
Trustees of Davidson College v. Chambers's Ex'rs, 3 Jones Eq. 253, p. 1971.
Trustees of Huntington v. Nicoll, 3 Johns. 566, 589, 590, 591, 595, 601, 602, p. 364, 385, 452, 2704.
Trustees of Internal Imp. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157, p. 2101.
Trustees of Jefferson College v. Prentiss, 29 Miss. 46, p. 2393.
Trustees of Poor School v. Jennings, 40 S. C. 168, 18 S. E. 257, 891, 42 Am. St. Rep. 855, p. 1105, 1129.
Trustees of Schools v. Wright, 11 Ill. 603, p. 2499.
Trustees of the South Newmarket Methodist S. v. Peaslee, 15 N. H. 317, p. 1834.
Trustees of Union College v. Wheeler, 61 N. Y. 88, 104–106, 113, 114, p. 1239, 1241, 1249, 1256.
Trustees of Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80, p. 399, 1200, 2687.
Trusts of the Abbott Fund, In re, [1900] 2 Ch. 326, p. 1987.
Trutch v. Lamprell, 20 Beav. 116, p. 2094.
Truth Lodge No. 213, A. F. & A. M. v. Barton, 119 Iowa. 230, 97 Am. St. Rep. 303, 93 N. W. 106, p. 1039.
Tryce v. Dittus, 199 Ill. 189, 65 N. E. 220, p. 1563.
Tryon v. Farnsworth, 30 Wis. 577, p. 2293.
Tryon v. Huntoon, 67 Cal. 325, 7 Pac. 741, p. 2000.
Tubbs v. Broadwood, 2 Russ. & M. 487, p. 953.
Tuck v. Calvert, 33 Md. 209, p. 2533.
Tuck v. Downing, 76 Ill. 71, p. 1566.
Tucke v. Bucholz, 43 Iowa, 415, p. 1775.
Tucker, In re, [1894] 1 Ch. 724, p. 2071.
Tucker, In re, [1893] 2 Ch. 323, p. 2486, 2488.
Tucker v. Andrews, 13 Me. 124, 128, p. 646, 2166.
Tucker v. Boswell, 5 Beav. 607, p. 2321.
Tucker v. Buffum, 16 Pick. 46, p. 2431.
Tucker v. Burrow, 2 Hem. & M. 515, 524, p. 1997, 1998, 2001.
Tucker v. Conwell, 67 Ill. 552, p. 2757.
Tucker v. Crowley, 127 Mass. 400, p. 1403.
Tucker v. Filton, 55 N. H. 223, p. 1160.
Tucker v. Grundy, 83 Ky. 540, p. 2109.
Tucker v. Hadley, 52 Miss. 414, p. 2501, 2516, 2518.
Tucker v. Henzill, 4 Ir. Ch. 513, p. 1154.
Tucker v. Howard, 122 Mass. 529, p. 541, 542.

Tucker v. Jackson, 60 N. H. 214, p. 2435.
Tucker v. Kenniston, 47 N. H. 267, 93 Am. Dec. 425, p. 2757.
Tucker v. McCoy, 3 Col. 284, p. 2722.
Tucker v. McDonald, 105 Mass. 423, p. 540.
Tucker v. Madden, 44 Me. 206, 215, 216, p. 548, 553, 1516.
Tucker v. N. H. Tr. Co., 69 N. H. 187, 44 Atl. 927, p. 2022.
Tucker v. Phipps, 3 Atk. 359, 360, p. 1654, 2033.
Tucker v. Seamen's Aid Soc., 7 Met. 188, 195, p. 1961, 1979.
Tucker v. State, 72 Ind. 243, p. 2077.
Tucker v. Tilton, 55 N. H. 223, p. 1358.
Tucker's Appeal, 75 Pa. St. 354, p. 1830, 2141.
Tuckey v. Henderson, 33 Beav. 174, p. 889.
Tudor v. Anson, 2 Ves. Sr. 582, p. 1468.
Tudor v. James, 53 Ga. 302, p. 2265.
Tuer v. Turner, 20 Beav. 560, p. 2172, 2331.
Tufnell v. Constable, 8 Sim. 69, p. 634.
Tufts v. Little, 56 Ga. 139, p. 2659.
Tufts v. Tapley, 129 Mass. 380, p. 2373, 2374.
Tuggle v. Berkeley, 101 Va. 83, 43 S. E. 199, p. 2380.
Tuohy v. Martin, 2 McAr. 572, p. 2492.
Tulare Co. Bank v. Madden, 109 Cal. 312, 41 Pac. 1092, p. 2405, 2414.
Tulk v. Moxhay, 11 Beav. 571, 2 Phill. Ch. 774, 777, p. 1199, 2594.
Tullett v. Armstrong, 4 Mylne & C. 377, 392, 1 Beav. 1, 21, 22, p. 1847, 2140, 2141, 2156, 2159, 2160, 2161.
Tullis v. Jacson, [1892] 3 Ch. 441, p. 1652.
Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102, p. 2383.
Tunison v. Chamblin, 88 Ill. 378, 390, p. 1023, 1042, 1045, 1145.
Tunstall v. Boothby, 10 Sim. 542, p. 2554.
Tunstall v. Trappes, 3 Sim. 286, 301, 305, p. 1152, 1357.
Tunstall's Will, In re, 4 De Gex & S. 421, p. 2109.
Tuolumne W. Co. v. Chapman, 8 Cal. 392, p. 2685, 2686.
Tupple v. Viers, 14 Iowa, 515, p. 2499.
Turk v. Funk, 68 Mo. 18, 30 Am. Rep. 771, p. 1283.
Turk v. Skiles, 45 W. Va. 82, 30 S. E. 234, p. 2525.
Turman v. Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35, p. 1031, 1032, 1099, 1117.
Turman v. Sanford, 69 Ark. 95, 61 S. W. 167, p. 1133.
Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135, p. 90, 164, 251.
Turnbull v. Pomeroy, 140 Mass. 117, 3 N. E. 15, p. 2099.
Turner v. Adams, 46 Mo. 95, p. 2790.
Turner v. Babb, 60 Mo. 342, p. 1064.
Turner v. Buck, 22 Viner's Abridgement, 21, pl. 5, p. 2054.
Turner v. City of Mobile, 135 Ala. 73, 33 South. 133, 140, 141, 142, 143, p. 357, 360, 366, 374, 441, 452, 454.
Turner v. Cochran, 94 Tex. 480, 61 S. W. 923, p. 1103, 1355, 1356, 2374.
Turner v. Coffin, 12 Allen, 401, p. 1440, 1562.
Turner v. Collins, L. R. 7 Ch. 329, p. 1450, 1738, 1751, 1778.
Turner v. Corney, 5 Beav. 515, 517, p. 2059.
Turner v. Crebill, 1 Ohio, 372, p. 1069.
Turner v. Davis, 41 Ark. 270, p. 2315.
Turner v. Dawson, 80 Va. 841, p. 2320.
Turner v. Dickerson, 9 N. J. Eq. 140, p. 245, 260, 262.
Turner v. Estabrook, 129 Mass. 425, 37 Am. Rep. 371, p. 2232, 2237, 2240, 2242, 2248.
Turner v. Evans, 2 De Gex, M. & G. 740, p. 2675.
Turner v. Farley, *supra*, p. 1915.
Turner v. Flenniken, 164 Pa. St. 469, 30 Atl. 486, 35 Wkly. Notes Cas. 366, 44 Am. St. Rep. 624, p. 2454, 2455.
Turner v. Hamilton, 88 Fed. 467, 473, p. 496.
Turner v. Harvey, 1 Jacob, 169, 178, 179, p. 1565, 1611.
Turner v. Horner, 29 Ark. 440, p. 2498.
Turner v. Hot Springs Nat. Bank, (S. Dak.) 101 N. W. 348, p. 2570.
Turner v. Houpt, 53 N. J. Eq. (8 Dick.) 526, 33 Atl. 28, 42, p. 1061, 1063, 1073, 1074, 1600.

Turner v. Kerr, 44 Mo. 429, p. 2373, 2377.
Turner v. Killian, 12 Nebr. 580, 12 N. W. 101, p. 1328.
Turner v. Lassiter, 27 Ark. 662, p. 2535.
Turner v. Letts, 20 Beav. 185, 191, p. 2763.
Turner v. Letts, 7 De Gex, M. & G. 243, p. 2539, 2728.
Turner v. Marriott, L. R. 3 Eq. 744, p. 2536.
Turner v. Morgan, 8 Ves. 143, p. 2741, 2742.
Turner v. Newman, (Ky.) 39 S. W. 504, p. 354.
Turner v. Ogden, 1 Cox, 316, p. 1939.
Turner v. Overall, 172 Mo. 271, 72 S. W. 644, p. 1718, 1735.
Turner v. Pierce, 34 Wis. 658, 665, p. 94, 355, 588.
Turner v. Robinson, 10 Ir. Ch. 121, 510, p. 2689.
Turner v. Rogers, 49 Ark. 51, 4 S. W. 193, p. 2253, 2258, 2270.
Turner v. Shaw, 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319, p. 2144.
Turner v. Smith, [1901] 1 Ch. 213, p. 1297.
Turner v. Turner, 57 Miss. 775, p. 2492.
Turner v. Turner, 44 Mo. 535, p. 1739, 1751, 1752, 1781, 2729.
Turner v. Turner, 80 Va. 379, p. 1706.
Turner v. Watkins, 31 Ark. 429, p. 1859, 1860.
Turner v. Wilkinson, 72 Ala. 361, p. 2373.
Turner's Case, 1 Vern. 7, and notes, p. 646.
Turpin v. Sudduth, 53 S. C. 295, 31 S. E. 245, 306, p. 1105.
Turpin v. Thompson, 2 Met. (Ky.) 420, p. 2236.
Turquand v. Marshall, L. R. 4 Ch. 376, 385, p. 2064, 2117.
Turquand v. Marshall, L. R. 6 Eq. 112, p. 2056, 2090.
Turton v. Barber, L. R. 17 Eq. 329, p. 281.
Turton v. Benson, 1 P. Wms. 497, 2 Vern. 764, p. 1226, 1228, 1229, 1679.
Turton v. Turton, 6 Md. 375, p. 2144.
Tuscaloosa Mfg. Co. v. Cox, 68 Ala. 71, p. 2121.
Tusch v. German Sav. Bk., 20 Misc. Rep. 571, 46 N. Y. Supp. 422, p. 1877.
Tussaud's Estate, In re, L. R. 9 Ch. Div. 363, 380, p. 869, 895, 917, 920.
Tuteur v. Chase, 66 Miss. 476, 14 Am St. Rep. 577, 6 South. 241, 4 L. R. A. 832, p. 983.
Tuthill v. Babcock, 2 Wood. & M. 298, p. 1588.
Tuttle v. Gilmore, 36 N. J. Eq. 617, p. 2056, 2066, 2068, 2071, 2077, 2078, 2087, 2090.
Tuttle v. Jackson, 6 Wend. 213, 227, 21 Am. Dec. 306, p. 1044, 1138, 1142.
Tuttle v. Moore, 16 Minn. 123, p. 2601, 2763.
Tuttle v. Robinson, 33 N. H. 104, p. 2100.
Tuttle v. Tuttle, 41 Mich. 211, 2 N. W. 21, p. 1641.
Twaddell's Appeal, 5 Pa. St. 15, p. 2077.
Tweddell v. Tweddell, Turn. & R. 1, 13, p. 1743, 1776.
Tweedale v. Tweedale, 23 Beav. 341, p. 1159.
Twelves v. Williams, 3 Whart. 485, 31 Am. Dec. 542, p. 1331.
Tweto v. Burau, (Minn.) 97 N. W. 128, p. 1114.
Twin City Power Co. v. Barrett, 126 Fed. 302, p. 353.
Twining v. Morrice, 2 Brown Ch. 326, p. 1513, 2770.
Twining v. Powell, 2 Coll. 262, p. 900, 903.
Twin Lick Oil Co. v. Marbury, 91 U. S. 587, p. 2084.
Twisden v. Twisden, 9 Ves. 413, p. 921
Twiss v. George, 33 Mich. 253, p. 2782
Twitchell v. Bridge, 42 Vt. 68, p. 1582, 1583.
Twitchell v. McMurtrie, 77 Pa. St. 383, p. 1232.
Twitty v. Logan, 80 N. C. 69, p. 2653, 2657.
Two Rivers Mfg. Co. v. Beyer, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131, p. 1324.
Twohy Mercantile Co. v. Melbye, 78 Minn. 357, 81 N. W. 20, 83 Minn. 394, 86 N. W. 411, p. 2020, 2021, 2030.
Twombly v. Cassidy, 82 N. Y. 155, p. 2424, 2426, 2437.

Twopenny v. Peyton, 10 Sim. 487, p. 1841, 1842.
Twort v. Twort, 16 Ves. 128, p. 2681, 2693.
Twycross v. Moore, 13 I. R. Eq. 250, p. 1154.
Twynam v. Hudson, 4 De Gex, F. & J. 462, p. 2470.
Twyne's Case, 3 Coke, 80, 1 Smith's Lead. Cas., 7th Am. ed., 33, p. 1186, 1792, 1793.
Tydings v. Pitcher, 82 Mo. 379, p. 1055.
Tygh v. Dolan, 95 Ala. 269, 10 South. 837, p. 2258.
Tylee v. Webb, 6 Beav. 552, 14 Beav. 14, p. 1166.
Tyler v. Abergh, 65 Md. 18, 3 Atl. 904, p. 1332.
Tyler v. Black, 13 How. 230, p. 1567.
Tyler v. Gardiner, 35 N. Y. 559, p. 1737.
Tyler v. Gould, 48 N. Y. 682, p. 2569.
Tyler v. Granger, 48 Cal. 259, p. 1895.
Tyler v. Hamersley, 44 Conn. 419, 26 Am. Rep. 479, p. 2702.
Tyler v. Herring, 67 Miss. 169, 19 Am. St. Rep. 263, 6 South. 840, p. 2059.
Tyler v. Lake, 2 Russ. & M. 183, 188, p. 2144, 2145.
Tyler v. Lake, 4 Sim. 351, 358, p. 1400.
Tyler v. McCardle, 9 Smedes & M. 230, p. 2775.
Tyler v. Sanborn, 128 Ill. 136, 15 Am. St. Rep. 97, 21 N. E. 19[illegible], 4 L. R. A. 218, p. 1761.
Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, p. 1642.
Tyler v. Yates, L. R. 11 Eq. 265, 6 Ch. 665, p. 1742, 1743, 1744.
Tyler Car & Lumber Co. v. Wettermark, 12 Tex. Civ. App. 399, 34 S. W. 807, p. 1230.
Tyner v. Fenner, 4 Lea, 469, p. 2800.
Tynes v. Grimstead, 1 Tenn. Ch. 508, p. 1761.
Tynt v. Tynt, 2 P. Wms. 542, 543, p. 2164.
Tyron v. Munson, 77 Pa. St. 250, p. 2352.
Tyrrell v. Bank of London, 10 H. L. Cas. 26, 39, 44, p. 1760, 1762, 1764, 1771.
Tyrrell v. Hope, 2 Atk. 558, 561, 562, p. 634, 2145.
Tyrrel's Case, Dyer, 155a, 1 Coke, 136b, 137, p. 1825.
Tyrwhitt v. Tyrwhitt, 32 Beav. 244, p. 1402, 1403, 1404.
Tysen v. Wabash R'y Co., 15 Fed. 763, 11 Biss. 510, p. 2521.
Tyson v. Brown, 64 Ala. 244, p. 2754, 2756.
Tyson v. Fairclough, 2 Sim. & St. 142, p. 2657.
Tyson v. McGuineas, 25 Wis. 656, p. 2552.
Tyson v. Passmore, 2 Pa. St. 122, 44 Am. Dec. 181, p. 1494, 1528, 1529, 1533, 1577.
Tyson v. Tyson, 31 Md. 134, p. 1494.
Tyson v. Tyson, 37 Md. 583, p. 1751.
Tyson v. Tyson, 54 Md. 35, p. 2147.
Tysson v. Benyon, 2 Brown Ch. 5, p. 856.
Tyus v. Rust, 37 Ga. 574, 95 Am. Dec. 365, p. 2643, 2644, 2645, 2646, 2649.

U.

Udell v. Atherton, 7 Hurl. & N. 172, p. 1625.
Uhl v. May, 5 Nebr. 157, p. 1147, 2757.
Uhler v. Hutchinson, 23 Pa. St. 110, p. 1272, 1279.
Uhlfelder v. Levy, 9 Cal. 607, 614, 615, p. 458, 592, 2716, 2719.
Uhrig v. Horstman, 8 Bush, 172, p. 2192.
Ukiah Bank v. Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118, p. 2312.
Umfreville v. Johnson, L. R. 10 Ch. 580, p. 2687.
Underhill, In re, 35 App. Div. 434, 54 N. Y. Supp. 967, p. 1835.
Underhill v. Horwood, 10 Ves. 209, 219, 225, p. 1584, 1666, 1667, 1734.
Underhill v. Van Cortland, 2 Johns. Ch. 339, 17 Johns. 405, p. 1549.
Underwood v. Boston etc. Bank, 141 Mass. 305, 4 N. E. 822, p. 1851.
Underwood v. Campbell, 14 N. H. 393, p. 528.
Underwood v. Crutcher, 7 J. J. Marsh. 529, p. 2749.
Underwood v. Curtis, 127 N. Y. 523, 28 N. E. 585, p. 2312.

Underwood v. Deckard, (Ind. App.) 70 N. E. 383, p. 1438.
Underwood v. Hitchcock, 1 Ves. Sr. 279, p. 2767.
Underwood v. Lord Courtown, 2 Schoales & L. 40, p. 1108.
Underwood v. Ogden, 6 B. Mon. 606, p. 1358.
Underwood v. Stevens, 1 Mer. 712, 717, p. 2087.
Underwood v. Sutcliffe, 77 N. Y. 58, p. 2004.
Unger v. Leiter, 32 Ohio St. 210, p. 2443.
Unger v. Smith, 44 Mich. 22, p. 2412.
Union & Planters' Bank v. Memphis, 111 Fed. 561, 49 C. C. A. 455, p. 386, 452.
Union Bank v. Barker, 3 Barb. Ch. 358, p. 257, 274.
Union Bank v. Bell, 14 Ohio St. 200, p. 649, 1704.
Union Bank v. Geary, 5 Pet. 99, p. 290.
Union Bk. of Austria Limited v. Murray-Aynsley, [1898] A. C. 693, p. 2018.
Union Bank of London v. Kent, 39 Ch. Div. 238, p. 1215.
Union Brick etc. Co. v. Lorillard, 44 N. J. Eq. 1, 13 Atl. 613, p. 2153.
Union Canal Co. v. Young, 1 Whart. 410, 431, 432, 30 Am. Dec. 212, p. 1107, 1202, 1315, 1324, 1334, 1358.
Union Cent. Life Ins. Co. v. Dodds, 155 Ind. 365, 58 N. E. 258, p. 1277.
Union Cent. Life Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263, p. 346.
Union Cent. Life Ins. Co. v. Smith, 105 Mich. 353, 63 N. W. 438, p. 1158.
Union Dime Sav. Inst. v. Clark, 59 How. Pr. 342, p. 1707.
Union Life Ins. Co. v. Riggs, 123 Fed. 312, p. 1639.
Union Meth. Epis. Ch. v. Wilkinson, 36 N. J. Eq. 141, p. 1944, 1956, 1975.
Union Mill & M. Co. v. Dangberg, 81 Fed. 73, 88, 119, p. 127, 423.
Union Mortgage, B. & Trust Co. v. Peters, 72 Miss. 1058, 18 South. 497, 30 L. R. A. 829, p. 2425.
Union Mut. Ins. Co. v. Campbell, 95 Ill. 267, 35 Am. Rep. 166, p. 1903.
Union Mutual Life Ins. Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. ed. 118, p. 2408.
Union Nat. Bank v. German Ins. Co., 71 Fed. 473, 18 C. C. A. 203, 34 U. S. App. 397, p. 1163.
Union Nat. Bk. v. Goetz, 138 Ill. 127, 32 Am. St. Rep. 119, 27 N. E. 907, p. 2022.
Union Nat. Bank v. Hines, 177 Ill. 417, 53 N. E. 83, p. 633.
Union Nat. Bank v. Lane, 177 Ill. 171, 69 Am. St. Rep. 216, 52 N. E. 361, p. 1079.
Union Nat. Bank v. Manhattan Life Ins. Co., 52 La. Ann. 36, 26 South. 800, p. 1158.
Union Nat. Bank v. Oium, 3 N. Dak. 193, 54 N. W. 1034, 44 Am. St. Rep. 533, p. 1328.
Union Pac. R. R. Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, p. 418.
Union Pacific R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, p. 118.
Union Pac. R. R. v. Durant, 3 Dill. 343, Fed. Cas. No. 14,377, p. 2121, 2129.
Union Pacific R. R. v. Lincoln Co., 3 Dill. 300, p. 2678.
Union Pacific R. R. Co. v. McAlpine, 129 U. S. 305, 314, 9 Sup. Ct. Rep. 286, 32 L. ed. 673, p. 2017.
Union Pac. R. R. Co. v. McShane, 3 Dill. 303, Fed. Cas. No. 14,382, p. 418.
Union Pac. R. Co. v. Meier, 28 Fed. 9, p. 504.
Union Pac. R. Co. v. United States, 59 Fed. 813, 19 U. S. App. 531, 8 C. C. A. 282, p. 494.
Union Pac. R'y v. McAlpine, 129 U. S. 309, 314, 9 Sup. Ct. 286, p. 1198.
Union Passenger R'y Co. v. Mayor, 71 Md. 238, 239, 17 Atl: 933, p. 250, 466.
Union Slate Co. v. Tilton, 69 Me. 244, p. 1753, 2086.
Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct 118, p. 239.

Union Trust Co. v. Southern I. N. & I. Co., 130 U. S. 565, 570, 9 Sup. Ct. 606, p. 1065.
Union Tr. Co. v. St. Louis etc. R. R., 4 Dill. 114, p. 2660.
Union Trust Co. v. Walker, 107 U. S. 596, 2 Sup. Ct. 299, 27 L. ed. 490, p. 2418.
United Nat. Bk. v. Weatherby, 70 App. Div. 279, 75 N. Y. Supp. 3, p. 2020.
United Security Life Ins. & Tr. Co. v. Central Nat. Bank, 185 Pa. St. 586, 40 Atl. 97, 42 Wkly. Notes Cas. 145, p. 1175.
United States v. American Bell Telephone Co., 32 Fed. 591, 605, 606, p. 513.
United States v. Athens Armory, 35 Ga. 344, p. 2358.
United States v. California & O. Land Co., 49 Fed. 496, 503, 504, 505, 506, 7 U. S. App. 128, 1 C. C. A. 330, affirmed, 148 U. S. 31, 46, 47, 13 Sup. Ct. 458, p. 1322, 1337, 1340, 1341, 1342, 1343.
United States v. Detroit Timber & L. Co., (C. C. A.) 131 Fed. 668, 678, p. 1313, 1370.
United States v. Devereux, 90 Fed. 182, 32 C. C. A. 564, p. 1273.
United States v. Duncan, 4 McLean, 99, p. 848.
U. S. v. Flournoy etc. Co., 69 Fed. 886, p. 233.
United States v. Grossmayer, 9 Wall. 72, p. 1696.
United States v. Guglard, 79 Fed. 21, p. 340.
United States v. Hooe, 3 Cranch, 73, 2 L. ed. 370, p. 2382, 2387.
United States v. Howland, 4 Wheat. 108, 115, 4 L. ed. 526, p. 495, 497, 499.
United States v. Huckabee, 16 Wall. 414, p. 1696.
United States v. Hughes, 12 Blatch. 553, p. 292, 293.
United States v. Ingate, 48 Fed. 251, p. 505.
United States v. Lapene, 17 Wall. 602, p. 1696.
United States v. McRae, L. R. 3 Ch. 79, p. 257, 274.
United States v. McRae, L. R. 4 Eq. 327, p. 257, 766.
United States v. Meyers, 2 Brock. 516, p. 514, 515, 517.
United States v. Minor, 29 Fed. 134, p. 1042.
United States v. Monroe, 5 Mason, 572, p. 1516.
United States v. National Lead Co., 75 Fed. 94, p. 274.
United States v. Ouachita Cotton, 6 Wall. 521, p. 1696.
United States v. Parrott, 1 McAll. 288, Fed. Cas. No. 15,998, p. 499.
United States v. Price, 9 How. 83, 92, p. 684, 2608, 2609.
United States v. Saline Bank, 1 Pet. 100, 104, p. 257, 274.
United States v. Schwalby, 8 Tex. Civ. App. 679, 29 S. W. 90, 87 Tex. 604, 30 S. W. 435, p. 1155.
United States v. Southern Pacific R. Co., 117 Fed. 544, 554, p. 392, 445.
United States v. Swan, 65 Fed. 647, 652, 31 U. S. App. 112, p. 501.
United States v. Throckmorton, 98 U. S. 61, p. 1642, 1652, 2727, 2730.
United States v. Union Pac. R. Co., 160 U. S. 1, 16 Sup. Ct. 190, p. 224, 350.
United States v. Vaughan, 3 Binn. 394, 5 Am. Dec. 375, p. 1212, 1222.
United States v. Vietor, 16 Abb. Pr. 153, p. 2644, 2645.
United States v. Wagner, L. R. 2 Ch. 582, L. R. 3 Eq. 724, p. 244, 255, 261, 266.
United States v. Wilson, 118 U. S. 86, 6 Sup. Ct. 993, p. 503.
United States Bank v. Bank of Georgia 10 Wheat. 333, 343, p. 1477, 1511.
United States Bank v. Burke, 4 Blackf. 141, p. 1079.
U. S. Bank v. Huth, 4 B. Mon. 423, p. 2562.
United States Ins. Co. v. Central Nat. Bank, 7 Ill. App. 426, p. 1640.
U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381, 385, p. 1111, 1142, 1146, 1164, 1379.
U. S. Life Ins. Co. v. Cable, 98 Fed. 761, 39 C. C. A. 756, p. 498, 1639.
U. S. Min. Co. v. Lawson, 115 Fed. 1005, p. 337, 503, 504.
U. S. Mortgage Co. v. Sperry, 138 U. S. 313, 11 Sup. Ct. 321, p. 723.

United States Shipbuilding Co. v. Conklin, 126 Fed. 132, (C. C. A.) p. 500.
United States Trust Co. v. Wiley, 41 Barb. 477, p. 2645.
Unity etc. Ass'n, Ex parte, 3 De Gex & S. 118, p. 1448.
Unity Bank, Ex parte, 3 De Gex & J. 63, p. 1725.
University v. Cambreling, 6 Yerg. 79, 84, p. 571.
University of London v. Yarrow, 1 De Gex & J. 72, p. 1942.
University of Penn. Appeal, 97 Pa. St. 187, p. 2225, 2226.
Unott v. Wilkes, Amb. 430, 2 Eden, 187, p. 807.
Unruh v. Lukens, 166 Pa. St. 324, 31 Atl. 110, p. 1780.
Upchurch v. Anderson, (Tenn. Ch. App.) 52 S. W. 917, p. 660.
Upham's Estate, In re, 127 Cal. 90, 59 Pac. 315, p. 1942, 1955, 1959, 1972.
Upland Land Co. v. Ginn, 144 Ind. 434, 43 N. E. 443, 55 Am. St. Rep. 181, p. 2499, 2512, 2521.
Upman v. Elkau, L. R. 7 Ch. 130, p. 2690.
Upperton v. Nickolson, 6 Ch. 436, 10 Eq. 228, p. 1585.
Uppington v. Bullen, 2 Dru. & War. 184, p. 625, 1673, 1674, 1769, 1772, 1808, 2006.
Upshaw v. Gibson, 53 Miss. 341, p. 1446, 1448.
Upshaw v. Hargrove, 6 Smedes & M. 286, 292, p. 1323, 1327, 2501.
Upshaw v. Upshaw, 2 Hen. & M. 381, 390, 3 Am. Dec. 632, p. 848.
Upton v. Betts, 59 Nebr. 724, 82 N. W. 19, p. 1390, 1391.
Upton v. Englehart, 3 Dill. 496, p. 1561.
Upton v. Hugos, 7 S. Dak. 476, 64 N. W. 523, p. 1265.
Upton v. Moore, 44 Vt. 552, p. 1224.
Upton v. Prince, Cas. t. Talb. 71, p. 907.
Upton v. Tribilcock, 91 U. S. 45, p. 1560.
Urann v. Coates, 109 Mass. 581, p. 1901.
Urann v. Coates, 117 Mass. 41, p. 2100.
Urch v. Walker, 3 Mylne & C. 702, p. 1904, 2045.
Ure v. Ure, 185 Ill. 216, 56 N. E. 1087, p. 1824.
Ure v. Hirsch, 123 Fed. 568, p. 1695.
Urmey's Ex'rs v. Wooden, 1 Ohio St. 160, 59 Am. Dec. 615, p. 1954, 1976, 2195.
Urmston v. Pate, 3 Ves. 235, p. 1510.
Urquhart v. Leverett, 69 Ga. 92, p. 982.
Usticke v. Peters, 4 Kay & J. 437, p. 789, 811, 812.
Utica Ins. Co. v. Bloodgood, 4 Wend. 652, p. 1721.
Utica Ins. Co. v. Cadwell, 3 Wend. 296, p. 1721.
Utica Ins. Co. v. Lynch, 11 Paige, 520, p. 2082.
Utica Ins. Co. v. Scott, 19 Johns. 1, p. 1721.
Utley v. Dunkelberger, 86 Iowa, 469, 53 N. W. 408, p. 1263.
Uzzell v. Mack, 4 Humph. 319, 40 Am. Dec. 648, p. 2502.

V.

Vachell v. Roberts, 32 Beav. 140, 142, p. 2322.
Vail v. Drexel, 9 Ill. App. 439, p. 2529, 2530, 2535.
Vail v. Foster, 4 N. Y. 312, p. 2514.
Vail v. Meyer, 71 Ind. 159, p. 2192.
Vail v. Nelson, 4 Rand. 478, p. 2775.
Vail v. Vail, 49 Conn. 52, p. 144.
Vail v. Vail, 4 Paige, 317, 328, p. 1896.
Vail's Appeal, 37 Conn. 185, p. 1900.
Vale v. Oppert, L. R. 10 Ch. 340, 342, p. 283, 287.
Valentine v. Austin, 124 N. Y. 400, 26 N. E. 973, p. 1069, 1086.
Valentine v. Havener, 20 Mo. 133, p. 1101, 1271, 1279.
Valentine v. Lunt, 115 N. Y. 496, 22 N. E. 209, p. 1344, 1345, 1384.
Valentine v. Richards, 126 N. Y. 272, 27 N. E. 255, p. 354.
Valentine v. Seiss, 79 Md. 187, 28 Atl. 892, p. 1268.
Valentine v. Stewart, 15 Cal. 387, 404, 405, p. 1701.
Valletort Sanitary Steam Laundry Co., Ltd., In re, [1903] 2 Ch. 654, p. 1059, 1196, 1296.

Vallette v. Bennett, 69 Ill. 632, p. 2049, 2347.
Vallette v. Tedens, 122 Ill. 607, 3 Am. St. Rep. 502, 14 N. E. 52, p. 1771, 1773, 2032.
Van v. Barnett, 19 Ves. 102, 109, p. 2309, 2328, 2331, 2333.
Van v. Corpe, 3 Mylne & K. 269, 277, p. 1053, 1599.
Van Akin v. Dunn, 117 Mich. 421, 75 N. W. 938, p. 1230.
Van Aken v. Gleason, 34 Mich. 477, p. 1136, 1262.
Van Alst v. Hunter, 5 Johns. Ch. 148, p. 1635.
Van Amee v. Jackson, 35 Vt. 173, 177, p. 1926, 1929.
Van Amringe v. Morton, 4 Whart. 382, 34 Am. Dec. 517, p. 1184.
Van Arsdale v. Drake, 2 Barb. 599, p. 2740.
Van Arsdale v. Van Arsdale, 26 N. J. L. 404, 417, p. 820, 827.
Vanarsdalen v. Whitaker, 10 Phila. 153, p. 2702.
Van Auken v. Dammeir, 27 Oreg. 150, 40 Pac. 89, p. 357, 373.
Van Beck v. Milbrath, 118 Wis. 42, 94 N. W. 657, p. 1450.
Van Bergen v. Van Bergen, 2 Johns. Ch. 272, 3 Johns. Ch. 282, 8 Am. Dec. 511, p. 2686.
Van Beuren v. Dash, 30 N. Y. 393, p. 2230.
Van Bibber v. Reese, 71 Md. 608, 18 Atl. 892, 6 L. R. A. 332, p. 1373.
Van Bokkelen v. Taylor, 62 N. Y. 105, p. 1791.
Van Boskerck v. Herrick, 65 Barb. 250, p. 2107, 2108.
Van Buren v. Degges, 52 U. S. (11 How.) 461, p. 730.
Van Buren v. Olmstead, 5 Paige, 9, p. 2428.
Van Burkleo v. Southwestern Mfg. Co., (Tex. Civ. App.) 39 S. W. 1085, p. 1227, 1299, 1305.
Van Buskirk v. Hartford etc. Ins. Co., 14 Conn. 141, 144, 36 Am. Dec. 473, p. 1212.
Van Buskirk v. Roy, 8 How. Pr. 425, p. 2647.
Van Buskirk v. Van Buskirk, 148 Ill. 9, 35 N. E. 383, p. 1991, 1999, 2000, 2042.
Van Campen v. Knight, 63 Barb. 205, p. 2775, 2776, 2778.
Vance, Estate of, 141 Pa. St. 201, 12 L. R. A. 227, 33 Am. St. Rep. 267, 21 Atl. 643, p. 782.
Vance v. Andrews, 2 Barb. Ch. 370, p. 324.
Vance v. Campbell's Heirs, 1 Dana, 229, p. 1684.
Vance v. Davis, 118 Wis. 548, 95 N. W. 939, p. 1779.
Vance v. Lincoln, 38 Cal. 586, p. 2381.
Vance v. McNairy, 3 Yerg. 176, 24 Am. Dec. 553, p. 1102.
Vance v. Nogle, 70 Pa. St. 176, 179, p. 2139.
Vance v. Vance, 1 Beav. 605, p. 1997.
Vance v. Wesley, 85 Fed. 157, 29 C. C. A. 63, p. 1088.
Vance's Heirs v. Johnson, 10 Humphr. 214, p. 2353.
Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553, p. 1335.
Vancleave v. Wilson, 73 Ala. 387, p. 1735.
Van Cloostere v. Logan, 149 Ill. 588, 36 N. E. 946, p. 1203.
Van Cortlandt v. Underhill, 2 Johns. Ch. 339, 17 Johns. 405, p. 1653.
Van Cott v. Prentice, 104 N. Y. 52, 10 N. E. 257, p. 1873.
Vandemark v. Schoonmaker, 9 Hun, 16, p. 2681.
Vandenberg v. Palmer, 4 Kay & J. 204, p. 1879.
Vandercook v. Baker, 48 Iowa, 199, p. 2417.
Vandercook v. Cohoes Sav. Inst., 5 Hun, 641, p. 1639.
Vandergucht v. DeBlaquiere, 5 Mylne & C. 229, p. 2176, 2185.
Vanderhaize v. Hugues, 13 N. J. Eq. 244, 410, 411, p. 2369, 2370, 2431.
Vanderheyden v. Mallory, 1 N. Y. 452, p. 2196.
Vanderheyden v. Young, 11 Johns. 150, 157, p. 2066.
Vanderkemp v. Shelton, 11 Paige, 28, p. 1299, 1402, 2401.
Vandermark v. Vandermark, 55 How. Pr. 408, p. 2237, 2240, 2243, 2247.
Vanderpool v. Brake, 28 Ind. 130, p. 1562.
Van Deusen v. Sweet, 51 N. Y. 378, p. 1444.

Van Diviere v. Mitchell, 45 S. C. 127, 22 S. E. 759, p. 1134.
Van Doren v. Mayor of New York, 9 Paige, 388, 389, p. 312, 2707, 2728, 2755, 2757.
Van Doren v. Robinson, 16 N. J. Eq. 256, p. 1147.
Vandoren v. Todd, 3 N. J. Eq. 397, p. 2501, 2509, 2511.
Van Dusen v. Bigelow, (N. Dak.) 100 N. W. 723, p. 342, 1762, 1763.
Van Duyne v. Van Duyne, 14 N. J. Eq. 397, p. 1926.
Van Duyne v. Vreeland, 12 N. J. Eq. 142, 151, 155, p. 994, 998, 2782.
Van Duzer v. Van Duzer, 6 Paige, 366, 368, 31 Am. Dec. 257, p. 2167.
Van Dyke v. Gardner, 49 N. Y. Supp. 328, 22 Misc. Rep. 113 (affirming 47 N. Y. Supp. 710, 21 Misc. Rep. 542), p. 1230.
Van Dyke v. Jackson, 1 E. D. Smith, 419, p. 2028.
Van Dyck v. McQuade, 86 N. Y. 38, 45, 46, p. 2114, 2783.
Van Dyke v. Van Dyke, (N. J.) 49 Atl. 1116, p. 257.
Van Dyke v. Van Dyke, 31 N. J. Eq. 176, p. 2282.
Van Dyke's Appeal, 60 Pa. St. 481, 489, 490, p. 782, 803, 857, 858.
Vane v. Fletcher, 1 P. Wms. 352, p. 1654.
Vane v. Lord Barnard, 2 Vern. 738, Prec. Ch. 454, p. 2682.
Vane v. Vane, L. R. 8 Ch. 383, p. 1607, 1609, 1613, 1634, 1648, 1649.
Van Epps v. Harrison, 5 Hill, 63, 40 Am. Dec. 314, p. 1565.
Van Epps v. Van Duesen, 4 Paige, 64, 74, 25 Am. Dec. 516, p. 2167.
Van Epps v. Van Epps, 9 Paige, 237, p. 1754, 1761.
Van Frank v. St. Louis, C., G. & Ft. S. R'y Co., (Mo.) 67 S. W. 688, 691, p. 459, 463.
Vangilder v. Hoffman, 22 W. Va. 1, p. 2372, 2379.
Van Grutten v. Foxwell, [1897] A. C. 658, p. 1838.
Van Gunden v. Virginia Coal & Iron Co., 52 Fed. 838, 850, 3 C. C. A. 294, 8 U. S. App. 229, p. 1019.
Van Heusen v. Radcliff, 17 N. Y. 580, 72 Am. Dec. 480, p. 1327, 1330, 1331.
Van Hook v. Throckmorton, 8 Paige, 33, p. 1064.
Van Hoozer v. Cory, 34 Barb. 9, 12, p. 2472.
Vanhorn v. Frick, 3 Serg. & R. 278, p. 1386.
Van Horne, In re, 7 Paige, 46, p. 1775.
Van Horne, In re, 18 R. I. 389, 28 Atl. 341, p. 1980.
Van Horne v. Fonda, 5 Johns. Ch. 388, 407, p. 2028.
Van Houten v. Post, 33 N. J. Eq. 344, p. 894, 896, 941, 945.
Van Houten v. Van Houten, (N. J. Eq.) 59 Atl. 555, p. 2001.
Van Keuren v. Cent. R. R., 38 N. J. L. 165, 167, p. 1009, 1023, 1030, 1147.
Van Keuren v. Corkins, 4 Hun, 129, 6 Thomp. & C. 355, p. 1303, 2420.
Van Keuren v. Corkins, 66 N. Y. 77, 79, 80, p. 1224.
Van Liew v. Johnson, 4 Hun, 415, p. 1603.
Van Loben Sels v. Bunnell, 120 Cal. 680, 53 Pac. 266, p. 1282.
Van Mater v. Sickler, 9 N. J. Eq. 483, p. 578, 2281.
Van Meter v. McFaddin, 8 B. Mon. 435, p. 692, 1293.
Van Ness v. City of Washington, 4 Pet. 232, p. 1513.
Van Norden v. Morton, 99 U. S. 378, 380, 25 L. ed. 455, p. 500.
Van Nostrand v. Moore, 52 N. Y. 12, 18, p. 1918.
Van Orden v. Durham, 35 Cal. 136, p. 2796.
Van Orden v. Van Orden, 10 Johns. 30, 6 Am. Dec. 314, p. 820.
Van Pelt v. Hurt, 97 Ga. 660, 25 S. E. 489, p. 2417.
Van Pelt v. U. S. Metallic Springs, etc., Co., 13 Abb. Pa., N. S., 325, 327, p. 570.
Van Rensselaer v. Clark, 17 Wend. 25, 31 Am. Dec. 280, p. 1135, 1358, 1359, 1360.
Van Rensselaer v. Stafford, Hopk. Ch. 569, 575; affirmed, 9 Cow. 316, 318, p. 1256, 2397.
Van Rensselaer v. Van Rensselaer, 113 N. Y. 208, 21 N. E. 75, p. 342.

Van Riper v. Baldwin, 19 Hun, 344, p. 2551.
Van Riper v. Van Riper, 2 N. J. Eq. 1, p. 872, 873, 874, 875, 878.
Van Santen v. Standard Oil Co., 81 N. Y. 171, p. 2796.
Van Schoonhoven, Re, 5 Paige, 559, p. 2045, 2108.
Van Schuler v. Commercial Inv. B. & L. Ass'n, 63 N. J. Eq. 388, 51 Atl. 932, p. 1116.
Van Steenwyck v. Washburn, 59 Wis. 483, 501, 48 Am. Rep. 532, 17 N. W. 289, p. 847.
Van Straubenzee, In re, [1901] 2 Ch. 779, p. 2322.
Van Syckel v. Beam, 110 Mo. 589, 19 S. W. 946, p. 1347.
Van Syckel v. Emery, 18 N. J. Eq. 387, p. 2702.
Van Thorniley v. Peters, 26 Ohio St. 471, p. 1116, 1264, 1272.
Van Vechten v. Keator, 63 N. Y. 52, p. 2305, 2310, 2315.
Van Vronker v. Eastman, 7 Met. 157, p. 2432.
Van Wagenen v. Brown, 26 N. J. L. 196, p. 1403.
Van Wagenen v. Hopper, 8 N. J. Eq. 684, 707, p. 1354.
Van Winkle v. Curtis, 3 N. J. Eq. 422, p. 308.
Van Winkle v. Hinckle, 21 Cal. 342, p. 2748, 2752.
Van Winkle v. Van Houten, 3 N. J. Eq. 172, 187, p. 2493.
Van Wyck v. Brasher, 81 N. Y. 260, p. 1732.
Van Wyck v. Seward, 6 Paige, 62, 18 Wend. 375, p. 1798, 1800, 1801.
Van Wyck v. Watters, 81 N. Y. 352, p. 1625.
Van Zandt v. Garretson, 21 R. I. 352, 43 Atl. 633, p. 1829.
Vanmeter v. McFaddin, 8 B. Mon. 435, 442, p. 1145, 2539.
Vann v. Edwards, 135 N. C. 661, 47 S. E. 785, p. 2196.
Vann v. Hargett, 22 N. C. (2 Dev. & B. Eq.) 31, 32 Am. Dec. 689 (1838), p. 421, 455.
Vann v. Marbury, 100 Ala. 438, 14 South. 273, 46 Am. St. Rep. 70, 23 L. R. A. 325, p. 1298.
Vannatta v. Lindley, 198 Ill. 40, 92 Am. St. Rep. 270, 64 N. E. 735, p. 1640.
Vanorden v. Johnson, 14 N. J. Eq. 376, 82 Am. Dec. 254, p. 1130, 2455.
Vanover v. Davis, 27 Ga. 354, 358, p. 407.
Vansant v. Allmon, 23 Ill. 30, p. 2347, 2392, 2396, 2417.
Vansittart v. Vansittart, 4 Kay & J. 62, p. 1680.
Vardon's Trust, In re, L. R. 31 Ch. Div. 275, reversing L. R. 28 Ch. Div. 124, p. 845, 846.
Varet v. N. Y. Ins. Co., 7 Paige, 560, 567, 568, p. 211, 227, 460.
Varick v. Briggs, 6 Paige, 323, 329, p. 268, 1314, 1344, 1345, 1346.
Varick v. Edwards, Hoff. Ch. 382, 11 Paige, 289, 5 Denio, 664, 679, p. 1742, 2574, 2704.
Varick v. Hitt, (N. J. Eq.) 55 Atl. 139, p. 2236.
Varner's Appeal, 80 Pa. St. 140, p. 2139.
Varney v. Pope, 60 Me. 192, p. 554, 565.
Varwig v. Cleveland, C., C. & St. L. R. Co., 54 Ohio St. 455, 44 N. E. 92, p. 1105, 1148.
Vason v. Ball, 56 Ga. 268, p. 2358.
Vason v. Beall, 58 Ga. 500, p. 2080.
Vassault v. Austin, 36 Cal. 691, p. 1096.
Vasser v. Vasser, 23 Miss. 378, p. 619, 634, 2590, 2769.
Vastine's Estate, In re, 190 Pa. St. 443, 42 Atl. 1038, p. 2100.
Vattier v. Hinde, 7 Pet. 252, 271, p. 267, 695, 1346, 1380, 1393.
Vaughan, Ex parte, Turn. & R. 434, p. 632.
Vaughan v. Buck, 13 Sim. 404, p. 646, 2170, 2171.
Vaughan v. Halliday, L. R. 9 Ch. 561, p. 2478.
Vaughan v. Thomas, 33 Ch. Div. 187, p. 1934, 1939.
Vaughan v. Vanderstegen, 2 Drew. 165, 363, 379, p. 1724, 2155.
Vaughn v. Johnson, 9 N. J. Eq. 173, p. 307, 2703, 2710.
Vaughn v. Rhode Island M. & T. Co., 24 R. I. 350, 53 Atl. 125, p. 2082.
Vaughn v. Schmalsde, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411, p. 1271.

Vaughn v. Vaughn, 100 Tenn. 282, 45 S. W. 677, p. 2353.
Vaught v. Meador, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908, p. 353, 1626.
Vaughton v. Noble, 30 Beav. 34, p. 2099.
Vaux v. Parke, 7 W. & S. 19, p. 1840, 1846.
Vauxhall Bridge Co. v. Earl of Spencer, 2 Madd. 356, Jacob, 64, p. 1698.
Vauxhall Bridge Co. v. Spencer, Jacob, 64, 67, p. 1678.
Vavasseur v. Krupp, L. R. 9 Ch. Div. 351, p. 2671.
Veal v. Veal, 27 Beav. 303, p. 2236.
Veal v. Veal, 89 Ky. 314, 25 Am. St. Rep. 534, 12 S. W. 384, p. 1997.
Veasey v. Doton, 3 Allen, 380, p. 1591, 1596.
Veazie v. Forsaith, 76 Me. 172, p. 2051.
Veazie v. Parker, 23 Me. 170, p. 1033, 1034, 1048, 1101, 1133.
Veazie v. Williams, 8 How. 134, 3 Story, 611, 622, Fed. Cas. No. 16,907, p. 1625, 1668, 1694.
Vedder v. Saxton, 46 Barb. 188, p. 820.
Veeder v. McKinley-Lanning L. & T. Co., 61 Nebr. 892, 86 N. W. 982, p. 1102, 1127.
Veile v. Blodgett, 49 Vt. 270, p. 2017, 2030, 2034.
Veitte v. McMurtry, 26 Nebr. 341, 42 N. W. 6, p. 1198.
Venable v. Cody, 68 Ga. 171, p. 2057.
Venable v. Coffman, 2 W. Va. 310, p. 1954, 1972.
Venable v. Everett, 63 Ga. 633, p. 2671.
Venables v. Morris, 7 Term Rep. 342–438, p. 1397.
Vendall v. Harvey, Nels. 19–21, p 2718.
Vennum v. Davis, 35 Ill. 568, p. 246, 2702.
Ventress v. Creditors, 20 La. Ann. 359, p. 2397.
Veramendi v. Hutchins, 48 Tex. 531, p. 1701.
Verrcuysse v. Williams, 112 Fed. 206, 50 C. C. A. 486, p. 1125.
Verdin v. Slocum, 71 N. Y. 345, p. 1896, 1911.
Veret v. Duprez, L. R. 6 Eq. 329, p. 2655.
Verges v. Prejean, 24 La. Ann. 78, p. 1116.
Vermont & Canada R. R. v. Vt. Cent. R. R., 46 Vt. 792, p. 2661.
Vermont & Canada R. R. v. Vt. Cent. R. R., 50 Vt. 500, p. 2660.
Verner v. Betz, 46 N. J. Eq. 256, 19 Atl. 206, 19 Am. St. Rep. 387, 7 L. R. A. 630, p. 1320, 2399.
Verner v. Verner, 62 Miss. 260, p. 2177.
Vernol v. Vernol, 63 N. Y. 45, p. 1603.
Vernon. In re, 32 Ch. Div. 165, p. 1865.
Vernon v. Mabbett, (N. J. Eq.) 58 Atl. 298, p. 2493.
Vernon v. Vawdry, 2 Atk. 119, p. 2088.
Vernon v. Vernon. Amb. 3, p. 1469.
Vernon v. Vernon, 53 N. Y. 351, 359, 362, p. 809, 811, 820, 832, 1895, 1911, 1918.
Vernon v. Vernon, 1 Ves. 456, p. 2619.
Vernon v. Vestry of St. James, L. R. 16 Ch. Div. 449, p. 2687.
Vernon, Ewens & Co., In re, L. R. 33 Ch. Div. 402, p. 1297.
Verplanck v. Van Buren, 76 N. Y. 247, p. 1559, 1567.
Verplank v. Sterry, 12 Johns. 536, 559, 7 Am. Dec. 348, p. 1800.
Very v. Levy, 13 How. 345, p. 2765.
Very v. Russell, 65 N. H. 646, 23 Atl. 522, p. 1756.
Vest v. Michie, 31 Gratt. 149, 31 Am. Rep. 722, p. 1149.
Vezey v. Jamson, 1 Sim. & St. 69, p. 1933, 1949, 1986.
Vibbard v. Roderick, 51 Barb. 616, p. 1562.
Vice v. Thomas, 4 Younge & C. 538, p. 2657.
Vick v. Beverly, 112 Ala. 458, 21 South. 325, p. 352.
Vick v. Percy, 7 Smedes & M. 256, 268, 45 Am. Dec. 303, p. 148.
Vickers, In re, L. R. 37 Ch. Div. 525, p. 903, 908.
Vickers v. Pound, 6 H. L. Cas. 885, p. 2215, 2218, 2219.
Vickers v. Vickers, L. R. 37 Ch. Div. 525, p. 902.
Vickers v. Vickers, L. R. 4 Eq. 529, p. 2773.
Vickery v. Welch, 19 Pick. 523, p. 1691.

Vicksburg & Meridian R. R. v. Ragsdale, 54 Miss. 200, p. 1452, 1454.
Vicksburg & Y. C. Tel. Co. v. Citizens' Tel. Co., 79 Miss. 341, 89 Am. St. Rep. 656, 30 South. 725, p. 352.
Victor G. & S. Min. Co. v. National Bank of the Republic, 15 Utah, 391, 49 Pac. 826, p. 1177.
Victor G. Bloede Co. v. Bloede, 84 Md. 129, 34 Atl. 1127, 57 Am. St. Rep. 373, 33 L. R. A. 107, p. 1220.
Vidal v. Girard's Ex'rs, 2 How. 127, 155, 194, 196, p. 1933, 1954, 1967, 1977, 1978.
Viele v. Hoag, 24 Vt. 46, 51, p. 228, 304, 461.
Viele v. Judson, 82 N. Y. 32, 39, p. 1116, 1126, 1127, 1436.
Viele v. Troy & B. R. R., 21 Barb. 381, p. 1666.
Vieley v. Thompson, 44 Ill. 9, 13, p. 408, 409.
Viers v. Viers, 175 Mo. 444, 75 S. W 395, p. 1997, 2001.
Viertel v. Viertel, (Mo. App.) 75 S. W. 187, p. 660.
Vigers v. Pike, 8 Clark & F. 562, 645, p. 1587, 1602, 1787, 2770.
Vilas v. Grand Island E. L., I. & C. S. Co., (Nebr.) 97 N. W. 613, p. 200.
Vilas v. Jones, 1 N. Y. 274, p. 2703, 2710.
Villa v. Rodriguez, 12 Wall. 323, 20 L. ed. 406, p. 2372, 2380.
Villard v. Robert, 1 Strob. Eq. 393, p. 1113.
Villa Real v. Lord Galway, 1 Brown Ch. 292, note, Amb. 682, p. 783, 794, 819, 833, 834, 835, 837.
Villey v. Lewis, 113 Wis. 618, 88 N. W. 1021, p. 826.
Villines v. Norfleet, 2 Dev. Eq. 167, p. 1758.
Vincent v. Moriarty, 31 App. Div. 484, 52 N. Y. Supp. 519, p. 342, 666, 1702.
Vincent v. Newcombe, 1 Younge, 599, p. 2208, 2322.
Vincent v. Walker, 86 Ala. 333, 5 South. 465, p. 2376.
Viret v. Viret, L. R. 17 Ch. Div. 365, note, p. 2141.
Virgin v. Brubaker, 4 Nev. 31, p. 1284.
Virgin v. Wingfield, 54 Ga. 451, 454, p. 997, 1144, 1337.
Virginia v. Levy, 23 Gratt. 21, p. 1971.
Virginia & T. Coal & Iron Co. v. Fields, 94 Va. 102, 26 S. E. 426, p. 1339.
Virginia & A. Min. & Mfg. Co. v. Hale, 93 Ala. 542, 9 South. 256, p. 265, 323, 326.
Virginia-Carolina Chemical Co. v. Home Ins. Co., 113 Fed. 1, 5, (C. C. A.) citing chapter, S. C. 109 Fed. 681, p. 360, 413, 445.
Viscount Clermont v. Tasburgh, 1 Jacob & W. 112, 119, p. 1606.
Viscount Downe v. Morris, 3 Hare, 394, p. 2436.
Viscountess Montacute v. Maxwell, 1 P. Wms. 618, p. 2593.
Viscount Holmesdale v. West, L. R. 12 Eq. 280, p. 1886.
Vizonneau v. Pegram, 2 Leigh, 183, p. 2153.
Vogler v. Montgomery, 54 Mo. 577, p. 2671, 2757.
Voltz v. Voltz, 75 Ala. 555, p. 1495, 1775.
Von Phul v. Penn, 31 Mo. 333, p. 2750.
Von Schuler v. Commercial Inv. B. & L. Ass'n, 63 N. J. Eq. 388, 51 Atl. 932, p. 1107.
Voorhees v. De Meyer, 2 Barb. 37, p. 1603, 1607. 2600, 2766.
Voorhees v. Howard, 4 Abb. App. 503, p. 2790.
Voorhees v. Olmstead, 3 Hun, 744, p. 1429, 1444, 1445.
Voorhis v. Child's Ex'rs, 17 N. Y. 354, 357, 362, p. 586, 682, 683, 2607.
Voorhis v. Murphy, 26 N. J. Eq. 434, p. 1510.
Voorhis v. Westervelt, 43 N. J. Eq. 642, 12 Atl. 533, 3 Am. St. Rep. 315, p. 1276.
Voris v. State ex rel. Davis, 47 Ind. 345, 349, 350, p. 683, 685, 2608, 2609.
Vorley v. Cooke, 1 Giff. 230, p. 1650.
Vosburgh v. Huntington, 15 Abb. Pr. 254, p. 2642, 2645, 2651.
Vose v. Grant, 15 Mass. 505, 517, 522, p. 2011.
Vose v. Philbrook, 3 Story, 335, 344, 345, p. 215, 217. 514.
Vose v. Reed, 1 Woods, 647, p. 2658.
Vose v. Trustees, etc., 2 Woods, 647, p. 2048, 2056, 2059.

Voshell v. Hynson, 26 Md. 83, p. 2653.
Vouillon v. States, 2 Jur., N. S., 845, p. 1520.
Voyle v. Hughes, 2 Smale & G. 18, p. 1872, 1879.
Vredenburgh v. Burnet, 31 N. J. Eq. 229, 232, p. 1007, 1263, 1304, 2419.
Vreeland v. Blauvelt, 23 N. J. Eq. 483, p. 2771, 2775.
Vreeland v. Van Horn, 17 N. J. Eq. 137, 139, p. 1872.
Vreeland v. Vreeland, 16 N. J. Eq. 512, p. 2195.
Vrooman v. Turner, 69 N. Y. 280, 283, 25 Am. Rep. 195, p. 2412, 2414.
Vyse v. Foster, L. R. 8 Ch. 309, p. 2048, 2065.
Vyse v. Foster, L. R. 13 Eq. 602, p. 284, 287.
Vyse v. Foster, L. R. 7 H. L. 318, p. 2778.

W.

W—— v. B——, 32 Beav. 574, p. 1715, 1719.
W—— v. Walker, 5 Russ. 7, p. 2071.
Wabash R. Co. v. Engleman, 160 Ind. 329, 66 N. E. 892, p. 382.
Wa Ching v. Constantine, 1 Idaho, 266, p. 2714.
Wacker v. Wacker, 147 Mo. 246, 48 S. W. 835, p. 2000.
Wadd v. Hazleton, 137 N. Y. 215, 33 Am. St. Rep. 707, 21 L. R. A. 693, 33 N. E. 143, p. 1868, 1869, 1878.
Waddell v. Beach, 9 N. J. Eq. 793, 795, 796, p. 148, 212, 219.
Waddell v. Carlock, 41 Ark. 523, p. 2498.
Waddell v. Lanier, 62 Ala. 347, p. 1729, 1738.
Waddell v. Waddell, (Tenn. Ch. App.) 42 S. W. 46, p. 2288.
Waddell's Contract, In re, L. R. 2 Ch. Div. 172, p. 2046.
Waddingham v. Robledo, 6 N. M. 347, 28 Pac. 663, p. 357, 421, 455.
Waddle v. Terry, 4 Cold. 51, 54, p. 825.
Wade v. Am. Colon. Soc., 7 Smedes & M. 663, 45 Am. Dec. 324, p. 1974.
Wade v. Bent, 24 Ky. Law Rep. 1294, 71 S. W. 444, p. 2401, 2404.
Wade v. Howard, 11 Pick. 289, 6 Pick. 492, p. 1405.
Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250, p. 2552.
Wade v. Miller, 32 N. J. Law, 296, 303, p. 2351.
Wade v. Paget, 1 Brown Ch. 363, p. 1837.
Wade v. Powell, 20 Ga. 645, p. 1839, 1852.
Wade v. Pulsifer, 54 Vt. 45, p. 1775, 1787.
Wade v. Thompson, 52 Miss. 367, p. 1863.
Wade v. Withington, 1 Allen, 561, p. 1185.
Wadhams v. Am. Home etc. Soc., 12 N. Y. 415, p. 2152.
Wadhams v. Gay, 73 Ill. 415, 422, p. 1071.
Wadman v. Calcraft, 10 Ves. 67, 68, 69, p. 752, 758, 759.
Wadsworth, Re, 2 Barb. Ch. 381, p. 1834.
Wadsworth v. Connell, 104 Ill. 378, p. 2267.
Wadsworth v. Davis, 63 N. C. 251, p. 2285.
Wadsworth v. Lyon, 93 N. Y. 201, 45 Am. Rep. 190, p. 1411, 2401.
Wadsworth v. Williams, 100 Mass. 126, p. 1409, 1793, 1796.
Wafer v. Mocate, 9 Mod. 112, p. 759.
Wagar v. Link, 150 N. Y. 549, 44 N. E. 1103, affirming 134 N. Y. 122, 31 N. E. 213, p. 2414.
Wagar v. Stone, 36 Mich. 364, p. 2359.
Wagenseller v. Prettyman, 7 Ill. App. 192, p. 2794.
Wager v. Link, 150 N. Y. 549, 44 N. E. 1103, affirming 134 N. Y. 122, 31 N. E. 213, p. 2413.
Wager v. Wager, 21 Hun, 93, p. 2300, 2301.
Wager v. Wager, 89 N. Y. 161, p. 2300, 2301.
Waggoner v. Dodson, 96 Tex. 415, 73 S. W. 517, p. 1052.
Waggoner v. Minter, 7 J. J. Marsh. 173, p. 1550.
Wagner Co. v. Cawker, 112 Wis. 532, 88 N. W. 532, p. 733, 741.
Wagner v. Meety, 69 Mo. 150, p. 2676, 2678.
Wagner v. Smith, 81 Tenn. (13 Lea) 560, p. 1066.

Wagoner's Estate, In re, 190 Pa. St. 513, 42 Atl. 955, p. 2053.
Wagoner's Estate, 174 Pa. St. 558, 52 Am. St. Rep. 828, 32 L. R. A. 766, 34 Atl. 114, p. 1864.
Wagstaff v. Lowerre, 23 Barb. 209, 215, p. 1886, 1918, 2099.
Wagstaff v. Smith, 9 Ves. 520, p. 1830, 1836, 2145, 2148.
Wahle v. Reinbach, 76 Ill. 322, p. 2687.
Wahn v. Fall, 55 Nebr. 547, 76 N. W. 13, 70 Am. St. Rep. 397, p. 1275.
Wahrenberger v. Waid, 8 Colo. App. 200, 45 Pac. 518, p. 1034, 1049, 1274.
Wailes v. Cooper, 24 Miss. 208, 228, p. 978, 994, 1052, 1315, 1393.
Wain v. Earl of Egmont, 3 Mylne & K. 445, p. 2051.
Wainford v. Heyl, L. R. 20 Eq. 321, 324, p. 2185, 2187.
Wainscott v. Occidental etc. Ass'n, 98 Cal. 253, 33 Pac. 88, p. 1605.
Wainwright v. Hardisty, 2 Beav. 363, p. 2149.
Wainwright v. Miller, [1897] 2 Ch. 255, p. 1657.
Waite v. City of Santa Cruz, 89 Fed. 619, p. 1176.
Waite v. Morland, 12 Jur., N. S., 763, p. 1547.
Waite v. O'Neil, 72 Fed. 348, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550, p. 344.
Waites v. Cooper, 24 Miss. 208, p. 2736.
Wake v. Conyers, 1 Eden, 331, 2 Lead. Cas. Eq., 4th Am. ed., 850–864, 2 Cox, 360, p. 233, 1472, 2737.
Wake v. Harrop, 6 Hurl. & N. 768, p. 1478.
Wake v. Wake, 3 Brown Ch. 255, 1 Ves. 335, p. 833, 835, 848, 849, 850, 855.
Wakefield v. Johnson, 26 Ark. 506, p. 2535.
Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551, p. 1576, 1584.
Wakeman v. Dickey, 19 Abb. Pr. 24, p. 2642.
Wakeman v. Dodd, 27 N. J. Eq. 564, p. 1753, 1782.
Walcop v. McKinney's Heirs, 10 Mo. 229, p. 2350.
Walcot v. Hall, 2 Brown Ch. 305, p. 1471.
Walcott v. Keith, 22 N. H. 196, p. 2460.
Walden v. Bodley, 9 How. (50 U. S.) 34, 49, p. 1065.
Walden v. Skinner, 101 U. S. 577, p. 1513.
Waldie v. Doll, 29 Cal. 553, p. 2461.
Waldman v. North British etc. Ins. Co., 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883, p. 1157, 1161.
Waldo v. Caley, 16 Ves. 206, p. 1949.
Waldo v. Richmond, 40 Mich. 380, p. 1146.
Waldo v. Russell, 5 Mo. 387, p. 1276, 1381.
Waldrom v. Waldrom, 76 Ala. 285, p. 2257.
Waldrom v. Zacharie, 54 Tex. 503, p. 2502, 2511.
Waldron, Matter of, 13 Johns. 418, p. 2616.
Waldron v. Harvey, (W. Va.) 46 S. E. 603, p. 353.
Waldron v. Letson, 15 N. J. Eq. 126, p. 1515.
Waldron v. Simmons, 28 Ala. 629, 631–633, p. 229, 563.
Waldron v. Sloper, 1 Drew. 193, p. 1195, 1296.
Waldrop v. Leaman, 30 S. C. 428, 9 S. E. 466, p. 1757.
Waldy v. Gray, L. R. 20 Eq. 238, 251, p. 1174, 1261, 1368, 1369, 2539, 2728.
Wales v. Bowdish, 61 Vt. 23, 17 Atl. 1000, 4 L. R. A. 819, p. 1847.
Wales v. Coffin, 105 Mass. 328, p. 650.
Wales v. Sammis, 120 Iowa, 293, 94 N. W. 840, p. 1187, 1267, 1268.
Wales v. Sherwood, 52 How. Pr. 413, p. 2407.
Walker, In re, [1901] 1 Ch. 259, p. 2108.
Walker v. Armstrong, 8 De Gex, M. & G. 531, p. 1515.
Walker v. Barker, 26 Vt. 710, p. 1402, 1406.
Walker v. Brewster, L. R. 5 Eq. 25, p. 2687.
Walker v. Brooks, 125 Mass. 241, p. 545, 2557.
Walker v. Brown, 58 Fed. 23, p. 325.

Walker v. Brown, 63 Fed. 204, 11 C. C. A. 135, 27 U. S. App. 291, affirming 58 Fed. 23, p. 508, 2471.
Walker v. Brown, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. ed. 865, p. 2471.
Walker v. Buffandeau, 63 Cal. 312, p. 1263.
Walker v. Burrows, 1 Atk. 93, p. 1800.
Walker v. Carleton, 97 Ill. 582, p. 2434.
Walker v. Carrington, 74 Ill. 446, p. 1763.
Walker v. Carroll, 65 Ala. 61, p. 2498, 2513, 2520.
Walker v. Cheever, 35 N. H. 339, 349, p. 522, 523, 529, 531, 2280, 2798.
Walker v. Collins, 50 Fed. 737, 1 C. C. A. 642, 4 U. S. App. 406, p. 983.
Walker v. Covar, 2 S. C. 16, p. 2787.
Walker v. Crawford, 70 Ala. 567, p. 2533.
Walker v. Daimwood, 80 Ala. 245, p. 469.
Walker v. Daly, 80 Wis. 222, 49 N. W. 812, p. 235.
Walker v. Dement, 42 Ill. 272, p. 2395.
Walker v. Denne, 2 Ves. 170, p. 2305.
Walker v. Detroit Transit Co., 47 Mich. 338, 11 N. W. 187, p. 1220, 1244.
Walker v. Dixon Crucible Co., 47 N. J. Eq. 342, 20 Atl. 885, p. 2196.
Walker v. Doane, 108 Ill. 236, p. 567.
Walker v. Downs, (Tex. Civ. App.) 64 S. W. 682, p. 1275.
Walker v. Dreville, 12 Wall. 440, p. 494, 516.
Walker v. Elledge, 65 Ala. 51, p. 1278.
Walker v. Fletcher, 3 Bligh, 172, p. 285.
Walker v. Gilbert, 1 Freem. Ch. 75, p. 1109.
Walker v. Goldsmith, 14 Oreg. 125, 12 Pac. 537, p. 112, 613, 1063, 1066, 1068, 1074, 1081, 1083.
Walker v. Hall, 34 Pa. St. 483, p. 1927.
Walker v. Hill's Ex'rs, 22 N. J. Eq. 513, 519, p. 659, 665, 2039.
Walker v. House, 4 Md. Ch. 39, p. 2656.
Walker v. Jeffreys, 1 Hare, 341, 352, p. 2775.
Walker v. Johnson, 82 Ala. 347, 2 South. 744, p. 2256, 2257.
Walker v. Johnson, 37 Tex. 127. 129, p. 1860, 2361.
Walker v. Kee, 14 S. C. 142, p. 2417.
Walker v. Kee, 16 S. C. 76, p. 2528.
Walker v. King, 45 Vt. 525, 44 Vt. 601, p. 1411, 2424.
Walker v. Laighton, 31 N. H. 111, p. 2604.
Walker v. Leslie, 90 Ky. 642, 14 S. W. 682, p. 213.
Walker v. Locke, 5 Cush. 90, p. 1660.
Walker v. McKay, 2 Met. (Ky.) 294, p. 1234.
Walker v. McKnight, 15 B. Mon. 467, 61 Am. Dec. 190, p. 1277.
Walker v. Matthews, 58 Ill. 196, p. 1261.
Walker v. Mauro, 18 Mo. 564, p. 195, 2562.
Walker v. Morris, 14 Ga. 323, 325–327, p. 222, 224, 331, 334, 335, 567, 575, 2264.
Walker v. Peay, 22 Ark. 103, p. 2756.
Walker v. Reamy, 36 Pa. St. 410, p. 2197.
Walker v. Robbins, 14 How. 584, p. 2702.
Walker v. Russell, 10 S. C. 82, p. 2624.
Walker v. Schreiber, 47 Iowa, 529, p. 2392, 2396.
Walker v. Sedgwick, 8 Cal. 398, p. 231, 355, 1524, 2499.
Walker v. Shepard, 210 Ill. 100, 71 N. E. 422, p. 1672, 1750.
Walker v. Simpson, 7 Watts & S. 83, 42 Am. Dec. 216, p. 2603.
Walker v. Smith, 29 Beav. 394, p. 1768.
Walker v. Spencer, 13 Jones & S. 71, p. 2800.
Walker v. State, 53 Miss. 532, 535, p. 577, 2276.
Walker v. Struve, 70 Ala. 167, p. 2498, 2512, 2513, 2514.
Walker v. Symonds, 3 Swanst. 1, 63, 64, 80, p. 1784, 2071, 2094, 2096, 2097.
Walker v. Thompson, 108 Mich. 686, 66 N. W. 584, p. 1297.
Walker v. Vaughn, 33 Conn. 577, p. 2586.
Walker v. Walker, 2 Atk. 98, 100, 6 Ves. 335, p. 1521, 1659, 2035, 2379.
Walker v. Walker, 25 Ga. 420, p. 1973.
Walker v. Walker, 5 Madd. 424, p. 2050.

Walker v. Walker, 101 Mass. 169, p. 1773, 1774.
Walker v. Walker, 199 Pa. St. 435, 49 Atl. 133, p. 1997, 2034.
Walker v. Walker's Assignee, 19 Ky. Law Rep. 626, 41 S. W. 315, p. 1332.
Walker v. Ware etc. R'y Co., 12 Jur. 18, p. 2528.
Walker v. Wheeler, 2 Conn. 229, 299, p. 717, 753.
Walker v. Whiting, 23 Pick. 313, p. 1921.
Walker v. Wildman, 6 Madd. & G. 47, p. 280.
Walker v. Zorn, 50 Ga. 370, p. 308.
Walkerly, In re, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772, p. 1895.
Walkins v. Stockett, 6 Har. & J. 435, p. 1659.
Wall v. Bright, 1 Jacob & W. 494, 508, p. 2531.
Wall v. Cockerell, 3 De Gex, F. & J. 737, 742, p. 1788.
Wall v. Cockerell, 10 H. L. Cas. 229, p. 1784, 1787.
Wall v. Colshead, 2 De Gex & J. 683, p. 2309, 2315, 2326.
Wall v. County of Monroe, 103 U. S. 77, p. 1229.
Wall v. Meilke, 89 Minn. 232, 94 N. W. 688, p. 1489, 1490.
Wall v. Pulliam, 5 Heisk. 365, p. 2663.
Wall v. Stubbs, 1 Madd. 80, p. 1585, 1590.
Wall v. Wall, 15 Sim. 513, 520, 521, p. 846.
Wallace v. Anderson, 16 Beav. 533, p. 1841.
Wallace v. Auldjo, 1 De Gex, J. & S. 643, p. 2167, 2168, 2174.
Wallace v. Blair, 1 Grant Cas. 75, p. 1403.
Wallace v. Bowen, 28 Vt. 638, p. 1833, 1906.
Wallace v. Campbell, 54 Tex. 87, p. 1280.
Wallace v. Cohen, 111 N. C. 103, 15 S. E. 892, p. 1332.
Wallace v. Coston, 9 Watts, 137, p. 2154.
Wallace v. Craps, 3 Strob. 266, p. 1148.
Wallace v. Du Bois, 65 Md. 153, 4 Atl. 402, p. 894, 896, 903, 945.
Wallace v. Finberg, 46 Tex. 35, p. 2198.
Wallace v. Furber, 62 Ind. 103, p. 1771.
Wallace v. Greenwood, L. R. 16 Ch. Div. 362, 365, p. 2320, 2331.
Wallace v. Heywood etc. Co., 16 Gray, 209, p. 2553.
Wallace v. Johnstone, 129 U. S. 58, 9 Sup. Ct. 243, 32 L. ed. 619, p. 2373.
Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625, p. 2121, 2127.
Wallace v. Lord Donegal, 1 Dru. & Walsh, 461, p. 1389.
Wallace v. Maples, 79 Cal. 433, 21 Pac. 860, p. 566.
Wallace v. Marquett, 88 Ky. 130, 10 S. W. 374, p. 1069.
Wallace v. Moody, 26 Cal. 387, p. 1115.
Wallace v. Pomfret, 11 Ves. 542, p. 933, 937, 939.
Wallace v. Pruitt, 1 Tex. Civ. App. 231, 20 S. W. 728, p. 1904.
Wallace v. Rappleye, 103 Ill. 229, p. 2780.
Wallace v. Reddick, 119 Ill. 151, 8 N. E. 801, p. 927.
Wallace v. Smith, 2 Handy, 78, p. 2788.
Wallace v. Smith, 155 Pa. St. 78, 25 Atl. 807, 32 Wkly. Notes Cas. 470, 35 Am. St. Rep. 868, p. 2381.
Wallace v. Stevens, 66 Me. 190, p. 550.
Wallace v. Stevens, 64 Me. 225, p. 2444.
Wallace v. Wainwright, 87 Pa. St. 263, p. 1901, 1908.
Wallace v. Walker, 37 Ga. 265, 92 Am. Dec. 70, p. 2265.
Wallace v. Wallace, 2 Dru. & War. 452, p. 1776.
Wallace v. Wallace, 82 Ill. 530, p. 2141, 2155.
Wallace v. Wallace, 23 N. H. 149, p. 2207, 2208.
Wallace v. Wilson, 30 Mo. 335, p. 1313.
Wallace's Appeal, 5 Pa. St. 103, p. 2796.
Wallack v. Soc. Ref. Jur. Del., 67 N. Y. 23, p. 2702.
Waller v. Armistead's Adm'rs, 2 Leigh, 11, 21 Am. Dec. 594, p. 1773, 1775, 2166.

Waller v. Dalt, 1 Ch. Cas. 276, 1 Dick. 8, p. 1075, 1705.
Waller's Adm'rs v. Catlett's Ex'rs, 83 Va. 200, 2 S. E. 280, p. 2077.
Wallgrave v. Tebbs, 2 Kay & J. 321, p. 2036.
Walling v. Aiken, 1 McMull. Eq. 1, p. 644, 650, 717, 753.
Wallinger v. Wallinger, L. R. 9 Eq. 301, p. 796.
Wallington v. Taylor, 1 N. J. Eq. 314, 318, p. 2682.
Wallingsford v. Wallingsford, 6 Har. & J. 485, p. 2176.
Wallis v. Carpenter, 13 Allen, 19, p. 729, 748.
Wallis v. Duke of Portland, 3 Ves. 494, p. 262, 1697, 1702.
Wallis v. Everard, 3 Ch. Rep. 161, p. 2734.
Wallis v. Rhea, 10 Ala. 451, 12 Ala. 646, p. 1104, 1274.
Wallis v. Skelly, 30 Fed. 747, p. 321.
Wallis v. Smith, L. R. 21 Ch. Div. 243, p. 745, 747.
Wallis v. Solicitor-General for New Zealand, [1903] App. Cas. 173, p. 1963.
Wallis v. Truesdell, 6 Pick. 455, p. 1428, 1438.
Wallis Iron Works v. Monmouth Park Ass'n, 55 N. J. L. 132, 39 Am. St. Rep. 626, 26 Atl. 140, 19 L. R. A. 456, p. 728, 731.
Wallop v. Hewett, 2 Ch. Rep. 70, p. 885.
Walls v. State, 140 Ind. 16, 38 N. E. 177, p. 1106, 1125.
Walls v. Stewart, 16 N. J. Eq. 275, 281, p. 2219.
Wallston v. Braswell, 1 Jones Eq. 137, p. 1254.
Wallwyn v. Coutts, 3 Mer. 707, 708, 3 Sim. 14, p. 2564.
Wallwyn v. Lee, 9 Ves. 24, 33, p. 695, 1310, 1312, 1315, 1318, 1367, 2763.
Walmesley v. Booth, 2 Atk. 25, p. 1769.
Walmsley v. Child, 1 Ves. Sr. 341, 344, 345, p. 1463, 1464.
Walp v. Lamkin & Foster, (Conn.) 57 Atl. 277, p. 1347.
Walpole v. Apthorp, L. R. 4 Eq. 37, p. 2209, 2210, 2224.
Walpole, Lord, v. Lord Orford, 3 Ves. 402, p. 2593.
Walrath v. Abbott, 75 Hun, 445, 454, 27 N. Y. Supp. 529, p. 2502.
Walrath v. Handy, 24 How. Pr. 353, p. 580, 2300, 2301.
Walrond v. Rosslyn, L. R. 11 Ch. Div. 640, p. 2332.
Walrond v. Walrond, 29 Beav. 586, p. 2054.
Wals v. Grosvenor, 31 Wis. 681, p. 2750.
Walsh v. Association of Master Plumbers, 97 Mo. App. 280, 71 S. W. 455, p. 1689.
Walsh v. Barton, 24 Ohio St. 28, p. 2775.
Walsh v. Boyle, 30 Md. 267, p. 1106.
Walsh v. Curtis, 73 Minn. 254, 76 N. W. 52, p. 723, 734.
Walsh v. Gladstone, 1 Phill. Ch. 290, p. 1939.
Walsh v. Hall, 66 N. C. 233, p. 2771.
Walsh v. McBride, 72 Md. 45, 19 Atl. 4, p. 2000.
Walsh v. Peterson, 3 Atk. 193, p. 1546.
Walsh v. Studdart, 4 Dru. & War. 159, p. 2235.
Walsh v. Wason, L. R. 8 Ch. 482, p. 2168, 2174.
Walsham v. Stainton, 1 De Gex, J. & S. 678, p. 1633, 1760, 1762, 1764.
Walsham v. Stainton, 2 Hem. & M. 1, p. 281.
Walsh's Appeal, 122 Pa. St. 177, 15 Atl. 470, 9 Am. St. Rep. 83, 1 L. R. A. 535, p. 2237, 2239.
Walsingham, Lord, v. Goodricke, 3 Hare, 122, p. 280.
Walston v. Smith, 70 Vt. 19, 39 Atl. 252, p. 1911, 1999, 2015.
Walter v. Brown, 115 Iowa, 360, 88 N. W. 832, p. 1356.
Walter v. Ford, 74 Mo. 195, 41 Am. Rep. 312, p. 2232, 2238, 2242, 2247.
Walter v. King, 44 Vt. 601, p. 2353.
Walter v. Maunde, 1 Jacob & W. 181, p. 1053.
Walter v. Maunde, 19 Ves. 424, p. 2321.
Walter v. McNabb, 1 Heisk. 703, p. 283.
Walter v. Rhea, 10 Ala. 451, 12 Ala. 646, p. 1144.

Walter v. Selfe, 4 De Gex & S. 315, p. 2684.
Walters v. Farmers' Bank, 76 Va. 12, p. 224, 352.
Walters v. Washington Ins. Co., 1 Iowa, 404, 63 Am. Dec. 451, p. 1207.
Walters v. Woodbridge, L. R. 7 Ch. Div. 504, p. 2098.
Waltner v. Dolan, 108 Ind. 504, 58 Am. Rep. 61, 8 N. E. 289, p. 2082.
Walton v. Crowley, 3 Blatchf. 440, p. 2691.
Walton v. Drumtra, 152 Mo. 489, 54 S. W. 233, p. 1894.
Walton v. Hargroves, 42 Miss. 18, 97 Am. Dec. 429, 433, p. 1270, 1778, 2501, 2511, 2515, 2516, 2518.
Walton v. Horkan, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77, p. 2584.
Walton v. Ketchum, 147 Mo. 209, 48 S. W. 924, p. 1850.
Walton v. Ruggles, 180 Mass. 24, 61 N. E. 267, p. 2408.
Walton v. Tusten, 49 Miss. 569, p. 2729.
Walton v. Walton, 21 Ga. 13, p. 575.
Walton v. Walton, 7 Johns. Ch. 258, 11 Am. Dec. 456, p. 2211, 2213.
Walton v. Wilson, 30 Miss. 576, p. 2778.
Walwyn v. Coutts, 3 Mer. 707, 3 Sim. 14, p. 1855.
Wambaugh v. Bimer, 25 Ind. 368, p. 1563, 2729.
Wampach v. St. Paul etc. R. R., 22 Minn. 34, p. 2194.
Wampler v. Wampler, 30 Gratt. 454, p. 1581, 1588, 1638, 1639.
Wampol v. Kountz, 14 S. Dak. 334, 85 N. W. 595, 86 Am. St. Rep. 765, p. 1415, 1436.
Wanmaker v. Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748, p. 904, 907.
Wanless v. United States, 6 Ct. of Cl. 123, p. 2555.
Wanzer v. Cary, 76 N. Y. 526, p. 1225, 1297.
Warburton v. Sandys, 14 Sim. 622, p. 2046.
Ward, In re, 31 Beav. 1, p. 1387.
Ward v. Amory, 1 Curtis, 419, 432, p. 2169.
Ward v. Arch, 15 Sim. 389, p. 2312.
Ward v. Armstrong, 84 Ill. 151, p. 1983.
Ward v. Audland, 8 Beav. 201, p. 1872.
Ward v. Baugh, 4 Ves. 623, 627, p. 782, 794, 856, 857.
Ward v. Beeton, L. R. 19 Eq. 207, p. 2674.
Ward v. Coffield, 1 Dev. Eq. 108, p. 872.
Ward v. Cooke, 17 N. J. Eq. 93, p. 2387, 2388, 2389.
Ward v. De Oca, 120 Cal. 102, 52 Pac. 130, p. 2413, 2414.
Ward v. Dewey, 16 N. Y. 519, p. 2754, 2757.
Ward v. Duke of Northumberland, 2 Anstr. 469, p. 363, 394, 395, 428.
Ward v. Dunscombe, [1893] App. Cas. 369, p. 1210, 1211, 1214.
Ward v. Estate of Ward, 36 Ark. 586, p. 2190.
Ward v. Green, (Tex. Civ. App.) 28 S. W. 574, p. 2406.
Ward v. Hollins, 14 Md. 158, p. 1804.
Ward v. Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256, p. 728, 733, 739, 740.
Ward v. Isbill, 73 Hun, 550, 26 N. Y. Suppl. 141, p. 1355.
Ward v. League, (Tex. Civ. App.) 24 S. W. 986, p. 1103, 1133.
Ward v. Lewis, 4 Pick. 518, 523, p. 1856.
Ward v. McKenzie, 33 Tex. 297, 7 Am. Rep. 261, p. 2791.
Ward v. Metropolitan El. R'y Co., 152 N. Y. 39, 46 N. E. 319, affirming 82 Hun, 545, 31 N. Y. Suppl. 527, p. 1039.
Ward v. Metropolitan Life Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80, p. 1158.
Ward v. Morrison, 25 Vt. 593, p. 1212.
Ward v. Peck, 114 Mass. 121, 122, p. 215, 217, 545, 2799.
Ward v. Peloubet, 10 N. J. Eq. 304, p. 1926.
Ward v. Pree, (S. Dak.) 94 N. W. 397, p. 2288.
Ward v. Seymour, 51 Vt. 320, p. 2434.
Ward v. Shire, 23 Ky. Law Rep. 1279, 65 S. W. 8, p. 2100.
Ward v. Thomas, 81 Ky. 452, p. 1101.

Ward v. Turner, 2 Ves. Sr. 431, 1 Lead. Cas. Eq. 1205, 1245, p. 2232, 2234, 2236, 2237, 2242, 2244, 2245, 2246.
Ward v. Van Bokkelen, 1 Paige, 100, p. 1647.
Ward v. Ward, 108 Ala. 278, 19 South. 354, p. 1756.
Ward v. Ward, 59 Conn. 188, 22 Atl. 149, p. 2000.
Ward v. Ward, 131 Fed. 946, 954, p. 1436.
Ward v. Ward, 2 H. L. Cas. 777, 784, p. 2058.
Ward v. Ward, L. R. 14 Ch. Div. 506, p. 2168, 2169.
Ward v. Ward, 105 N. Y. 73, 11 N. E. 373, p. 1918.
Ward v. Warren, 82 N. Y. 265, p. 1153.
Warde v. Warde, 16 Beav. 103, p. 953.
Warde v. Warde, 2 Phill. Ch. 786, p. 2616.
Warde v. Warde, 1 Sim., N. S., 18, 3 Macn. & G. 365. p. 281.
Wardell v. Railroad Co., 103 U. S. 651, 26 L. ed. 509, p. 2084.
Warden v. Adams, 15 Mass. 233, p. 2397.
Warden v. Jones, 2 De Gex & J. 76, 87, p. 2141, 2169.
Warden v. Richards, 11 Gray, 277, p. 2046.
Warder v. Cornell, 105 Ill. 169, p. 1099, 1127, 1145.
Wardlaw v. Wardlaw, 50 Ga. 544, p. 1550.
Wardle v. Claxton, 9 Sim. 524, p. 2146.
Wardour v. Berisford, 1 Vern. 452, cited, 2 P. Wms. 748, 749, p. 1654.
Ward's Ex'r v. Hague, 25 N. J. Eq. 397, p. 1129.
Ward's Appeal, (Conn.) 54 Atl. 731, p. 1500.
Ware v. Cowles, 24 Ala. 446, 60 Am. Dec. 482, p. 1507.
Ware v. Curry, 67 Ala. 274, p. 2498, 2511.
Ware v. Gardner, L. R. 7 Eq. 317, p. 1803.
Ware v. Grand Junction etc. Co., 2 Russ. & M. 470, p. 2118.
Ware v. Harwood, 14 Ves. 28, 29, 31, 33, p. 307, 363, 419, 455, 1476, 1510, 2701.
Ware v. Lord Egmont. 4 De Gex, M. & G. 460, 473, 474. p. 1005, 1006, 1008, 1011, 1016, 1045, 1058, 1292.
Ware v. Polhill, 11 Ves. 257, 278, p. 2619.
Ware v. Regent's Canal Co., 3 De Gex & J. 212, p. 2677.
Ware v. Tharp, 1 Swan, 489, p. 2155.
Ware v. Thompson, 13 N. J. Eq. 66, p. 648, 1705.
Ware v. Ware, 42 Ga. 408, p. 2265.
Ware v. Ware, 6 N. J. Eq. 117, p. 2682.
Ware's Adm'rs v. Russell, 70 Ala. 174, 45 Am. Rep. 82, p. 1703.
Warfield v. Booth, 33 Md. 63, p. 1690.
Warfield v. Clark, 118 Iowa, 69, 91 N. W. 833, p. 1576.
Warfield v. Warfield, 5 Har. & J. 459, p. 2741.
Warfield v. Warfield, 76 Iowa, 633, 41 N. W. 383, p. 1725.
Warford v. Hankins, 150 Ind. 489, 50 N. E. 468, p. 1328, 2424, 2525.
Waring, Ex parte, 19 Ves. 343, p. 2478.
Waring v. Lewis, 53 Ala. 615, p. 2257.
Waring v. Smyth, 2 Barb. Ch. 119, 133, 135, 47 Am. Dec. 299, p. 1185, 2360, 2364.
Waring v. Somborn, 82 N. Y. 604, p. 1427, 1443.
Waring v. Suydam, 4 Edw. Ch. 426, p. 283.
Waring v. Waring, 6 Moore P. C. C. 341, p. 1727.
Wark v. Willard, 13 N. H. 389, p. 1134.
Warmstrey v. Lady Sanfield, 1 Ch. Rep. 16, 29, 2 Lead. Cas. Eq., 4th Am. ed., 1530, 1559, 1605, p. 193, 2547, 2574.
Warne v. Routledge, L. R. 18 Eq. 497, p. 2676.
Warneford v. Thompson, 3 Ves. 513, p. 1469.
Warner v. Bates, 98 Mass. 274, 277, p. 1926.
Warner v. Baynes, Amb. 589, p. 2742.
Warner v. Bennett, 31 Conn. 461, 468, 478, p. 632, 760.
Warner v. Conant, 24 Vt. 351, 58 Am. Dec. 178, p. 2703, 2710.
Warner v. Daniels, 1 Wood. & M. 90, 110, 112. p. 321, 326, 1559, 1563, 1582, 1637, 1665.

Warner v. De Witt Co. Bank, 4 Ill. App. 305, p. 2448, 2452, 2455.
Warner v. Dove, 33 Md. 579, p. 2193.
Warner v. Jacob, L. R. 20 Ch. Div. 220, p. 1666, 1756, 2677.
Warnick v. Lawrence, 43 N. J. Eq. 179, 3 Am. St. Rep. 299, 10 Atl. 376, p. 2196.
Warner v. McMullin, 131 Pa. St. 370, 18 Atl. 1056, 25 Wkly. Notes Cas. 157, p. 237.
Warner v. Peck, 11 R. I. 431, p. 2197.
Warner v. Rice, 66 Md. 436, 8 Atl. 84, p. 1844.
Warner v. Rising etc. Iron Co., 3 Woods, 514, p. 2659, 2660.
Warner v. Swett, 31 N. H. 332, p. 1147.
Warner v. Van Alstyne, 3 Paige, 513, p. 2502. 2515.
Warner v. Watson, 35 Fla. 402, 17 South. 654, p. 1372, 1373, 1446.
Warner v. Williams, 93 Md. 517, 49 Atl. 559, p. 2408.
Warner v. Winslow, 1 Sand. Ch. 430, p. 1300.
Warner v. Wittaker, 6 Mich. 133, 72 Am. Dec. 65, p. 1096.
Warnock v. Campbell, 25 N. J. Eq. 485, p. 2729.
Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 168, 31 Am. St. Rep. 209, p. 1081, 1082, 1088, 1096, 1372.
Warren, Ex parte, L. R. 10 Ch. 222, p. 2662.
Warren v. Baker, 43 Me. 570, 574, p. 555.
Warren v. Boynton, 2 Barb. 13, p. 2451.
Warren v. Branch, 15 W. Va. 21, p. 2534.
Warren v. Burt, 58 Fed. 101, 3 C. C. A. 105, 12 U. S. App. 591, p. 1761.
Warren v. Copelin, 4 Met. 594, p. 1212.
Warren v. Daniels, 72 Ill. 272, p. 2762.
Warren v. Davies, 2 Mylne & K. 49, p. 2490.
Warren v. Ewing, 34 Iowa, 168, p. 2762.
Warren v. Fenn, 28 Barb. 333, p. 2502, 2505, 2511.
Warren v. Freeman, 85 Tenn. 513, 3 S. W. 513, p. 2180. 2198.
Warren v. Haley, 1 Smedes & M. Ch. 647, p. 2144.
Warren v. Hawkins, 49 Mo. 137, p. 1772.
Warren v. Hull, 123 Ind. 126, 24 N. E. 96, p. 1268.
Warren v. Ireland, 29 Me. 62, p. 552.
Warren v. Richmond, 53 Ill. 52, p. 1019, 1023, 1024, 1145, 2772.
Warren v. Swett, 31 N. H. 332, 341, 342, p. 973, 977, 979, 981, 1007, 1018.
Warren v. Union Bank of Rochester, 157 N. Y. 259, 68 Am. St. Rep. 777, 51 N. E. 1036, 43 L. R. A. 256, p. 2030.
Warren v. Warren, 1 Brown Ch. 305, note, p. 917.
Warren v. Warren, 148 Ill. 61, 22 L. R. A. 393, 36 N. E. 611, p. 823.
Warren v. Warren, 30 Vt. 530, p. 1403, 1411.
Warren v. Wilder, 114 N. Y. 215, 21 N. E. 159, p. 1336.
Warren v. Winslow, 1 Sand. Ch. 430, p. 1303.
Warren County v. Marcy, 97 U. S. 96, p. 1065, 1079.
Warren Mills v. N. O. Seed Co., 65 Miss. 391, 7 Am. St. Rep. 671, 4 South. 298, p. 359, 382, 450.
Warrick v. Queen's College, L. R. 4 Eq. 254, p. 284, 287
Warrick v. Warrick, 3 Atk. 291, 293, p. 1166, 1383.
Warriner v. Rogers, L. R. 16 Eq. 340, p. 1868, 1875.
Wartemberg v. Spiegel, 31 Mich. 400, p. 1730.
Wartnaby v. Wartnaby, Jac. 377, p. 2626.
Warwick v. Warwick, 3 Atk. 291, 293, p. 1887.
Wasdale, In re, [1899] 1 Ch. 163, p. 1210, 1214.
Washaw v. Gimble, 50 Ark. 355, 7 S. W. 389, p. 2616.
Washburn v. Burnham, 63 N. Y. 132, p. 2758.
Washburn v. Goodwin, 17 Pick. 137, p. 2399.
Washburn v. Huntington, 78 Cal. 573, 21 Pac. 305, p. 1007.
Washburn v. Sewall, 9 Met. 280, p. 1979.
Washburn v. Van Steenwyck, 32 Minn. 336, 349, p. 462, 847.
Washburn & Co. v. Donnenberg Co., 117 Ga. 567, 44 S. E. 97, p. 1072.

Washburn's Appeal, 105 Pa. St. 480, p. 383.
Washer v. Independent M. & D. Co., 142 Cal. 702, 76 Pac. 654, p. 2411.
Washington v. Opie, 145 U. S. 214, 12 Sup. Ct. 822, p. 1449.
Washington Bank v. Lewis, 22 Pick. 24, p. 1156.
Washington County v. Williams, 111 Fed. 801, 815, 49 C. C. A. 621, p. 360, 390, 396, 415, 441, 443, 445, 453.
Washington Iron Works v. Jensen, 3 Wash. St. 584, 28 Pac. 1019, p. 2544.
Washington Life Ins. Co. v. Lawrence, 28 How. Pr. 435, p. 2651.
Washington Loan & Tr. Co. v. McKenzie, 64 Minn. 273, 66 N. W. 976, p. 2404.
Washington Nat. Bank v. Pierce, 6 Wash. 491, 33 Pac. 972, 36 Am. St. Rep. 174, p. 1164.
Washington, O. & W. R. R. v. Cazenove, 83 Va. 744, 3 S. E. 433, p. 2403.
Washington's Ex'r v. Abraham, 6 Gratt. 66, 77, p. 2315.
Wasley v. Foreman, 38 Cal. 90, p. 1992.
Wason v. Colburn, 99 Mass. 342, p. 619, 1872, 2590.
Wason v. Wareing, 15 Beav. 151, p. 1292.
Wass v. Mugridge, 128 Mass. 394, p. 2775, 2777.
Wassell v. Leggatt, [1896] 1 Ch. 554, p. 2140.
Wasson v. Connor, 54 Miss. 351, p. 1146.
Wasson v. Davis, 34 Tex. 159, p. 2502, 2513, 2514.
Wasson v. English, 13 Mo. 176, p. 1754.
Wasson v. Garrett, 58 Tenn. 477, p. 2056, 2059.
Waterbury v. Netherland, 6 Heisk. 512, p. 848, 849.
Waterbury Sav. Bank v. Lawler, 46 Conn. 243, 246, p. 2755, 2757.
Waterfield v. Wilber, 64 Mich. 642, 31 N. W. 553, p. 2500, 2508.
Waterloo Bank v. Elmore, 52 Iowa, 541, 3 N. W. 547, p. 1403.
Waterlow v. Bacon, L. R. 2 Eq. 514, p. 2713.
Waterman v. Alden, 144 Ill. 90, 32 N. E. 972, p. 2052, 2065, 2108.
Waterman v. Baldwin, 68 Iowa, 255, 26 N. W. 435, p. 2049.
Waterman v. Curtis, 26 Conn. 241, p. 2431.
Waterman v. Hunt, 2 R. I. 298, p. 2397.
Waterman v. McKenzie, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. 334, p. 2461.
Waterman v. Matteson, 4 R. I. 539, 545, p. 2352.
Waters v. Bailey, 2 Younge & C. Ch. 219, p. 1782.
Waters v. Groom, 11 Clark & F. 684. p. 1755.
Waters v. Crabtree, 105 N. C. 394, 11 S. E. 240, p. 2380.
Waters v. Howard, 1 Md. Ch. 112, p. 785, 789.
Waters v. Hubbard, 44 Conn. 340, p. 2407, 2415.
Waters v. Margerum, 60 Pa. St. 39, p. 2046.
Waters v. Mattingly, 1 Bibb, 244, 4 Am. Dec. 631, p. 1637.
Waters v. Stewart, 1 Caines Cas. 47, p. 2360.
Waters v. Stickney, 12 Allen, 1, 90 Am. Dec. 122, p. 1635.
Waters v. Taylor, 15 Ves. 10, p. 2656.
Waters v. Tazewell, 9 Md. 291, p. 1681, 1683, 1847, 2161.
Waters v. Thorn, 22 Beav. 547, p. 1784.
Waters's Rep's v. Riley's Adm'r, 2 Har. & G. 305, 310, 18 Am. Dec. 302, p. 2608.
Waterworks v. Yeomans, L. R. 2 Ch. App. 11, p. 363, 379, 394, 413, 419, 420, 431, 455.
Watford v. Oates, 57 Ala. 290, p. 2431, 2432.
Wathen v. Smith, 4 Madd. 325, p. 874.
Watkins v. Baird, 6 Mass. 511, 4 Am. Dec. 170, p. 1736.
Watkins v. Brent, 1 Mylne & C. 97, 102, p. 2655.
Watkins v. Edwards, 23 Tex. 443, 448, p. 1023, 1148, 1355.
Watkins v. Gregory, 6 Blackf. 113, p. 2373.
Watkins v. Holman, 16 Pet. 25, 26, 58, 59, p. 155, 494, 520, 2632, 2633.
Watkins v. Maule, 2 Jacob & W. 237, 242, p. 1472.

Watkins v. Nugen, (Ga.) 45 S. E. 262, p. 667, 1702, 1712.
Watkins v. Owens, 47 Miss. 593, 598, p. 223.
Watkins v. Reynolds, 123 N. Y. 211, 25 N. E. 322, p. 1336, 1372.
Watkins v. Sproull, 8 Tex. Civ. App. 427, 28 S. W. 356, p. 1028.
Watkins v. Stockett, 6 Har. & J. 435, p. 1487.
Watkins v. Wassell, 15 Ark. 73, 94, 95, p. 1269.
Watkins v. Watkins, 7 Serg. 283, p. 855.
Watkins v. Wilhoit, 104 Cal. 395, 38 Pac. 53, p. 1096.
Watkyns v. Watkyns, 2 Atk. 96, 98, p. 2175.
Watson v. Bothwell, 11 Ala. 650, p. 1635.
Watson v. Columbia Bridge Co., 13 S. C. 433, p. 2544.
Watson v. Doyle, 130 Ill. 415, 22 N. E. 613, p. 1732.
Watson v. Duke of Wellington, 1 Russ. & M. 602, 605, p. 195, 2561, 2563, 2566, 2568.
Watson v. Dundee Mfg. Co., 12 Oreg. 474, 8 Pac. 548, p. 1107, 1113.
Watson v. Earl of Lincoln, Amb. 327, p. 963.
Watson v. Erb, 33 Ohio St. 35, p. 1644.
Watson v. Hayes, 5 Mylne & C. 125, p. 178, 1988, 2326.
Watson v. Hunter, 5 Johns. Ch. 169, 9 Am. Dec. 295, p. 2681.
Watson v. Le Row, 6 Barb. 481, 485, p. 1188, 1190.
Watson v. Knight, 19 Beav. 369, p. 1856.
Watson v. Marshall, 17 Beav. 363, p. 2173.
Watson v. Marston, 4 De Gex, M. & G. 230, p. 1517, 1518.
Watson v. Mayrant, 1 Rich. Eq. 449, p. 1921.
Watson v. Mercer, 8 Pet. 88, p. 1115.
Watson v. Phelps, 40 Iowa, 482, p. 1060, 1145, 1339.
Watson v. Reid, 5 Sim. 431, p. 886.
Watson v. Sherman, 84 Ill. 263, p. 1862.
Watson v. Smith, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 665, p. 2574.
Watson v. Smith, 7 Oreg. 448, p. 2765.
Watson v. Sutherland, 5 Wall. 74, 78, 18 L. ed. 580, p. 223, 308, 515, 2667, 2687, 2695.
Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64, p. 354, 1154, 1162, 1171.
Watson v. Thompson, 12 R. I. 466, p. 2024.
Watson v. Thurber, 11 Mich. 457, p. 2194.
Watson v. Watson, 33 Beav. 574, p. 899, 908.
Watson v. Watson, 98 Iowa, 132, 67 N. W. 83, p. 829.
Watson v. Watson, (Tenn. Ch. App.) 57 S. W. 385, p. 353.
Watson v. Watson, 45 W. Va. 290, 31 S. E. 939, p. 340.
Watson v. Wells, 5 Conn. 468, p. 1098, 1157, 2503.
Watson v. Wilcox, 39 Wis. 643, 20 Am. Rep. 63, p. 1075.
Watson v. Wilson, 2 Dana, 406, 26 Am. Dec. 459, p. 1069, 1070, 1079.
Watson v. Young, 30 S. C. 144, 8 S. E. 706, p. 2040.
Watson Children's Aid Soc., Henry, v. Johnston, 58 Md. 139, p. 1971.
Watson Coal & M. Co. v. Casteel, 68 Ind. 476, p. 2729.
Watson's Ex'rs v. McLaren, 19 Wend. 557, p. 1231.
Watson's Interdiction, 31 La. Ann. 757, p. 2624.
Watt v. Conger, 13 Smedes & M. 412, p. 2799.
Watt v. Creyke, 3 Sm. & Giff. 362, p. 1656.
Watt v. Grove, 2 Schoales & L. 492, 501, 504, p. 1673, 1674, 1763, 1771.
Watt v. Mayor etc., 1 Sand. 23, p. 1233.
Watt v. Watt, 19 Ky. Law Rep. 25, 39 S. W. 48, p. 2005.
Watt v. Watt, 3 Ves. 244, p. 1468.
Watt v. White, 33 Tex. 421, p. 2521.
Watts v. Ball, 1 P. Wms. 108, Ames' Cas. on Trusts, 379, p. 1837, 1849.
Watts v. Brooks, 3 Ves. 612, p. 1711.
Watts v. Bullas, 1 P. Wms. 60, p. 1468.
Watts v. Corner, 8 Tex. Civ. App. 588, 27 S. W. 1087, p. 1328, 1330.

Watts v. Cummins, 59 Pa. St. 84, p. 1494, 1563, 1590, 1594.
Watts v. Hailswell, 4 Brown Ch. 507, p. 1386.
Watts v. Kellar, 56 Fed. 1, 5 C. C. A. 394, 12 U. S. App. 274, p. 2373, 2375.
Watts v. Sheppard, 2 Ala. 425, 445, p. 747.
Watts v. Symes, 1 De Gex, M. & G. 240, 244, 16 Sim. 640, p. 1407, 1411.
Watts v. Turner, 1 R. & M. 634, p. 2054.
Watts v. Vansant, (Md.) 58 Atl. 433, p. 664.
Watts v. Waddle, 1 McLean, 200, p. 520, 2633, 2771.
Watts v. Waddle, 6 Pet. 389, p. 2775.
Watts v. Watts, L. R. 17 Eq. 217, p. 2212.
Watt's Appeal, 78 Pa. St. 371, p. 1789.
Watt's Settlement, In re, 9 Hare, 106, p. 2106.
Waugh v. Blumenthal, 28 Mo. 462, p. 2740.
Waugh v. Land, Coop. 129, p. 2436.
Waughop v. Bartlett, 165 Ill. 124, 46 N. E. 124, p. 1099, 1129.
Way v. Lamb, 15 Iowa, 79, 83, p. 2709.
Wayland v. Crank's Ex'r, 79 Va. 602, 608, p. 1755, 2051.
Wayland v. Tucker, 4 Gratt. 267, 50 Am. Dec. 76, p. 2794.
Wayman v. Jones, 4 Md. Ch. 500, p. 2061, 2095, 2096.
Waymell v. Reed, 5 Term Rep. 599, p. 1720.
Wayne v. Fouts, 108 Tenn. 145, 65 S. W. 471, p. 2333.
Waynesburg College's Appeal, 111 Pa. St. 130, 3 Atl. 19, 56 Am. Rep. 252, p. 2238.
Wayt v. Carwithen, 21 W. Va. 516, p. 2475.
Way's Trust, In re, 2 De Gex, J. & S. 365, p. 1207, 1872, 1879.
Wead v. Gray, 78 Mo. 59, p. 1406.
Weakley v. Gurley's Adm'r, 60 Ala. 399, p. 2255.
Weakley v. Watkins, 7 Humph. 356, 357, p. 659, 667, 1708, 1716.
Weal v. Lower, 1 Eq. Cas. Abr. 266, p. 1461.
Weale v. Ollive, 17 Beav. 252, p. 1878.
Weale v. West Middlesex Water Co., 1 Jacobs & W. 358, 369, p. 226, 393, 396, 453.
Weall v. Rice, 2 Russ. & M. 251, 263, 267, 268, p. 868, 918, 930, 931, 933, 934, 945.
Weare v. Linnell, 29 Mich. 224, p. 2004, 2529.
Wearing v. Roberts, 32 Beav. 140, 142, p. 2322.
Weatherall v. Thornburg, L. R. 8 Ch. Div. 261, p. 1851.
Weatherby v. Slack, 16 N. J. Eq. 491, p. 2447.
Weathersly v. Weatherslay, 40 Mass. 462, 469, 90 Am. Dec. 344, p. 2373.
Weaver, In re, L. R. 21 Ch. Div. 615, p. 2622.
Weaver v. Barden, 49 N. Y. 286, p. 1323, 1327, 1336, 1385.
Weaver v. Brown, 87 Ala. 533, 6 South. 354, p. 2498, 2520.
Weaver v. Carpenter, 42 Iowa, 343, p. 1647.
Weaver v. Carter, 10 Leigh, 37, p. 1509.
Weaver v. Eureka Lake Co., 15 Cal. 271, p. 2686.
Weaver v. Fisher, 110 Ill. 146, p. 2032, 2052.
Weaver v. Leiman, 52 Md. 708, p. 1989.
Weaver v. Lynch, 25 Pa. St. 449, 64 Am. Dec. 713, p. 1232.
Weaver v. McCorkle, 14 Serg. & R. 304, p. 1229.
Weaver v. Shryock, 6 Serg. & R. 262, 264, 265, p. 682, 684, 2608.
Weaver v. Spurr, (W. Va.) 48 S. E. 852, p. 1972.
Weaver v. Toogood, 1 Barb. 268, p. 2447.
Weaver v. Weaver, 182 Ill. 287, 74 Am. St. Rep. 173, 55 N. E. 338, p. 1865.
Webb, Estate of, 49 Cal. 541, 545, p. 619, 634, 2769.
Webb, In re, [1894] 1 Ch. 73, p. 2098.
Webb, In re, 2 Phill. Ch. 10, p. 2622, 2623.
Webb v. Austin, 22 Ky. Law Rep. 764, 58 S. W. 808, p. 1101, 1116, 1117.
Webb v. Bailey, 41 W. Va. 463, 23 S. E. 644, p. 1335.

Webb v. Branner, 59 Kan. 190, 52 Pac. 429, p. 1774, 1775.
Webb v. Claverden, 2 Atk. 424, p. 1635.
Webb v. Donaldson, 60 Mo. 394, p. 2750.
Webb v. Earl of Shaftsbury, 7 Ves. 480, p. 784, 2098.
Webb v. Evans, 1 Binn. 565, 572, p. 820.
Webb v. Foley, 20 Ky. Law Rep. 1207, 49 S. W. 40, p. 1995, 2005, 2018.
Webb v. Gay, 74 N. C. 447, p. 2196.
Webb v. Grace, 2 Phill. Ch. 701, p. 1684.
Webb v. Hammond, 31 Ind. App. 613, 68 N. E. 916, p. 1541.
Webb v. Hayden, 166 Mo. 39, 65 S. W. 760, p. 1824.
Webb v. Hoselton, 4 Nebr. 308, 19 Am. Rep. 638, p. 1860, 2195, 2360.
Webb v. John Hancock Mut. Life Ins. Co., (Ind.) 69 N. E. 470, p. 1446.
Webb v. Jonas, 39 Ch. Div. 660, p. 2073.
Webb v. Kirby, 7 De Gex, M. & G. 376, p. 1539.
Webb v. Meloy, 32 Wis. 319, p. 1403.
Webb v. Parks, 110 Ga. 639, 36 S. E. 70, p. 379.
Webb v. Portland Mfg. Co., 3 Sum. 189, p. 382, 451.
Webb v. Ridgely, 38 Md. 364, p. 2677.
Webb v. Robinson, 14 Ga. 216, p. 2518, 2519.
Webb v. Roff, 9 Ohio St. 430, p. 1804.
Webb v. Rorke, 2 Schoales & L. 661, 673, p. 2372.
Webb v. Smith, 30 Ch. Div. 192, p. 2561.
Webb v. Wools, 2 Sim., N. S., 267, p. 1925.
Webber v. Gage, 39 N. H. 182, p. 529, 530.
Webber v. Ramsey, 100 Mich. 58, 58 N. W. 625, 43 Am. St. Rep. 429, p. 2399.
Webber v. Stanley, 16 Com. B., N. S., 698, p. 1548.
Webber v. Taylor, 2 Jones Eq. 9, p. 1019, 1021, 1036.
Webber v. Webber, 1 Sim. & St. 311, p. 2205.
Webb's Estate, 49 Cal. 541, 545, p. 1871, 1877, 1907, 2590.
Weber v. Bryant, 161 Mass. 400, 37 N. E. 203, p. 1956, 1957, 1979.
Weber v. Bullock, 19 Colo. 214, 35 Pac. 183, p. 1221.
Weber v. Clark, 136 Ill. 256, 26 N. E. 360, p. 1154.
Weber v. Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162, p. 1356, 1390, 1391, 1392.
Weber v. Tschetter, 1 S. Dak. 205, 46 N. W. 201, p. 1230.
Weber v. Weatherby, 34 Md. 656, p. 1436.
Weber v. Weber, 58 How. Pr. 255, p. 1837, 1912.
Weber v. Weitling, 18 N. J. Eq. 441, p. 1665.
Weber v. Zeimet, 30 Wis. 283, p. 2410.
Webster v. Bond, 9 Hun, 437, p. 2714, 2715.
Webster v. Bush, 19 Ky. Law Rep. 565, 39 S. W. 411, 42 S. W. 1124, p. 2055.
Webster v. Cecil, 30 Beav. 62, p. 1517, 1518, 1519, 1520.
Webster v. Clark, 25 Me. 313, 315, p. 551, 552, 2790.
Webster v. Cook, L. R. 2 Ch. 542, 546, p. 1742.
Webster v. Fleming, 178 Ill. 140, 52 N. E. 975, affirming 73 Ill. App. 234, p. 2413.
Webster v. Hale, 8 Ves. 410, p. 2209.
Webster v. Harris, 16 Ohio, 490, p. 1523.
Webster v. Helm, 93 Tenn. 322, 24 S. W. 488, p. 2148, 2154, 2155, 2186, 2198.
Webster v. Hildreth, 33 Vt. 457, 78 Am. Dec. 632, p. 2199.
Webster v. King, 36 Cal. 348, p. 2032.
Webster v. McCollough, 61 Iowa, 496, 16 N. W. 578, p. 2500.
Webster v. McDaniel, 2 Del. Ch. 297, p. 2642.
Webster v. Maddox, 6 Me. (6 Greenl.) 256, p. 1032, 1044, 1146.
Webster v. Metford, 2 Eq. Cas. Abr. 363, p. 782.
Webster v. Morris, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353, p. 1944, 1947, 1953, 1957, 1970.
Webster v. Pawson, Dick. 540, p. 298.
Webster v. Pierce, 108 Wis. 407, 83 N. W. 938, p. 1081, 1088.

Webster v. Reid, 11 How. 437, p. 1651.
Webster v. Skipworth, 26 Miss. 341, p. 2708.
Webster v. Southey, 36 Ch. Div. 9, p. 1942.
Webster v. Sughrow, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100, p. 1934, 1938, 1975.
Webster v. Town of Harwinton, 32 Conn. 131, 140, p. 407, 408.
Webster v. Van Steenbergh, 46 Barb. 211, p. 1111, 1323, 1336, 1346, 1364.
Webster v. Webster, 31 Beav. 393, p. 1211.
Webster v. Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510, p. 1944, 1947, 1948, 1960, 1980.
Weck v. Tabler, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837, p. 1997.
Wedderburn v. Wedderburn, 4 Mylne & C. 41, 2 Keen, 722, 728, p. 182, 1775, 1784, 1785, 2032, 2096.
Wedderburn's Trusts, In re, L. R. 9 Ch. Div. 112, p. 2070, 2073.
Wedge v. Moore, 6 Cush. 8, p. 1409.
Weed v. Case, 55 Barb. 534, p. 1584.
Weed v. Pierce, 9 Cow. 722, p. 1079.
Weed v. Small, 7 Paige, 573, p. 2801.
Weed v. Weed, 94 N. Y. 243, p. 2300.
Weeding v. Weeding, 1 Johns. & H. 424, p. 2314.
Weedon v. American Bonding & Trust Co., 38 S. E. 255, 128 N. C. 69, p. 729, 733, 740.
Weed Sewing Machine Co. v. Emerson, 115 Mass. 554, p. 1410, 2404.
Weed Sewing Machine Co. v. Wicks, 3 Dill. 265, Fed. Cas. No. 17,348, p. 496.
Weehawken F. Co. v. Sisson, 17 N. J. Eq. 475, p. 1884, 1886.
Weekes v. Slake, 2 Vern. 301, p. 362.
Weekes' Settlement, In re, [1897] 1 Ch. 289, p. 1890.
Weeks v. Downing, 30 Mich. 4, p. 1762.
Weeks v. Hobson, 150 Mass. 377, 23 N. E. 215, 6 L. R. A. 147, p. 1979.
Weeks v. Patten, 18 Me. 42, 36 Am. Dec. 696, p. 787, 812, 815, 820.
Weeks v. Robie, 42 N. H. 316, p. 1647.
Weeks v. Sego, 9 Ga. 199, p. 2158.
Weeks v. Staker, 2 Vern. 301, p. 455.
Weeks v. Tomes, 16 Hun, 349, p. 1067, 1088.
Weeks v. Weeks, 5 Ired. Eq. 111, 47 Am. Dec. 358, p. 2744.
Weeks v. Weeks, 77 N. C. 421, p. 785.
Weems v. George, 13 How. (U. S.) 190, 14 L. ed. 108, p. 2408.
Weems v. Lathrop, 42 Tex. 207, p. 2662.
Weetjen v. Vibbard, 5 Hun, 265, p. 2090.
Wehm v. Fall, 55 Nebr. 547, 70 Am. St. Rep. 397, 76 N. W. 13, p. 1102.
Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 132, p. 385, 503.
Weide v. Gehl, 21 Minn. 449, p. 2376, 2381.
Weidenfeld v. Allegheny & K. R. Co., 47 Fed. 11, p. 2128.
Weider v. Maddox, 66 Tex. 372, 59 Am. Rep. 617, p. 1856.
Weidner v. Thompson, 69 Iowa, 36, 28 N. W. 422, p. 1404.
Weigel v. Walsh, 45 Mo. 560, p. 308, 2694.
Weil v. Casey, 125 N. C. 356, 34 S. E. 506, 74 Am. St. Rep. 644, p. 1281.
Weil v. Lankins, 3 Nebr. 384, p. 2791.
Weil v. Reiss, 167 Mo. 125, 66 S. W. 946, p. 1161.
Weimer v. Lowery, 11 Cal. 104, p. 2686.
Weinberg v. Rempe, 15 W. Va. 829, p. 2199.
Weinstein v. National Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23, p. 1437, 1445.
Weir v. Barnett, L. R. 3 Ex. Div. 32, L. R. 3 Ex. Div. 238, p. 1574.
Weir v. Mundell, 3 Brewst. 594, p. 560, 2764.
Weire v. Davenport, 11 Iowa, 49, 52, 77 Am. Dec. 132, p. 2552.
Weisberger v. Wisner, 55 Mich. 246, 21 N. W. 331, p. 1023, 1026.
Weise v. Anderson, (Mich.) 96 N. W. 575, p. 2380.
Weise's Appeal, 72 Pa. St. 351, 354, p. 662, 2767, 2771.
Weiss v. Herlihy, 49 N. Y. Supp. 81, 23 App. Div. 608, p. 669.
Weiss v. Levy, 166 Mass. 290, 44 N. E. 225, p. 213.
Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731, p. 1161, 1163, 1166, 1176.

Welby v. Duke of Rutland, 6 Brown Parl. C. 575, p. 212.
Welby v. Thornagh, Prec. Ch. 123, p. 1635.
Welby v. Welby, 2 Ves. & B. 190, 191, 199, p. 782, 787, 794, 857.
Welch, In re, 3 Mylne & C. 292, p. 2109.
Welch v. Adams, 152 Mass. 74, 81, 25 N. E. 34, 9 L. R. A. 244, p. 2274.
Welch v. Beers, 8 Allen, 151, p. 2411.
Welch v. Gould, 2 Root, 287, p. 1098.
Welch v. Henshaw, 170 Mass. 409, 64 Am. St. Rep. 309, 49 N. E. 659, p. 1868, 1911.
Welch v. Ketchum, 48 Minn. 241, 51 N. W. 113, p. 1097.
Welch v. McGrath, 59 Iowa, 519, 528, 529, 10 N. W. 810, 13 N. W. 639, p. 1755.
Welch v. Priest, 8 Allen, 165, p. 1344.
Welch v. Smith, 65 Miss. 394, 4 South. 340, p. 1460.
Welch v. Stearns, 69 Me. 192, p. 2434.
Welch v. Thorn, 16 La. 188, 196, p. 568, 588.
Welch's Appeal, 28 Pa. St. 363, p. 2219.
Weld v. Lancaster, 56 Me. 453, p. 1692.
Weld v. Rees, 48 Ill. 428, p. 1665.
Weld v. Sabin, 20 N. H. 533, 51 Am. Dec. 240, p. 1402, 2434.
Weldon v. Superior Court, 138 Cal. 427, 71 Pac. 502, p. 122.
Welland v. Huber, 8 Nev. 203, p. 958.
Welland Canal Co. v. Hathaway, 8 Wend. 480, 483, 24 Am. Dec. 51, p. 1427.
Wellbeloved v. Jones, 1 Sim. & St. 40, p. 1960.
Wellborn v. Williams, 9 Ga. 861, 52 Am. Dec. 427, p. 2519.
Wellemin v. Dunn, 93 Ill. 511, p. 1728.
Weller v. City of St. Paul, 5 Minn. 95, p. 2756.
Weller v. Jersey City, H. & P. St. R'y Co., (N. J. Eq.) 57 Atl. 730, p. 2548, 2551, 2552, 2553.
Weller v. Smeaton, 1 Cox, 102, 1 Brown Ch. 573, p. 364, 385, 452.
Welles v. Castles, 3 Gray, 323, p. 1850.
Welles v. Middleton, 1 Cox, 112, 125, p. 1769, 1772.
Welles v. Rhodes, 59 Conn. 498, 22 Atl. 286, p. 263.
Welles v. Yates, 44 N. Y. 525, p. 231, 355, 1524, 1541.
Wellesley v. Duke of Beaufort, 2 Russ. 1, 21, 22, p. 2612, 2613, 2616.
Wellesley v. Mornington, 2 Kay & J. 143, p. 1657.
Wellesley v. Wellesley, 2 Bligh, N. S., 124, 129, 136, 142, p. 2612, 2613, 2616.
Wellesley v. Wellesley, 4 Mylne & C. 561, 579, 581, p. 191, 700, 952, 2471, 2472.
Wellesley v. Wellesley, 6 Sim. 497, p. 2682.
Wellesley v. Wellesley, 10 Sim. 256, p. 1680.
Wellford v. Chancellor, 5 Gratt. 39, p. 1764.
Welling v. Ryerson, 94 N. Y. 98, p. 2446.
Wells v. American Mortgage Co., 109 Ala. 430, 20 South. 136, p. 1037, 1065.
Wells v. Archer, 10 Serg. & R. 412, 13 Am. Dec. 682, p. 1218, 1382.
Wells v. Barnett, 7 Tex. 584, 586, 587, p. 571, 589.
Wells v. Beall, 2 Gill & J. 458, p. 2134.
Wells v. Benton, 108 Ind. 585, p. 1268, 1272.
Wells v. Caywood, 3 Colo. 487, p. 2200.
Wells v. City of Buffalo, 80 N. Y. 253, p. 2728, 2755, 2757.
Wells v. Cooper, 6 Ves. 139, p. 2798.
Wells v. Cruger, 5 Paige, 164, p. 1520.
Wells v. Dayton, 11 Nev. 161, p. 2678.
Wells v. Doane, 3 Gray, 201, p. 1979.
Wells v. Francis, 7 Colo. 336, 396, 4 Pac. 49, 56, p. 638, 642, 650, 2533.
Wells v. Goodbread, 1 Ired. Eq. 9, p. 570.
Wells v. Harter, 56 Cal. 342, p. 2499, 2513.
Wells v. Heath, 10 Gray, 17, p. 1979.
Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584, p. 1051.
Wells v. McCall, 64 Pa. St. 207, p. 1847, 2154, 2159.
Wells v. Miller, 66 N. Y. 255, p. 2794.
Wells v. Millet, 23 Wis. 64, p. 1570, 1603.
Wells v. Morrow, 38 Ala. 125, p. 1202, 1314, 1348, 2520.
Wells v. Neff, 14 Oreg. 66, 12 Pac. 84, 88, p. 1502.

Wells v. Pierce, 27 N. H. 503, 511–514, p. 228, 229, 460, 462, 522, 524, 527, 528, 529, 1386, 1388, 2280.
Wells v. Pressey, 105 Mo. 164, 16 S. W. 670, p. 1101.
Wells v. Robinson, 13 Cal. 133, 140, 141, p. 2029.
Wells v. Smith, 2 Edw. Ch. 78, 7 Paige, 22, 24, 31 Am. Dec. 274, p. 761, 2776, 2777, 2779.
Wells v. Smith, 13 Gray, 207, 74 Am. Dec. 631, p. 1712.
Wells v. Smith, 44 Miss. 296, p. 2276, 2530.
Wells v. Somers, 4 Ill. App. 297, p. 2381.
Wells v. Stewart, 3 Barb. 40, p. 1233.
Wells v. Town of Salina, 71 Hun, 559, 25 N. Y. Supp. 134, p. 2605.
Wells v. Treadwell, 28 Miss. 717, p. 1806.
Wells v. Tucker, 3 Binn. 366, p. 2233.
Wells v. Van Dyke, 109 Pa. St. 330, p. 2352.
Wells v. Waterhouse, 22 Me. 131, p. 1603.
Wells v. Wells, 88 N. Y. 323, p. 2306.
Wells, Fargo & Co. v. Miner, 25 Fed. 533, p. 500.
Wells, Fargo & Co. v. Wall, 1 Oreg. 295, p. 563, 571.
Wellsford v. Durst, 8 Kan. App. 231, 55 Pac. 493, p. 1067, 1087.
Wells-Stone Mercantile Co. v. Aultman, Miller & Co., 9 N. Dak. 520, 84 N. W. 375, p. 2067.
Welman v. Welman, L. R. 15 Ch. Div. 570, p. 2727.
Welsh v. Bayaud, 21 N. J. Eq. 186, p. 2780.
Welsh v. Crater, 32 N. J. Eq. 177, p. 2315.
Welsh v. Freeman, 21 Ohio St. 402, p. 2743.
Welsh v. German-American Bank, 73 N. Y. 424, 29 Am. Rep. 175, p. 1176.
Welsh v. Phillips, 54 Ala. 309, 25 Am. Rep. 679, p. 1395, 1396, 1398, 2345.
Welsh v. Usher, 2 Hill Eq. 167, 170, 29 Am. Dec. 63, p. 2475, 2540.
Welton v. Tizzard, 15 Iowa, 495, p. 1270, 1272.
Wemyss v. White, 159 Mass. 484, 34 N. E. 718, p. 1844.
Wendell v. New Hampshire Bank, 9 N. H. 404, 416, p. 525.
Wendell v. Van Rensselaer, 1 Johns. Ch. 344, 354, p. 1194, 1195, 1294, 1386, 1434, 1770.
Wendhill Local Board v. Vint, 45 Ch. Div. 351, p. 670.
Wendler v. Lambeth, 163 Mo. 428, 63 S. W. 684, p. 1281.
Wentworth v. Cox, 6 Madd. 363, p. 790.
Wentworth v. Lloyd, 32 Beav. 467, p. 1762.
Wentworth v. Wentworth, 2 Minn. 277, 72 Am. Dec. 97, p. 2004.
Wentz's Appeal, 126 Pa. St. 541, 17 Atl. 875, p. 2320.
Wenzel v. Powder, (Md.) 59 Atl. 194, p. 1844.
Wenzel v. Shulz, 78 Cal. 221, 20 Pac. 404, p. 1590, 1597, 1598.
Werner v. Litzinger, 45 Mo. App. 106, p. 982.
Wert v. Naylor, 93 Ind. 431, p. 1328, 1329.
Wertheimer v. Thomas, 168 Pa. St. 168, 31 Atl. 1096, 47 Am. St. Rep. 882, p. 1860.
Wertz's Appeal, 69 Pa. St. 173, p. 2494.
Wesco's Appeal, 52 Pa. St. 195, p. 872.
Weskett v. Raby, 2 Brown Parl. C. 386, p. 882.
Wesley v. Thomas, 6 Har. & J. 24, p. 1523, 1659.
Wesley Church v. Moore, 10 Pa. St. 273, 278–282, p. 229, 461, 467, 560, 2793.
Wessell v. Rathjohn, 89 N. C. 377, 45 Am. Rep. 696, p. 1779.
Wessen v. Washburn Iron Co., 13 Allen, 95, 90 Am. Dec. 181, p. 2684.
West, In re, [1900] 1 Ch. 84, p. 1987.
West v. Beanes, 3 Har. & J. 568, p. 229, 461, 465.
West v. Camden, 135 U. S. 507, 10 Sup. Ct. 838, p. 1697.
West v. Cavino, 74 Ind. 265, p. 2232, 2238, 2248.
West v. Jones, 1 Sim., N. S., 205, 207, 208, p. 1388, 1566, 1569, 1581.
West v. Lawday, 11 H. L. Cas. 375, p. 1548.
West v. Loeb, 16 Tex. Civ. App. 399, 42 S. W. 612, p. 1276.

West v. Lord Sackville, [1903] 2 Ch. 378, p. 296.
West v. Mayor etc. of New York, 10 Paige, 539, p. 162, 226, 388, 389, 390, 425, 452, 2704.
West v. Miller, 125 Ind. 70, 25 N. E. 143, p. 2402.
West v. Norwich Union Fire Ins. Co., 10 Utah, 442, 37 Pac. 685, p. 1159.
West v. Ray, Kay, 385, p. 1654.
West v. Shuttleworth, 2 Mylne & K. 684, p. 1937.
West v. Skip, 1 Ves. Sr. 239, 456, p. 2011, 2484.
West v. Smith. 52 Cal. 322, p. 2695.
West v. West's Ex'rs, 3 Rand. 373, 378, p. 2144.
West v. Williams, [1899] 1 Ch. 132, 68 Law J. Ch. 127, 79 Law T., N. S., 575, 47 Wkly. Rep. 308, p. 2386.
West v. Wythes, [1893] 2 Ch. 369, p. 1852.
Westbrook v. Gleason, 79 N. Y. 23, 28, 30, 31, 36, p. 1095, 1147, 1299, 1302, 1303, 1305, 1323, 1324, 1326, 1336, 1374.
Westbrook v. Harbeson, 2 McCord Eq. 112, p. 1507, 1532.
Westbury v. Simmons, 57 S. C. 477, 35 S. E. 764, p. 1226.
Westby v. Westby, 2 Dru. & War. 502, p. 1501, 1502.
West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622, p. 1221.
Westcott v. Edmunds, 68 Pa. St. 34, p. 1831.
West Cumberland etc. Co. v. Kenyen, L. R. 11 Ch. Div. 782, 6 Ch. Div. 773, p. 2686.
Westerfelt v. Adams, 131 N. C. 379, 42 S. E. 823, p. 231.
Westerfield, In re, 32 App. Div. 324, 53 N. Y. Supp. 25, p. 2077.
Westerlo v. De Witt, 35 Barb. 215, p. 2233, 2234.
Westerlo v. De Witt, 36 N. Y. 340, 93 Am. Dec. 517, p. 2236.
Westerman v. Evans, 1 Kan. App. 1, 41 Pac. 675, p. 1169.
Westerman v. Westerman, 25 Ohio St. 500, p. 2197.
Western v. Mac Dermot, L. R. 1 Eq. 499, 505, 2 Ch. 72, 75, p. 1199, 1450, 2673.
Western Assur. Co. v. Ward, 75 Fed. 338, (C. C. A.) 41 U. S. A. 443, p. 1541.
Western Bank v. Douglas, 11 Sec. Cas. S., 3rd series, 112, p. 2063.
Western Bank v. Sherwood, 29 Barb. 383, p. 1225, 1228, 1229.
Western Bank of Scotland v. Addie, L. R. 1 H. L. S. 145, p. 1566, 1569, 1605, 1625.
Western Min. & Mfg. Co. v. Peytona C. Coal Co., 8 W. Va. 406, p. 1149.
Western Mortg. & Inv. Co. v. Ganzer, 63 Fed. 647, 11 C. C. A. 371, 23 U. S. App. 608, p. 1176, 2425.
Western Nat. Bank v. Maverick Nat. Bank, 90 Ga. 339, 16 S. E. 942, 35 Am. St. Rep. 210, p. 1225, 1236, 1257, 1258.
Western R. R. v. Babcock, 6 Met. 346, p. 1476, 1510, 1518, 1539, 1666.
Western R. R. v. Bayne, 75 N. Y. 1, p. 2729, 2730.
Western Union Tel. Co. v. Ann Arbor R. Co., 33 C. C. A. 113, 90 Fed. 379, p. 2359.
Western U. T. Co. v. Atlantic etc. T. Co., 7 Biss. 367, Fed. Cas. No. 17,445, p. 1700.
Western U. T. Co. v. Chicago etc. R. R., 86 Ill. 246, 29 Am. Rep. 28, p. 1700.
Western Union Tel Co. v. Davenport, 97 U. S. 369, p. 543, 1253, 1382, 2784.
Western Union Tel. Co. v. Norman, 77 Fed. 13, 21, p. 415, 456.
Western Union Tel. Co. v. Poe, 61 Fed. 449, 453, p. 418, 456.
Western U. Tel. Co. v. St. Jo etc. R'y, 1 McCrary, 558, 2675.
Western U. Tel. Co. v. Union Pac. R'y, 1 McCrary, 558, 2675.
Western U. Tel. Co. v. Western etc. R. R., 8 Baxt. 54, p. 2633, 2667, 2675.
Western Wheeled Scraper Co. v. Stickleman, (Iowa) 98 N. W. 139, p. 1542.
Western Wooden-Ware Ass'n v. Starkey, 84 Mich. 76, 47 N. W. 604, 22 Am. St. Rep. 686, 11 L. R. A. 503, p. 1689.
Westervelt v. Haff, 2 Sand. Ch. 98, p. 1152.

Westervelt v. Hagge, 61 Nebr. 647, 85 N. W. 852, 54 L. R. A. 333, p. 1268.
Westervelt v. Matheson, 1 Hoff. Ch. 37, p. 1666.
Westervelt v. Wyckoff, 32 N. J. Eq. 188, p. 1051, 1056.
Westfield Bank v. Cormen, 37 N. Y. 320, 93 Am. Dec. 573, p. 1177.
Westinghouse v. German Nat. Bank, 196 Pa. St. 249, 46 Atl. 380, p. 1244.
Westlake v. Dunn, (Mass.) 68 N. E. 212, p. 1639.
Westoby v. Day, 2 El. & B. 605, 624, p. 157, 2549.
West of Eng., etc., Bank v. Nickolls, L. R. 6 Ch. Div. 613, p. 283.
Weston, In re, [1902] 1 Ch. 680, p. 2237.
Weston v. Bear River etc. Co., 5 Cal. 186, 63 Am. Dec. 117, 6 Cal. 425, 429, p. 1221, 1253.
Weston v. Hight, 17 Me. 287, 290, 35 Am. Dec. 250, p. 2233.
Weston v. Johnson, 48 Ind. 1, p. 892, 896, 909.
Weston v. Wilson, 31 N. J. Eq. 51, p. 1541, 2726.
Westphal v. City of New York, 177 N. Y. 140, 69 N. E. 369, p. 343.
West Point Iron Co. v. Reymert, 45 N. Y. 703, p. 2694.
West Seattle Land & Imp. Co. v. Novelty Mill Co., 31 Wash. 435, 72 Pac. 69, p. 1452.
West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527, p. 1689, 2596.
Wetherbee v. Chase, 57 Vt. 347, p. 2291.
Wetherbee v. Dunn, 36 Cal. 249, p. 1472, 2737.
Wetherby v. Dixon, 19 Ves. 406, 407, 411, 412, p. 898, 900, 910.
Wethered v. Wethered, 2 Sim. 183, p. 1679, 1745.
Wetherell v. Johnson, (Ill.) 70 N. E. 229, p. 1756.
Wetherell v. O'Brien, 140 Ill. 146, 33 Am. St. Rep. 221, 29 N. E. 904, p. 2022, 2043.
Wetherell v. Thirty-first St. B. & L. Ass'n, 153 Ill. 361, 39 N. E. 143, p. 1331.
Wetherell v. Wilson, 1 Keen, 80, p. 1921.
Wetmore v. Parker, 52 N. Y. 450, p. 1936.
Wetmore v. Porter, 92 N. Y. 76, 77, p. 1198, 1717, 2016, 2017, 2018, 2067.
Wetmore v. San Francisco, 44 Cal. 294, p. 2553.
Wetmore v. Scovell, 3 Edw. Ch. 515, 529, p. 2689.
Wetmore v. Truslow, 51 N. Y. 338, 339, p. 1845, 2110.
Wetmore v. Zabriskie, 29 N. J. Eq. 62, p. 2743.
Wettlaufer v. Ames, (Mich.) 94 N. W. 950, p. 1398.
Wetzstein v. Largey, 27 Mont. 212, 70 Pac. 717, p. 1338.
Wevins v. Dunlap, 33 N. Y. 676, p. 1516.
Whaley v. Dawson, 2 Schoales & L. 367, 370, p. 226, 379, 395, 428, 2738.
Whaley v. Norton, 1 Vern. 482, p. 667.
Whaley v. Whaley, 71 Ala. 159, p. 1995.
Whall v. Converse, 146 Mass. 345, 15 N. E. 660, p. 2055.
Whalley v. Whalley, 3 Bligh, 1, 13, p. 1673.
Whalley v. Whalley, 2 De Gex, F. & J. 310, p. 1788.
Whalley v. Whalley, 1 Mer. 436, p. 1669.
Wharton, In re, 5 De Gex, M. & G. 33, p. 2320, 2331, 2622.
Wharton v. May, 5 Ves. 27, 68, p. 1743, 1745.
Wharton v. Morris, 1 Dall. 124, 125, p. 558, 559.
Wharton v. Stoutenburgh, 35 N. J. Eq. 266, p. 2774, 2780.
Wharton v. Wharton, 1 Sim. & St. 235, p. 284.
Whatley v. Barker, 79 Ga. 790, 4 S. E. 387, p. 1705.
Whatman v. Gibson, 9 Sim. 196, p. 1199.
Wheadon v. Olds, 20 Wend. 174, p. 1477.
Wheatley, In re, L. R. 27 Ch. Div. 606, p. 845.
Wheatley v. Purr, 1 Keen, 551, p. 1872, 1879.
Wheatley v. Strobe, 12 Cal. 92, 98, 73 Am. Dec. 522, p. 195, 304, 2562.

Wheaton v. Dyer, 15 Conn. 307, 310, p. 1098, 1144, 1349.
Wheaton v. Wheaton, 9 Conn. 96, p. 1486.
Wheeler v. Addison, 54 Md. 41, p. 2442.
Wheeler v. Bingham, 3 Atk. 364, 367, p. 1682, 1683.
Wheeler v. Conn. Mutual L. Ins. Co., 82 N. Y. 543, 559, 37 Am. Rep. 594, p. 1466.
Wheeler v. Howell, 3 Kay & J. 198, p. 2489, 2490.
Wheeler v. Kidder, 105 Pa. St. 270, p. 1997.
Wheeler v. Kirtland, 23 N. J. Eq. 13, p. 1550, 2726.
Wheeler v. Kirtland, 24 N. J. Eq. 552, p. 1264, 1270, 1271, 1327.
Wheeler v. Love, 21 Tex. 583, p. 2502.
Wheeler v. Newbould, 16 N. Y. 392, p. 2464.
Wheeler v. Perry, 18 N. H. 307, 311, p. 529, 2280.
Wheeler v. Philadelphia, 77 Pa. St. 338, 344, p. 560.
Wheeler v. Randall, 48 Ill. 182, p. 1584.
Wheeler v. Reynolds, 66 N. Y. 227, p. 2039, 2040.
Wheeler v. Sage, 1 Wall. 518, p. 664, 1782.
Wheeler v. Smith, 1 Giff. 300, p. 1921, 2000.
Wheeler v. Smith, 9 How. 55, 77, 79, p. 1478, 1494, 1910, 1967, 1978.
Wheeler v. Willard, 44 Vt. 640, p. 1411, 1771, 2424, 2440.
Wheeler v. Young, (Conn.) 55 Atl. 670, p. 1098, 1134, 1363.
Wheeling etc. R. R. Co. v. Gourley, 99 Pa. St. 171, p. 559.
Wheelock v. American Tract Soc., 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578, p. 1952, 1970.
Wheelock v. Lee, 64 N. Y. 242, p. 2552.
Wheelock v. Town of Hardwick, 48 Vt. 19, p. 1444.
Wheelwright v. De Peyster, 4 Edw. Ch. 232, p. 2454.
Whelan v. Reilly, 61 Mo. 565, p. 725, 1466.
Whelan v. Reilly, 3 W. Va. 597, p. 1920, 2055.
Whelan v. Whelan, 3 Cow. 537, p. 1673, 1729, 1730, 1779.
Wheldale v. Partridge, 5 Ves. 388, 396, 8 Ves. 226, 227, 235, 236, p. 185, 620, 1853, 2313, 2332, 2334.
Whelen's Appeal, 70 Pa. St. 410, 425, p. 1494, 1500.
Whelpley v. Erie R'y, 6 Blatchf. 271, p. 2653, 2660.
Whetsel v. Roberts, 31 Ohio St. 503, p. 2502, 2516.
Whetstone v. McQueen, 137 Ala. 301, 34 South. 229, p. 352, 2430.
Whetstone v. Whetstone's Ex'rs, 75 Ala. 495, 506, p. 2624.
Whichcote v. Lawrence, 3 Ves. 740, p. 1755.
Whichcote v. Lyle's Ex'r, 28 Pa. St. 73, p. 1831.
Whicker v. Hume, 14 Beav. 509, 1 De Gex, M. & G. 506, 7 H. L. Cas. 124, p. 1933, 1945.
Whicker v. Hushaw, 159 Ind. 1, 64 N. E. 460, p. 2404.
Whilden v. Whilden, Riley Ch. 205, p. 832.
Whillock v. Grisham, 3 Sneed, 237, p. 2756.
Whipple v. Adams, 1 Met. 444, p. 1926.
Whipple v. Farrar, 3 Mich. 436, 64 Am. Dec. 99, p. 353.
Whipple v. Giles, 55 N. H. 139, p. 2195.
Whipple v. Guile, 22 R. I. 576, 84 Am. St. Rep. 855, 48 Atl. 935, p. 399, 453.
Whipple v. Village of Fair Haven, 63 Vt. 221, 21 Atl. 533, p. 340.
Whistler v. Webster. 2 Ves. 367, 370, 372, p. 775, 782, 787, 794, 804, 857.
Whistler v. Whistler, 2 Ves. 367, 371, p. 848.
Whitaker v. Bond, 63 N. C. 290, p. 1670.
Whitaker v. Hall, 1 Glyn & J. 213, p. 638, 643.
Whitaker v. Whitaker, 52 N. Y. 368, 11 Am. Rep. 711, p. 2238.
Whitaker v. Williams, 20 Conn. 98, p. 1437.
Whitbread, Ex parte, 2 Mer. 99, 102, p. 2622.
Whitbread, Ex parte, 19 Ves. 209, p. 2538.
Whitbread v. Boulnois, 1 Younge & C. 303, p. 1004, 1008.
Whitbread v. Jordan, 1 Younge & C. 303, p. 192, 1001, 1045, 1292, 2538.

Whitbread & Co., Lim. v. Watt, [1902] 1 Ch. 835, affirming [1901] 1 Ch. 911, p. 2536.
Whitcher v. Webb, 44 Cal. 127, p. 725.
Whitchurch v. Bevis, 2 Brown Ch. 559, 565, p. 1659.
Whitcomb, In re, 86 Cal. 265, 24 Pac. 1028, p. 1929.
Whitcomb v. Cardell, 45 Vt. 24, p. 1912.
Whitcomb v. Minchin, 5 Madd. 91, p. 1756.
White, In re, [1901] 1 Ch. 570, p. 2054.
White, In re, [1893] 2 Ch. 41, p. 1940, 1950.
White, In re, [1898] 2 Ch. 217, p. 2098.
White, In re, L. R. 5 Ch. 698, p. 2109.
White, In re, 84 L. T. 594, 50 Wkly. Rep. 81, p. 730.
White v. Aherns, L. R. 26 Ch. Div. 717, p. 276.
White v. Arlith, 1 Bond, 319, p. 729, 730.
White v. Ashton, 51 N. Y. 280, p. 1436.
White v. Attorney-General, 4 Ired. Eq. 19, 44 Am. Dec. 92, p. 1971.
White v. Birch, 36 L. J. Ch. 174, p. 1547.
White v. Blakemore, 8 Lea (Tenn.) 49, p. 2530, 2534.
White v. Briggs, 2 Phill. Ch. 583, p. 1909, 1924, 1929.
White v. Buloid, 2 Paige, 164, p. 261.
White v. Buss, 3 Cush. 448, p. 1720.
White v. Carpenter, 2 Paige, 217, 252, 266, p. 1060, 1064, 1269.
White v. Casenave's Heirs, 1 Har. & J. 106, p. 2500.
White v. Cole, 9 Tex. Civ. App. 277, 29 S. W. 1148, p. 2524, 2533.
White v. Coleman, 127 Mass. 34, p. 2566.
White v. Coleman, 130 Mass. 316, p. 2567, 2584.
White v. Crew, 16 Ga. 416, 420, p. 664.
White v. Cuddon, 8 Clark & F. 766, p. 2770.
White v. Cuthbert, 41 N. Y. Supp. 818, 10 App. Div. 220, p. 664.
White v. Daly, (N. J. Eq.) 58 Atl. 929, p. 1738.
White v. Damon, 7 Ves. 30, p. 1666.
White v. Denman, 1 Ohio St. 110, 112, 114, 1114, 1140, 1267, 1272.
White v. Ditson, 140 Mass. 351, 4 N. E. 606, 54 Am. Rep. 273, p. 1956, 1978.
White v. Dobson, 17 Gratt. 262, p. 2776, 2779.
White v. Downs, 40 Tex. 225, 226, p. 192, 2502, 2521, 2522, 2524.
White v. Drew, 42 Mo. 561, p. 701, 958, 2024.
White v. Equitable Nuptial Benefit Union, 76 Ala. 251, 52 Am. Rep. 325, p. 1678, 1712, 1717.
White v. Fisk, 22 Conn. 31, p. 1954, 1972.
White v. Fitzgerald, 19 Wis. 480, p. 1896.
White v. Foster, 102 Mass. 375, 380, p. 987, 1050, 1055, 1142, 1146, 1358.
White v. Frank, 91 Tex. 70, 40 S. W. 964, p. 1342.
White v. Franklin Bank, 22 Pick. 181, 186, p. 671, 1719, 1721.
White v. Gouldin's Ex'rs, 27 Gratt. 491, p. 2168, 2173, 2174.
White v. Greenish, 11 Com. B., N. S., 209, 233, p. 1395.
White v. Hale, 2 Cold. 77, p. 1977.
White v. Hampton, 10 Iowa, 238, p. 290.
White v. Hampton, 13 Iowa, 259, p. 1403, 2424.
White v. Herrick, L. R. 4 Ch. 345, p. 2621.
White v. Hildreth, 32 Vt. 265, p. 2199.
White v. Howard, 46 N. Y. 144, p. 2305, 2309, 2310, 2334.
White v. Interstate B. & L. Ass'n, 106 Ga. 146, 32 S. E. 26, p. 1366.
White v. Jameson, L. R. 18 Eq. 303, p. 2746.
White v. Jones, 4 Call, 253, 2 Am. Dec. 564, p. 235.
White v. Jones, 92 N. C. 388, p. 2504.
White v. Kaufmann, 66 Md. 89, 5 Atl. 865, p. 2493.
White v. Knapp, 8 Paige, 173, p. 1402.
White v. Lady Lincoln, 8 Ves. 363, p. 2052.
White v. Langdon, 30 Vt. 500, p. 1432.
White v. Lucas, 46 Iowa, 319, p. 2374, 2376.
White v. Lyons, 42 Cal. 279, 282, p. 231, 355, 585.
White v. McGammon, 29 Gratt. 511, p. 2770.

White v. McGarry, 47 Fed. 420, p. 1341.
White v. McGregor, 92 Tex. 556, 50 S. W. 564, 71 Am. St. Rep. 875, p. 1103, 1131.
White v. Merritt, 7 N. Y. 352, 57 Am. Dec. 527, p. 1582.
White v. Miners Nat. Bank, 102 U. S. 661, p. 1913.
White v. Nutts, 1 P. Wms. 61, p. 1460.
White v. Parker, 8 Barb. 48, p. 1773.
White v. Parker, 1 Bing. N. C. 573, p. 1918.
White v. Patten, 24 Pick. 324, p. 1134.
White v. Patterson, 139 Pa. St. 429, 21 Atl. 360, p. 613.
White v. Perry, 14 W. Va. 66, p. 1088.
White v. Port Huron etc. R. R., 13 Mich. 356, p. 760.
White v. Provident Nat. Bank, 27 Tex. Civ. App. 487, 65 S. W. 498, p. 1051.
White v. Rankin, 90 Ala. 541, 8 South. 118, p. 1220.
White v. Rice, 112 Mich. 403, 70 N. W. 1024, p. 1940, 1970.
White v. Rittenmyer, 30 Iowa, 268, p. 2358, 2361, 2364.
White v. School Dist. of Braddock Borough, 159 Pa. St. 201, 28 Atl. 136, p. 739.
White v. Schurer, 4 Baxt. 23, p. 2793.
White v. Shaffer, 97 Md. 359, 54 Atl. 974, p. 1542.
White v. Sheriff, 32 La. Ann. 130, p. 2750.
White v. Sherman, 168 Ill. 589, 606, 611, 61 Am. St. Rep. 132, 140, 48 N. E. 128, p. 2072, 2078, 2079, 2080, 2097.
White v. Stevenson, (Cal.) 77 Pac. 829, p. 1550.
White v. Stover, 10 Ala. 441, p. 2520.
White v. Thayer, 121 Mass. 226, 228, p. 540, 541.
White v. Thompson, 1 Dev. & B. Eq. 493, p. 1666, 1673.
White v. Wakefield, 7 Sim. 401, p. 1019, 1027, 1029.
White v. Walker, 31 Ill. 422, 437, p. 1436.
White v. Ward, 26 Ark. 445, p. 1762.
White v. Warner, 2 Mer. 459, p. 632, 753, 758, 759.
White v. Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723, p. 1781.
White v. Washington, 5 Gratt. 645, 648, 649, p. 229, 461, 465.
White v. Watkins, 23 Mo. 423, p. 2781.
White v. Whaley, 3 Lans. 327, 40 How. Pr. 353, p. 1769.
White v. White, 52 Ark. 188, 12 S. W. 201, p. 2001.
White v. White, 1 Brown Ch. 12, p. 1958, 1959.
White v. White, 22 Ch. Div. 555, p. 794.
White v. White, L. R. 15 Eq. 247, p. 1541.
White v. White, 89 Ill. 460, p. 1729.
White v. White, 105 Ill. 313, p. 1024, 1039.
White v. White, L. R. 15 Eq. 247, p. 2726.
White v. White, 16 N. J. L. 202, 211, 31 Am. Dec. 232, p. 827, 836.
White v. White, 30 Vt. 338, p. 1847.
White v. White, 7 Ves. 423, p. 1942.
White v. Williams, 48 Barb. 222, p. 1513, 1516.
White v. Williams, 1 Paige, 502, p. 2502, 2511, 2520.
White v. Williams, 8 Ves. 193, p. 283.
Whitecar's Estate, In re, 147 Pa. St. 368, 23 Atl. 575, p. 2089.
Whitechurch, Ltd., George, v. Cavanagh, [1902] App. Cas. 117, 145, p. 1437, 1445.
Whitefield v. Longfellow, 13 Me. 146, p. 1736.
Whitehead v. Fitzpatrick, 58 Ga. 348, p. 2562.
Whitehead v. Jordan, 1 Younge & C. 303, p. 1142.
Whitehead v. Kitson, 119 Mass. 484, p. 212, 545, 2696.
Whitehead v. Peck, 1 Ga. 140, p. 1705.
Whitehead v. Shattuck, 138 U. S. 146, 151, 11 Sup. Ct. 276, 277, 34 L. ed. 873, p. 499, 503, 504, 514.
Whitehead v. Thompson, 79 N. C. 450, p. 2496.
Whitehead v. Whitehead, 85 Va. 870, 9 S. E. 10, p. 2071.
Whitehorn v. Cranz, 20 Nebr. 392, 30 N. W. 406, p. 1198.
Whitehouse v. Whitehouse, 90 Me. 468, 60 Am. St. Rep. 278, 30 Atl. 374, p. 1913.
Whitehouse's Case, L. R. 3 Eq. 790, p. 1474.

Whitehurst v. Harker, 2 Ired. Eq. 292, p. 1890.
Whitehurst v. Yandall, 7 Baxt. 228, p. 2528.
White Mts. R. R. v. Bay State Iron Co., [1870] 50 N. H. 57, p. 525, 529, 2463.
Whitescarver v. Bonney, 9 Iowa, 480, p. 1804.
Whiteselle v. Texas Loan Agency, (Tex. Civ. App.) 27 S. W. 309, p. 1422, 2421.
Whiteside v. Watkins, (Tenn. Ch. App.) 58 S. W. 1107, p. 1102.
Whiteside v. Whiteside, 20 Pa. St. 473, p. 573, 2286.
Whitesides v. Cannon, 23 Mo. 457, p. 2153.
White's Trusts, In re, 33 Ch. Div. 449, p. 1965.
White's Trusts, In re, Johns. 656, p. 1890.
White Sulphur Springs Co. v. Holley, 4 W. Va. 597, p. 403, 433, 435.
White Water etc. Co. v. Comegys, 2 Ind. 469, p. 2645, 2682.
Whitfield v. Fausset, 1 Ves. Sr. 387, 392, p. 1465.
Whitfield v. Hales, 12 Ves. 492, p. 2616.
Whitfield v. Langdale, L. R. 1 Ch. Div. 61, p. 1543.
Whitfield v. Levy, 35 N. J. L. 149, p. 734, 744.
Whitfield v. Riddle, 78 Ala. 99, p. 1060, 1069, 1347.
Whitfield v. United States, 92 U. S. 165, p. 1696.
Whitford v. Daggett, 84 Ill. 144, p. 2191.
Whiting v. Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598, p. 2429, 2430, 2431.
Whiting v. Barney, 30 N. Y. 330, 86 Am. Dec. 385, p. 281.
Whiting v. Beckwith, 37 Conn. 596, p. 2190.
Whiting v. Beebe, 12 Ark. 421, 564, p. 1065.
Whiting v. Burke, L. R. 6 Ch. 342, p. 2794.
Whiting v. Dyer, 21 R. I. 278, 43 Atl. 181, p. 2040.
Whiting v. Eichelberger, 16 Iowa, 422, p. 2474.
Whiting v. Gould, 2 Wis. 522, 1 Lead. Cas. Eq., 4th Am. ed., 355–364, p. 1904, 1994, 2040.
Whiting v. Whiting, 4 Gray, 236, 240, p. 1890, 1919.
Whiting v. Whiting's Adm'r, 64 Md. 157, 20 Atl. 1030, p. 2273.
Whitley v. Price, 2 Vern. 78, p. 1744.
Whitley v. Ogle, 47 N. J. Eq. 67, 20 Atl. 284, p. 1997.
Whitley v. Whitley, 31 Beav. 173, p. 787, 856.
Whitlock v. Vaun, 38 Ga. 562, p. 2212.
Whitman v. Bowden, 27 S. C. 53, 2 S. E. 630, p. 1609, 1613.
Whitman v. Fisher, 74 Ill. 147, p. 181, 580, 2299.
Whitman v. Robinson, 21 Md. 30, p. 2656.
Whitman v. Weller, 39 Ind. 515, p. 293.
Whitman v. Weston, 30 Me. 285, p. 1383.
Whitmarsh v. Robertson, 1 Younge & C. 715, p. 2054.
Whitmore v. Learned, 70 Me. 276, p. 1999.
Whitmore v. Shiverick, 3 Nev. 288, p. 2360.
Whitmore v. Tatum, 54 Ark. 457, 16 S. W. 198, 26 Am. St. Rep. 56, p. 2399.
Whitmore v. Turquand, 3 De Gex, F. & J. 107, p. 1856.
Whitmore v. Weld, 1 Vern. 326, 328, p. 2087.
Whitmore v. Whitmore, L. R. 8 Eq. 603, p. 1585.
Whitney v. Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598, p. 2427.
Whitney v. Allaire, 4 Denio, 554, p. 1602.
Whitney v. Cowan, 55 Miss. 626, 647, p. 2637.
Whitney v. Eliot Nat. Bank, 137 Mass. 351, 50 Am. Rep. 316, p. 2568.
Whitney v. Fairbanks, 54 Fed. 985, p. 217.
Whitney v. Foster, 117 Mich. 643, 76 N. W. 114, p. 2470.
Whitney v. Hay, 181 U. S. 77, 21 Sup. Ct. Rep. 537, 45 L. ed. 758, p. 1907, 2038, 2039.

Whitney v. Kelley, 94 Cal. 146, 28 Am. St. Rep. 106, 29 Pac. 624, p. 2555.
Whitney v. Lowe, 59 Nebr. 87, 80 N. W. 266, p. 1300.
Whitney v. Monro, 4 Edw. Ch. 5, p. 2283.
Whitney v. New Haven, 23 Conn. 624, p. 2766.
Whitney v. Smith, L. R. 4 Ch. 513, p. 2079.
Whitney v. Stearns, 11 Met. 319, p. 535, 538, 1833.
Whitney v. Stevens, 97 Ill. 482, p. 2748.
Whitney v. Stone, 23 Cal. 275, p. 749.
Whitney v. Union Railway, 11 Gray, 359, 364, 71 Am. Dec. 715, p. 767, 1200, 2595.
Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504, p. 1721.
Whitney Nat. Bank v. Parker, 41 Fed. 385, p. 418, 456.
Whiton v. Snyder, 88 N. Y. 299, p. 2164.
Whitridge v. Parkhurst, 20 Md. 62, 72, p. 853, 854, 855, 1535, 1659.
Whitridge v. Whitridge, 76 Md. 54, 24 Atl. 645, p. 1778.
Whitselle v. Texas Loan Agency, (Tex. Civ. App.) 27 S. W. 309, p. 2425.
Whitsett v. Kershow, 4 Colo. 419, p. 2381.
Whitson v. Whitson, 53 N. Y. 479, p. 2219.
Whittaker v. Greenwood, 17 Utah, 33, 53 Pac. 736, p. 1089.
Whittaker v. Howe, 3 Beav. 383, 387, 395, p. 1688, 2684, 2773.
Whitteaker v. Vanschoiack, 5 Oreg. 113, p. 1532.
Whittelsey v. Hughes, 39 Mo. 13, p. 1862.
Whittemore v. Farrington, 76 N. Y. 452, p. 2725.
Whittemore v. Fisher, 132 Ill. 243, 24 N. E. 636, p. 2375.
Whittemore v. Gibbs, 24 N. H. 484, p. 2350, 2417.
Whittemore v. Whittemore, L. R. 8 Eq. 603, p. 1539, 1607.
Whitten v. Jenkins, 34 Ga. 297, p. 2139.
Whitten v. McFall, 122 Ala. 619, 26 South. 131, p. 1739.
Whitten v. Whitten, 36 N. H. 326, 332, p. 530.
Whittfield v. Foster, 124 Cal. 418, 57 Pac. 219, p. 1835.
Whittick v. Kane, 1 Paige, 200, 208, p. 1335.
Whittier v. Stege, 61 Cal. 238, p. 616.
Whittingham v. Burgoyne, 3 Anstr. 900, p. 2610.
Whittingham v. Thornburgh, 2 Vern. 506, p. 2730.
Wnittington v. Wright, 9 Ga. 23, p. 1132.
Whittle v. Henning, 2 Phill. Ch. 731, p. 846.
Whittle v. Skinner, 23 Vt. 531, p. 2460.
Whittle v. Vanderbilt Mfg. & Milling Co., 83 Fed. 48, p. 1176, 2018.
Whittlesey v. Hartford etc. R. R., 23 Conn. 421, 431, p. 565.
Whitton v. Russell, 1 Atk. 448, p. 1461.
Whitton v. Whitton, 38 N. H. 127, 135, 75 Am. Dec. 163, p. 2740.
Whitton's Trusts, In re, L. R. 8 Eq. 352, p. 2098.
Whitwell v. Warner, 20 Vt. 425, p. 2032.
Whitworth v. Davis, 1 Ves. & B. 545, p. 264.
Whitworth v. Erie R. R., 37 N. Y. Super. Ct. 437, p. 293.
Whitworth v. Gaugain, 3 Hare, 416, 1 Phill. Ch. 728, p. 268, 1193.
Whitworth v. Whyddon, 2 Macn. & G. 52, 55, p. 2654, 2655.
Whorton v. Moragne, 59 Ala. 641, p. 2255.
Whyte v. Builders' League, 54 N. Y. Supp. 822, 35 App. Div. 480, p. 342.
White v. Cahal's Adm'r, 2 Swan, 550, p. 2702.
White v. Crew, 16 Ga. 416, p. 2704.
Wibaux v. Wrinnell etc. Co., 9 Mont. 154, 22 Pac. 492, p. 746.
Wick v. Dawson, 48 W. Va. 469, 37 S. E. 639, p. 1071.
Wicker v. Hoppock, 6 Wall. 94, p. 1694.
Wickersham, Estate of, 138 Cal. 355, 363, 70 Pac. 1076, p. 840, 841, 1742.
Wickersham v. Chicago etc. Co., 18 Kan. 487, 26 Am. Rep. 784, p. 1100.
Wickes v. Clark, 8 Paige, 161, p. 1804, 1806.

Wickes v. Hynson, 95 Md. 511, 52 Atl. 747, p. 2474.
Wickes v. Lake, 25 Wis. 71, p. 1037, 1149.
Wickham v. Berry, 55 Pa. St. 70, p. 1831, 1852.
Wickham v. Henthorn, 91 Iowa, 242, 59 N. W. 276, p. 1338.
Wickham v. Hull, 60 Fed. 326, 330, p. 508, 510, 511.
Wickiser v. Cook, 85 Ill. 68, p. 1775, 2130.
Wickliffe v. Breckinridge, 1 Bush, 427, p. 1075.
Wickliffe v. Owens, 17 How. 47, 51, p. 502.
Wickman v. Robinson, 14 Wis. 493, 494, 80 Am. Dec. 789, p. 192, 2536.
Wicks v. Dean, 103 Ky. 69, 44 S. W. 397, p. 652.
Wicks v. Hunt, Johns. 372, 380, p. 345.
Wicks v. McConnell, 102 Ky. 434, 43 S. W. 205, p. 1274.
Wicks v. Mitchell, 8 Kan. 80, p. 2192.
Wicks v. Scrivens, 1 Johns. & H. 215, p. 2436.
Widdicombe v. Childers, 84 Mo. 382, p. 1197.
Widdow's Trusts, In re, L. R. 11 Eq. 408, p. 2054.
Widgery v. Tepper, L. R. 7 Ch. Div. 423, p. 2172.
Widmore v. Woodroffe, Amb. 636, 640, p. 1962.
Wieland v. Kobick, 110 Ill. 16, 51 Am. Rep. 676, p. 1448.
Wieneke v. Deputy, (Ind. App.) 68 N. E. 921, p. 1514, 1516.
Wier v. Tucker, L. R. 14 Eq. 25, p. 272, 273, 283.
Wiese v. Grove, (Iowa) 99 N. W. 191, p. 1584.
Wigg v. Tiler, 2 Dick. 552, p. 2622.
Wigg v. Wigg, 1 Atk. 382, 384, p. 1197, 1201, 1202, 1293, 1347.
Wiggin v. Heywood, 118 Mass. 514, p. 540.
Wiggins v. Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837, p. 1689.
Wiggins v. Howard, 83 N. Y. 613, p. 2069, 2077.
Wiggins v. McDonald, 18 Cal. 126, p. 585.
Wiggins v. Williams, 36 Fla. 637, 18 South. 859, 30 L. R. A. 754, p. 216, 224, 340.
Wiggins Ferry Co. v. Chicago etc. R. R., 5 Mo. App. 347, p. 1688.
Wigglesworth v. Steers, 1 Hen. & M. 70, 3 Am. Dec. 602, p. 1733.
Wight v. Rindskopf, 43 Wis. 344, p. 1701, 1703.
Wigram v. Buckly, [1894] 3 Ch. 483, p. 1077, 1210.
Wihn v. Fall, 55 Nebr. 547, 76 N. W. 13, 70 Am. St. Rep. 397, p. 1131.
Wikoff v. Coxe, 1 Yeates, 353, 358, p. 558.
Wikoff v. Davis, 4 N. J. Eq. 224, p. 2447, 2448.
Wilbanks v. Wilbanks, 18 Ill. 17, p. 782, 857.
Wilber v. Goodrich, 34 Mich. 84, p. 1454.
Wilber v. Wilber, 52 Wis. 298, 9 N. W. 163, p. 825.
Wilbraham v. Livesey, 18 Beav. 206, p. 1025, 1047, 1053.
Wilbur v. Flood, 16 Mich. 40, p. 1647.
Wilbur v. Lynde, 49 Cal. 290, 19 Am. Rep. 645, p. 1760, 1761, 1762.
Wilbur v. Warren, 104 N. Y. 192, 10 N. E. 263, p. 2401.
Wilcocks v. Hannyngton, 5 Ir. Ch. Rep. 38, p. 2149.
Wilcocks v. Wilcocks, 2 Vern. 558, 2 Lead. Cas. Eq. 833, p. 699, 949, 950, 952.
Wilcox v. Allen, 36 Mich. 160, p. 725, 726, 2393.
Wilcox v. Bates, 26 Wis. 465, p. 2381.
Wilcox v. Bickel, 11 Nebr. 154, 8 N. W. 436, p. 2125, 2126.
Wilcox v. Campbell, 106 N. Y. 325, 12 N. E. 823, p. 2407.
Wilcox v. Equitable Life Assur. Soc., 173 N. Y. 50, 65 N. E. 857, 93 Am. St. Rep. 579, p. 1464.
Wilcox v. Hill, 11 Mich. 256, 263, p. 1096.
Wilcox v. Howell, 44 N. Y. 398, p. 1440, 1445.
Wilcox v. Iowa W. Univ., 32 Iowa, 367, p. 1583.
Wilcox v. Leominster Nat. Bank, 43 Minn. 541. 45 N. W. 1136, 19 Am. St. Rep. 259, p. 1027, 1028, 1272, 1273.

Wilcox v. Lucas, 121 Mass. 21, p. 542, 543.
Wilcox v. Matteson, 53 Wis. 23, 40 Am. Rep. 754, 9 N. W. 814, p. 2241.
Wilcox v. Saunders, 4 Nebr. 69, 569, 587, p. 569, 586.
Wilcox v. Walker, (Tex. Civ. App.) 43 S. W. 579, p. 733.
Wilcox v. Wheeler, 47 N. H. 488, p. 2684, 2693.
Wilcox v. Wilcox, 14 N. Y. 575, 579, 581, p. 570, 586, 587, 2494, 2612, 2613.
Wilcox & Gibbs Guano Co. v. Phœnix Ins. Co., 61 Fed. 199, p. 495.
Wilcoxson v. Miller, 49 Cal. 193, p. 1095, 1270.
Wild v. Banning, L. R. 2 Eq. 577, p. 1985.
Wild v. Hillas, 28 L. J. Ch. 170, p. 1476, 1509.
Wild v. Wells, 1 Dick. 3, Toth. 82, p. 2733.
Wilday v. Sandys, L. R. 7 Eq. 455, p. 2321.
Wilde v. Gibson, 1 H. L. Cas. 605, 624, p. 1163, 1166, 1568, 1609, 1616, 1618.
Wilder v. Brooks, 10 Minn. 50, 88 Am. Dec. 49, p. 1111, 2194.
Wilder v. Butterfield, 50 How. Pr. 385, p. 1270.
Wilder v. City of St. Paul, 12 Minn. 192, p. 2749.
Wilder v. Crane, 53 Ill. 490, p. 2462.
Wilder v. Pigott, L. R. 22 Ch. Div. 263, p. 847.
Wilder v. Ranney, 95 N. Y. 7, 12, p. 2045, 2317.
Wilder v. Wilder, 89 Ala. 414, 7 South. 767, 18 Am. St. Rep. 130, 9 L. R. A. 97, p. 1446, 1448.
Wilderman v. Baltimore, 8 Md. 551, p. 1971.
Wilder's Ex'x v. Wilder, 75 Vt. 178, 53 Atl. 1072, p. 1994.
Wildes v. Davies, 1 Smale & G. 475, 482, p. 2327.
Wildes v. Rural Homestead Co., 53 N. J. Eq. 452, 32 Atl. 676, p. 2128.
Wildgoose v. Wayland, Goulds, 147, pl. 67, p. 993.
Wilding v. Balder, 21 Beav. 222, Ames' Cas. on Trusts, 221, p. 2109.
Wilding v. Sanderson, [1897] 2 Ch. 534, p. 1486, 1493.
Wiles v. Gresham, 2 Drew. 258, 5 De Gex. M. & G. 770, p. 2056, 2057, 2090.
Wiles v. Wiles, 3 Md. 1, 56 Am. Dec. 733, p. 2169.
Wiley v. Ewalt, 66 Ill. 26, p. 2729.
Wiley v. Ewing, 47 Ala. 418, p. 2435, 2437.
Wiley v. Knight, 27 Ala. 336, p. 1168.
Wiley v. White, 10 Rich. Eq. 294, p. 1847.
Wiley's Executors' Appeal, 84 Pa. St. 270, p. 2286.
Wilfong v. Johnson, 41 W. Va. 283, 23 S. E. 730, p. 1066.
Wilhelm v. Byles, 60 Mich. 561, 27 N. W. 847, 29 N. W. 113, p. 1856.
Wilhelm v. Eaves, 21 Oreg. 194, 27 Pac. 1053, 14 L. R. A. 297, p. 730, 731, 745.
Wilhelm v. Lee, 2 Md. Ch. 322, p. 2348.
Wilhelm v. Wilken, 149 N. Y. 447, 44 N. E. 82, 52 Am. St. Rep. 743, 32 L. R. A. 370, affirming 27 N. Y. Supp. 853, p. 1339, 1342.
Wilhelmi v. Leonard, 13 Iowa, 330, p. 1400, 1403.
Wilhite v. Roberts, 4 Dana, 172, p. 1703.
Wilhoit v. Lyons, 98 Cal. 409, 413, 33 Pac. 325, p. 1354.
Wilie v. Brooks, 45 Miss. 542, p. 1448.
Wilken v. Voss, 120 Iowa, 500, 94 N. W. 1123, p. 1517.
Wilkerson v. Phillips, (Ky.) 81 S. W. 691, p. 1075, 1077.
Wilkerson v. Walters, 1 Idaho, 564, p. 433.
Wilkes v. Collin, L. R. 8 Eq. 338, p. 1405.
Wilkes v. Holmes, 9 Mod. 485, p. 1468.
Wilkes v. Wilkes, 2 Dick. 791, p. 1680.
Wilkie v. City of Chicago, 188 Ill. 444, 80 Am. St. Rep. 182, 58 N. E. 1004, p. 414.
Wilkie v. Sassen, (Iowa) 99 N. W. 124, p. 1672.
Wilkin v. Barnard, 61 N. Y. 628, p. 1590, 1594.
Wilkin v. Wilkin, 1 Johns. Ch. 111, 118, p. 2741.
Wilkins v. Bevier, 43 Minn. 213, 45 N. W. 157, 19 Am. St. Rep. 238, p. 1034, 1048, 1049, 1273.

Wilkins v. Finch, Phill. Eq. 355, p. 2285.
Wilkins v. French, 20 Me. 111, p. 2348.
Wilkins v. Fry, 1 Mer. 244, 268, p. 2049.
Wilkins v. Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204, p. 1422, 2425.
Wilkins v. Hogg, 8 Jur., N. S., 25, p. 2095.
Wilkins v. McCorkle, (Tenn.) 80 S. W. 834, p. 1355.
Wilkins v. Taylor, 8 Rich. Eq. 291, 1 Lead. Cas. Eq., 4th Am. ed., 1157–1160, 1160–1162, p. 2316.
Wilkins v. Wright, 6 McLean, 340, Fed. Cas. No. 17,666, p. 1860.
Wilkinson v. Barber, L. R. 14 Eq. 96, p. 1933, 1943, 1950.
Wilkinson v. Brayfield, 2 Vern. 307, p. 1655.
Wilkinson v. Charlesworth, 10 Beav. 324, p. 646, 2171.
Wilkinson v. Colley, 164 Pa. St. 35, 30 Atl. 286, 35 Wkly. Notes Cas. 177, 26 L. R. A. 114, p. 737.
Wilkinson v. Dent, L. R. 6 Ch. 339, 340, p. 785, 809, 811, 813.
Wilkinson v. Dodd, 40 N. J. Eq. 123, 3 Atl. 360, p. 2093.
Wilkinson v. Elliott, 43 Kan. 590, 19 Am. St. Rep. 158, 23 Pac. 614, p. 1068, 1072, 1076.
Wilkinson v. Filby, 24 Wis. 441, p. 1448.
Wilkinson v. Getty, 13 Iowa, 157, 81 Am. Dec. 428, p. 1467.
Wilkinson v. Henderson, 1 Mylne & K. 582, p. 683, 2606.
Wilkinson v. Joughin, L. R. 2 Eq. 319, p. 1654.
Wilkinson v. Lindgren, L. R. 5 Ch. 570, p. 1933, 1939, 1940, 1950.
Wilkinson v. May, 69 Ala. 33, p. 2498, 2520.
Wilkinson v. Parish, 3 Paige, 653, p. 2739.
Wilkinson v. Parmer, 82 Ala. 367, 3 South. 4, p. 2508.
Wilkinson v. Parry, 4 Russ. 272, 276, p. 2106.
Wilkinson v. Sherman, 45 N. J. Eq. 421, 18 Atl. 228, p. 1730.
Wilkinson v. Stitt, 175 Mass. 581, 56 N. E. 830, p. 234.
Wilkinson v. Stuart, 74 Ala. 198, p. 220.
Wilkinson v. Thomas, 128 Ill. 363, 21 N. E. 596, p. 927.
Wilkinson v. Tousley, 16 Minn. 299, 10 Am. Rep. 139, p. 1676.
Wilkinson v. Wilkinson, 1 Desaus. Eq. 201, p. 2602.
Wilks v. Davis, 3 Mer. 507, p. 2773.
Willan v. Lancaster, 3 Russ. 108, p. 2490.
Willan v. Willan, 16 Ves. 72, 81, 82, 83, 19 Ves. 590, 2 Dow. 274, p. 1477, 1494, 1501, 1513, 1515, 1671, 1673, 2770.
Willard v. Denise, 50 N. J. Eq. 482, 26 Atl. 29, 35 Am. St. Rep. 788, p. 1165.
Willard v. Eastham, 15 Gray, 328, 77 Am. Dec. 366, p. 2187, 2193.
Willard v. Kramer, 36 Iowa, 22, p. 1100.
Willard v. Reas, 26 Wis. 540, p. 2503, 2529.
Willard v. Tayloe, 8 Wall. 557, 558, 565, 571, 650, 662, 1670, p. 2761, 2767, 2770, 2774.
Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, p. 494.
Willard v. Worsham, 76 Va. 392, p. 2409, 2414.
Willard's Ex'rs v. Ramsburg, 22 Md. 206, p. 1106.
Wille v. Ellis, 22 Tex. Civ. App. 462, 54 S. W. 922, p. 1081.
Willemin v. Dunn, 93 Ill. 511, p. 1639.
Willer v. Bergenthal, 50 Wis. 474, 7 N. W. 352, p. 2544.
Willes v. Greenhill, 29 Beav. 376, 387, 392, p. 1213, 1214, 1229.
Willes v. Greenhill, 4 De Gex, F. & J. 147, 150, p. 1157.
Willet v. Sandford, 1 Ves. Sr. 186, p. 1826.
Willett v. Blanford, 1 Hare, 253, p. 2032, 2079.
Willett v. Winnell, 1 Vern. 488, p. 2370.
Willey v. Tindal, 5 Del. Ch. 194, p. 1774.
Willey's Estate, In re, 128 Cal. 1, 60 Pac. 471, p. 1835, 1934, 1936, 1938, 1942, 1972.
Williams, In re, [1897] 2 Ch. 12, p. 1925.

Williams. In re, 7 Jur., N. S., 323, p. 284, 287.
Williams, In re, L. R. 5 Ch. Div. 735, p. 1933, 1935, 1941.
Williams, In re, 26 Misc. Rep. 636, 57 N. Y. Supp. 943, p. 1834.
Williams v. Adams, 43 Ga. 407, p. 1104, 1144.
Williams v. Allen, 32 Beav. 650, p. 2097.
Williams v. Allen, 32 N. J. Eq. 485, p. 237.
Williams v. Avery, 38 Ala. 115, p. 2144.
Williams v. Baker, 100 Mo. App. 284, 73 S. W. 339, p. 2501, 2520, 2521.
Williams v. Baker, 71 Pa. St. 476, p. 1448.
Williams v. Baldridge, 66 Ala. 338, p. 180.
Williams v. Banks, 11 Md. 198, p. 1112.
Williams v. Bayley, L. R. 1 H. L. 200, 218, p. 675, 1731, 1734.
Williams v. Beard, 1 S. C. 309, p. 1105, 1336, 1373.
Williams v. Beazley, 3 J. J. Marsh. 578, p. 1615.
Williams v. Benedict, 8 How. 107, 112, p. 510.
Williams v. Bradley, 3 Allen, 270, p. 1844.
Williams v. Bradley, 7 Heisk. 54, p. 1693, 1694.
Williams v. Brooklyn Sav. Bk., 51 App. Div. 332, 64 N. Y. Supp. 1021, p. 1866.
Williams v. Brown, 2 Keyes, 486, p. 1233.
Williams v. Butterfield, (Mo.) 77 S. W. 729, p. 1115.
Williams v. Butterfield, (Mo.) 81 S. W. 615, p. 1102, 1114.
Williams v. Callow, 2 Vern. 752, p. 2175.
Williams v. Carle, 10 N. J. Eq. 543, p. 2166.
Williams v. Chamberlain, 165 Ill. 210, 46 N. E. 250, p. 1865.
Williams v. Christian, 23 Ark. 255, p. 2519.
Williams v. Claiborne, 7 Smedes & M. 488, p. 2144.
Williams v. Coade, 10 Ves. 500, p. 1986.
Williams v. Collins, 67 Iowa, 413, 25 N. W. 682, p. 672, 1718.
Williams v. Cooke, 9 Jur., N. S., 658, p. 2172.
Williams v. County Court, 26 W. Va. 488, 501, 502, 503, 53 Am. Rep. 94, p. 401, 406, 407, 409, 410, 437, 454.
Williams v. Crabb, 117 Fed. 193, 59 L. R. A. 425, p. 509.
Williams v. Crary, 5 Cow. 368, 8 Cow. 246, 4 Wend. 443, 450, p. 878, 945.
Williams v. Crow, 84 Mo. 298, p. 2501, 2509, 2514.
Williams v. Cudd, 26 S. C. 213, 2 S. E. 14, 4 Am. St. Rep. 714, p. 961, 1469.
Williams v. Davison's Estate, (Mich.) 94 N. W. 1048, p. 1775.
Williams v. Donnelly, 54 Nebr. 193, 74 N. W. 601, p. 1257.
Williams v. Dwinelle, 51 Cal. 442, 446, p. 2053.
Williams v. Earl of Jersey, Craig & P. 91, p. 1195, 1430, 1434, 2705.
Williams v. Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595, p. 1900.
Williams v. Evans, L. R. 19 Eq. 547, p. 2781.
Williams v. Fitch, 18 N. Y. 546, p. 282, 2036.
Williams v. Fitzhugh, 37 N. Y. 444, p. 648, 1705.
Williams v. Fowler, 201 Pa. St. 336, 50 Atl. 969, p. 214.
Williams v. Gilbert, 37 N. J. Eq. 84, p. 2387.
Williams v. Green, 14 Ark. 313, 315, 326, 327, p. 732, 738, 742, 743.
Williams v. Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366, p. 2235, 2237, 2242.
Williams v. Haddock, 145 N. Y. 144, 39 N. E. 825, p. 615.
Williams v. Halbert, 7 B. Mon. 184, p. 2649.
Williams v. Hamilton, 104 Iowa, 423, 65 Am. St. Rep. 475, 73 N. W. 1029, p. 1494, 1511, 1542.
Williams v. Harden, 1 Barb. Ch. 298, p. 2705.
Williams v. Harlan, 88 Md. 1, 71 Am. St. Rep. 394, 41 Atl. 51, p. 2480.
Williams v. Hart, 116 Mass. 513, p. 2779.

Williams v. Hedley, 8 East, 461, p. 1721.
Williams v. Hollingsworth, 1 Strob. Eq. 103, 47 Am. Dec. 527, p. 1278.
Williams v. Hugunin, 69 Ill. 214, 18 Am. Rep. 607, p. 2191.
Williams v. Hyde, 98 Mich. 152, 57 N. W. 98, p. 1096, 1116.
Williams v. Imbrada Land & Copper Co., [1895] 2 Ch. 751, p. 276, 278.
Williams v. Ingersoll, 23 Hun, 284, p. 2470, 2474.
Williams v. Ingersoll, 89 N. Y. 508, 518, p. 1207, 2568, 2585.
Williams v. Jackson, 107 U. S. 478, 483, 484, 2 Sup. Ct. 814, p. 1298, 1300.
Williams v. Jenkins, 11 Ga. 595, p. 2657.
Williams v. Jones, 10 Smedes & M. 108, p. 2710.
Williams v. Kerr, 113 N. C. 306, 18 S. E. 501, p. 1082.
Williams v. Kershaw, 5 Clark & F. 111, note, p. 1933, 1949, 1986.
Williams v. Keyes, 90 Mich. 290, 51 N. W. 520, 30 Am. St. Rep. 438, p. 1227, 1301.
Williams v. Lambe, 3 Brown Ch. 263, 264, p. 1314, 1315, 1317, 1318, 1369.
Williams v. Leech, 28 Pa. St. 89, p. 1831.
Williams v. Logan, 32 Ga. 165, p. 1104.
Williams v. Lonsdale, 3 Ves. 752, p. 1848.
Williams v. Lucas, 2 Cox, 160, p. 2471.
Williams v. McCarty, 74 Ala. 295, p. 2498, 2511.
Williams v. McGrade, 13 Minn. 46, p. 2194.
Williams v. McGuire, 60 Mo. 254, p. 2762.
Williams v. McIlroy, 34 Ark. 85, p. 1278.
Williams v. McIntyre, 8 Ga. 34, 42, p. 567.
Williams v. Mayne, 1 I. R. Eq. 519, p. 846.
Williams v. Michenor, 11 N. J. Eq. 520, p. 2791.
Williams v. Mitchell, 30 Ala. 299, p. 1637.
Williams v. Moody, 95 Ga. 8, 22 S. E. 30, p. 2405, 2408.
Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411, p. 2414.
Williams v. New York Cent. R. R. Co., 16 N. Y. 97, 69 Am. Dec. 651, p. 340.
Williams v. Nichol, 47 Ark. 254, 1 S. W. 243, p. 2066, 2107, 2485.
Williams v. Nixon, 2 Beav. 472, p. 2094.
Williams v. Noland, 2 Tenn. Ch. 151, p. 2659.
Williams v. Owen, 5 Mylne & C. 303, p. 2372, 2376.
Williams v. Owens, 2 Ves. 603, p. 168.
Williams v. Papworth, [1900] A. C. 563, p. 1838.
Williams v. Peabody, 8 Hun, 271, p. 2681.
Williams v. Pearson, 38 Ala. 299, p. 1972.
Williams v. Peinny, 25 Iowa, 436, p. 406, 408.
Williams v. Perrin, 73 Ind. 57, p. 2268.
Williams v. Powell, 66 Ala. 20, 41 Am. Rep. 742, p. 1758.
Williams v. Powell, 15 Beav. 461, p. 2080.
Williams v. Powell, 1 Ired. Eq. 460, p. 1773, 1775.
Williams v. Price, 1 Sim. & St. 581, p. 304.
Williams v. Prince of Wales Life Ins. Co., 23 Beav. 338, p. 279.
Williams v. Rand, 9 Tex. Civ. App. 631, 30 S. W. 509, p. 1307.
Williams v. Reed, 3 Mason, 405, p. 1785, 2097.
Williams v. Roberts, 5 Ohio, 35, p. 2502.
Williams v. San Saba County, 59 Tex. 442, p. 1995.
Williams v. Savage Mfg. Co., 1 Md. Ch. 306, 3 Md. Ch. 418, p. 1744.
Williams v. Scott, [1900] A. C. 499, 507, p. 1755, 2086, 2087.
Williams v. Scott's Adm'r, 11 Iowa, 475, p. 683, 2607.
Williams v. Shelly, 37 N. Y. 375, p. 1323, 1326.
Williams v. Simmons, 79 Ga. 649, 7 S. E. 133, p. 2528.
Williams v. Slaughter, (Tex. Civ. App.) 42 S. W. 327, p. 1103, 1133.
Williams v. Smith, 49 Me. 564, p. 550.

Williams v. Smith, 10 R. I. 280, 283, p. 2103.
Williams v. Smith, 117 Wis. 142, 93 N. W. 464, p. 2294.
Williams v. Sneed, 3 Coldw. 533, p. 1508.
Williams v. Spriggs, 6 Ohio St. 585, 594, p. 1027, 1037.
Williams v. Spurr, 24 Mich. 335, p. 1615, 1616.
Williams v. Stewart, 56 Ga. 663, p. 2702.
Williams v. Stratton, 10 Smedes & M. 418, 426, p. 2540, 2541.
Williams v. Tatnall, 29 Ill. 553, p. 1168.
Williams v. Teachey, 85 N. C. 402, p. 2418.
Williams v. Thorn, 70 N. Y. 270, 81 N. Y. 381, p. 1897.
Williams v. Thorn, 11 Paige, 459, p. 1236.
Williams v. Turner, 7 Ga. 348, p. 2005.
Williams v. Uncompahgre Canal Co., 13 Colo. 477, 22 Pac. 806, p. 629, 635, 636.
Williams v. Urmston, 35 Ohio St. 296, 35 Am. Rep. 611, p. 2196.
Williams v. Vance, 9 S. C. (9 Rich.) 344, 30 Am. Rep. 26, p. 731.
Williams v. Vanderbilt, 145 Ill. 238, 251, 36 Am. St. Rep. 486, 494, 34 N. E. 476, 21 L. R. A. 489, p. 2469, 2481, 2482.
Williams v. Van Tuyl, 2 Ohio St. 336, p. 2740.
Williams v. Vreeland, 29 N. J. Eq. 417, p. 2035, 2036.
Williams v. Vreeland, 32 N. J. Eq. 135, p. 2765.
Williams v. Walker, 2 Rich. Eq. 291, 46 Am. Dec. 53, p. 2649.
Williams v. Wann, 8 Blackf. 478, p. 259.
Williams v. Wentworth, 5 Beav. 325, p. 1726.
Williams v. Wilbur, 67 Ind. 42, p. 2192.
Williams v. Williams, 7 Baxt. 116, p. 2756.
Williams v. Williams, 32 Beav. 370, p. 1997, 2001.
Williams v. Williams, 73 Cal. 99, 14 Pac. 394, p. 2260.
Williams v. Williams, 180 Ill. 361, 54 N. E. 229, p. 2038.
Williams v. Williams, L. R. 2 Ch. 294, p. 1776.
Williams v. Williams, 63 Md. 371, p. 1729, 1738, 1778.
Williams v. Williams, 3 Mer. 157, p. 2670, 2773.
Williams v. Williams, 8 N. Y. 525, p. 1954, 1967, 1969.
Williams v. Williams, 1 Sim., N. S., 358, 368, p. 1908, 1924, 1928.
Williams v. Williams, 2 Swanst. 253, p. 2675.
Williams v. Williams, 55 Wis. 300, 42 Am. Rep. 708, 12 N. W. 465, 13 N. W. 274, p. 2058.
Williams v. Winsor, 12 R. I. 9, p. 1332, 2473, 2576, 2586.
Williams v. Worthington, 49 Md. 572, 33 Am. Rep. 286, p. 1926, 1929.
Williams v. Young, (Ark.) 71 S. W. 669, p. 616.
Williams v. Young, 21 Cal. 227, p. 2519.
Williams v. Young, 17 Cal. 403, p. 2499.
Williams Mower etc. Co. v. Raynor, 38 Wis. 132, p. 293.
Williamson v. Berry, 8 How. 495, 531, p. 2612, 2619.
Williamson v. Brown, 15 N. Y. 354, 360, 362, p. 974, 981, 990, 1002, 1008, 1045, 1142, 1147, 1172.
Williamson v. Carskadden, 36 Ohio St. 664, p. 1644.
Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917, p. 2183, 2199.
Williamson v. Duffy, 19 Hun, 312, p. 2201.
Williamson v. Gihon, 2 Schoales & L. 357, p. 1678.
Williamson v. Gore, (Tex. Civ. App.) 73 S. W. 563, p. 1995.
Williamson v. Jones, 43 W. Va. 562, 563, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694, 702, 703, p. 1050, 1445, 1446, 1447, 1448, 1725, 2481.
Williamson v. Moore, 101 Fed. 322, p. 353.
Williamson v. Morton, 2 Md. Ch. 94, p. 1057.
Williamson v. Russell, 39 Conn. 406, p. 1384.

Williamson v. Stone, 128 Ill. 129, 22 N. E. 1005, p. 1863.
Williamson v. Wilkins, 14 Ga. 416, p. 1852.
Williamson v. Williams, 11 Lea, (Tenn.) 355, p. 1066, 1068, 1079.
Williamson v. Williamson, 3 Smedes & M. 715, 41 Am. Dec. 636, p. 1698.
Williamson v. Wilson, 1 Bland, 418, p. 2656.
Williamson v. Yager, 91 Ky. 282, 15 S. W. 660, 34 Am. St. Rep. 184, p. 1864, 2141.
Williams's Appeal, 73 Pa. St. 249, p. 910, 1657.
Williams's Appeal, 83 Pa. St. 377, 387, p. 1830, 1850.
Williman v. Holmes, 4 Rich. Eq. 475, 479, p. 2145.
Willin v. Burdett, 130 Ill. 304, 49 N. E. 1000, p. 1772.
Willingham v. Hardin, 75 Mo. 429, p. 1343.
Willink v. Vanderveer, 1 Barb. 599, p. 1658.
Willis v. Adams, 66 Vt. 223, 28 Atl. 1033, p. 1148.
Willis v. Alvey, 30 Tex. Civ. App. 96, 69 S. W. 1035, p. 1837, 2109.
Willis v. Barron, [1902] A. C. 271, affirming [1900] 2 Ch. 121, p. 1767.
Willis v. Crawford, 38 Oreg. 522, 63 Pac. 985, p. 217.
Willis v. Farley, 24 Cal. 490, 491, 499, 500, p. 566, 2251, 2252, 2262.
Willis v. Gay, 48 Tex. 463, 26 Am. Rep. 328, p. 1050, 1148.
Willis v. Henderson, 4 Scam. 13, 38 Am. Dec. 120, p. 1331.
Willis v. Johnson, 38 Tex. 303, p. 1325.
Willis v. Kymer, L. R. 7 Ch. Div. 181, 183, p. 687, 1890.
Willis v. Moore, Clarke Ch. 150, p. 2789.
Willis v. Morris, 63 Tex. 458, 51 Am. Rep. 655, p. 1791.
Willis v. O'Brien, 35 N. Y. Sup. Ct. 536, p. 725.
Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900, p. 1900.
Willis v. Searcy, 49 Ala. 222, p. 192, 2529.
Willis v. Sharp, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493, p. 2103, 2105.
Willis v. Smith, 66 Tex. 31, 17 S. W. 247, p. 2049.
Willis v. Smyth, 91 N. Y. 297, p. 1873, 1877, 1912.
Willis v. Swartz, 28 Pa. St. 413, p. 1388.
Willis v. Sweet, 49 Wis. 505, 5 N. W. 895, p. 1640, 2756.
Willis v. Terry, 15 Ky. Law Rep. 753, 24 S. W. 621, p. 2403.
Willis v. Webster, 1 App. Div. 301, 37 N. Y. Supp. 354, p. 741.
Willis v. Willis, 2 Atk. 71, p. 1999.
Williston v. Mathews, 55 Minn. 422, 56 N. W. 1112, p. 729.
Willmott v. Barber, L. R. 15 Ch. Div. 96, 106, p. 1454.
Willmott v. Jenkins, 1 Beav. 401, p. 2227.
Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758, p. 1199, 1204, 2594.
Willoughby v. Middleton, 2 J. & H. 344, p. 786, 845.
Willoughby v. Moulton, 47 N. H. 205, 208, p. 1647.
Willoughby v. Willoughby, 1 Term Rep. 763, 767, 771, p. 266, 1322, 1371, 1373, 1375, 1377.
Wills, Ex parte, 1 Ves. 162, 2 Cox, 233, p. 191, 2470, 2476.
Wills v. Cowper, 2 Ohio, 124, p. 2633.
Wills v. Sayers, 4 Madd. 409, p. 2146.
Wills v. Slade, 6 Ves. 498, p. 2740.
Wills v. Stradling, 3 Ves. 378, p. 2781.
Wills v. Van Dyke, 109 Pa. St. 330, p. 559.
Willson v. Burton, 52 Vt. 394, p. 2426.
Willson v. Louisville Trust Co., 19 Ky. Law Rep. 1590, 44 S. W. 121, p. 2017.
Willson v. Love, [1896] 1 Q. B. 626, p. 743, 745.
Wills's Appeal, 22 Pa. St. 325, 332, p. 1775.
Wilmer v. Atlanta etc. R'y, 2 Woods, 409, p. 2653, 2659, 2660.
Wilmer v. Currey, 2 De Gex & S. 347, p. 684, 2608.
Wilmerding v. Jarmulowsky, 85 Hun, 285, 32 N. Y. Supp. 983, p. 987.
Wilmerding v. McKesson, 103 N. Y. 329, 8 N. E. 665, p. 2066, 2089.

Wilmington City Ry. Co. v. Wilmington & B. S. Ry Co., (Del. Ch.) 46 Atl. 12, p. 1689.
Wilmington Transp. Co. v. O'Neil, 98 Cal. 1, 32 Pac. 795, p. 736.
Wilmot v. Maccabe, 4 Sim. 263, p. 257, 258.
Wilmot v. Pike, 5 Hare, 14, 22, p. 1215, 1261, 1288.
Wilmot v. Woodhouse, 4 Brown Ch. 227, p. 881, 933, 937.
Wilsey v. Maynard, 21 Iowa, 107, p. 307.
Wilson v. American Palace Car Co., (N. J. Eq.) 54 Atl. 415, p. 2127.
Wilson v. Army, 1 Dev. & B. Eq. 376, 377, p. 785.
Wilson v. Barnes, 38 Ch. Div. 507, p. 1963.
Wilson v. Barney, 5 Hun, 257, p. 2660.
Wilson v. Bell, L. R. 4 Ch. 581, p. 1921, 1925.
Wilson v. Bird, 28 N. J. Eq. 352, p. 659.
Wilson v. Brett, 11 Mees. & W. 113, 115, p. 2064.
Wilson v. Brownsmith, 9 Ves. 180, p. 2209.
Wilson v. Buchanan, 7 Gratt. 334, p. 1801.
Wilson v. Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544, p. 1227, 1303.
Wilson v. Carpenter, 62 Ind. 495, p. 2373, 2376.
Wilson v. Carpenter, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824, p. 1642.
Wilson v. Carrico, 50 W. Va. 336, 40 S. E. 439, p. 983.
Wilson v. Cluer, 3 Beav. 136, p. 2432.
Wilson v. Cobb, 28 N. J. Eq. 177, p. 1450.
Wilson v. Conway Fire Ins. Co., 4 R. I. 141-152, p. 1161.
Wilson v. Coolidge, 42 Mich. 112, p. 2710.
Wilson v. Crook, 17 Ala. 59, p. 335, 580, 2255, 2258.
Wilson v. Davisson, 2 Rob. (Va.) 384, 404, p. 2505.
Wilson v. Deen, 74 N. Y. 531, p. 2729.
Wilson v. Dresser, 152 Ill. 387, 38 N. E. 888, p. 351.
Wilson v. Drumrite, 21 Mo. 325, p. 2370.
Wilson v. Duncan, 11 Abb. Pr. 3, p. 2648.
Wilson v. Duncan, 44 Miss. 642, p. 2743.
Wilson v. Eigenbrodt, 30 Minn. 4, 13 N. W. 907, p. 2393, 2396.
Wilson v. Esten, 14 R. I. 621, p. 1332.
Wilson v. Fairchild, 45 Minn. 203, 47 N. W. 642, p. 616.
Wilson v. Fridenberg, 21 Fla. 386, p. 2104.
Wilson v. Furness R'y, L. R. 9 Eq. 28, p. 2766.
Wilson v. Gannon, 54 Me. 384, p. 552.
Wilson v. Goodman, 4 Hare, 54, p. 2092.
Wilson v. Giddings, 28 Ohio St. 554, p. 2376.
Wilson v. Hamilton, 9 Serg. & R. 424, p. 855.
Wilson v. Hart, 2 Hem. & M. 551, 11 Jur., N. S., 735, L. R. 1 Ch. 463, p. 1199.
Wilson v. Hart, L. R. 1 Ch. 463, 2 Hem. & M. 551, p. 1014, 1041, 1047, 1050.
Wilson v. Hayne, Cheves Eq. 37, 40, p. 830.
Wilson v. Hayward, 6 Fla. 171, p. 2392.
Wilson v. Hefflin, 81 Ind. 35, p. 1089.
Wilson v. Herbert, 41 N. J. L. 454, 32 Am. Rep. 243, p. 2137, 2200.
Wilson v. Hicks, 40 Ohio St. 419, p. 1194.
Wilson v. Hooper, 12 Vt. 653, 36 Am. Dec. 366, p. 2353.
Wilson v. Howser, 12 Pa. St. 109, p. 1801.
Wilson v. Hunter, 30 Ind. 466, 472, p. 1009, 1142, 1145, 1202, 1348.
Wilson v. Ivy, 32 Miss. 233, p. 1648.
Wilson v. Jarvis, 19 Wis. 597, p. 2719.
Wilson v. Johnson, 74 Wis. 337, 43 N. W. 148, p. 2463.
Wilson v. Jones, 46 Md. 349, p. 2193.
Wilson v. King, 27 N. J. Eq. 374, p. 2726.
Wilson v. Leigh, 4 Ired. Eq. 97, p. 304.
Wilson v. Leishman, 12 Met. 316, p. 544, 573, 2273.
Wilson v. Lineberger, 88 N. C. 416, p. 2057.

Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307, p. 2460.
Wilson v. Louisville Trust Co., 19 Ky. Law Rep. 1590, 44 S. W. 121, p. 2007, 2009.
Wilson v. Lyon, 51 Ill. 166, p. 2499.
Wilson v. McCullough, 23 Pa. St. 440, 62 Am. Dec. 347, p. 980, 994, 1011.
Wilson v. McDowell, 78 Ill. 514, p. 2381.
Wilson v. McLoughlin, 11 Colo. 465, 18 Pac. 739, p. 1486.
Wilson v. Maddison, 2 Younge & C. Ch. 372, p. 1921.
Wilson v. Major, 11 Ves. 205, p. 2324.
Wilson v. Mallett, 4 Sand. 112, p. 2798.
Wilson v. Md. Life Ins. Co., 60 Md. 150, p. 2049, 2097.
Wilson v. Mason, 1 Cranch, 24, p. 2017.
Wilson v. Mayor etc. of Baltimore, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774, p. 728, 731, 743, 763.
Wilson v. Metcalfe, 1 Russ. 530, p. 2428, 2432.
Wilson v. Miller, 16 Iowa, 111, p. 1145.
Wilson v. Mineral Point, 39 Wis. 160, p. 2695.
Wilson v. Minnesota etc. Ins. Ass'n, 36 Minn. 112, 30 N. W. 401, 29 N. W. 887, 1 Am. St. Rep. 659, p. 1155, 1158, 1170.
Wilson v. Moore, 1 Mylne & K. 126, p. 2090.
Wilson v. Morley, L. R. 5 Ch. Div. 776, p. 1543.
Wilson v. Morrell, 5 Wash. 654, 32 Pac. 733, p. 1191.
Wilson v. Mount, 3 Ves. 194, p. 783.
Wilson v. Northampton etc. R'y, L. R. 9 Ch. 279, 284, p. 2760, 2766.
Wilson v. Northampton etc. R'y Co., L. R. 14 Eq. 477, p. 277, 281.
Wilson v. O'Leary, L. R. 12 Eq. 525, 527, 7 Ch. 448, p. 884, 885, 886.
Wilson v. Ott, 173 Pa. St. 253, 34 Atl. 23, 51 Am. St. Rep. 767, p. 1298.
Wilson v. Patrick, 34 Iowa, 362, 370, p. 2369, 2374, 2376.
Wilson v. Perry, 29 W. Va. 169, 1 S. E. 302, p. 1972.
Wilson v. Piggot, 2 Ves. 351, 356, p. 950, 953, 1469.
Wilson v. Piper, 77 Ind. 437, p. 2486, 2489.
Wilson v. Riddle, 48 Ga. 609, p. 2799.
Wilson v. Roach, 4 Cal. 362, 366, p. 566, 2263.
Wilson v. Robertson, 21 N. Y. 587, p. 1858.
Wilson v. Russell, 13 Md. 494, 71 Am. Dec. 645, p. 2383, 2387.
Wilson v. St. Louis & S. F. Ry. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624, p. 1220, 1222.
Wilson v. Shoenberger, 34 Pa. St. 121, p. 1276, 1381.
Wilson v. Short, 6 Hare, 366, 377, 378, 383, p. 1440, 1569, 1598, 1601, 1633, 1762.
Wilson v. Stewart, 63 Ind. 294, p. 2726.
Wilson v. Thornbury, L. R. 10 Ch. 239, 248, 249, p. 848, 854.
Wilson v. Thornbury, L. R. 17 Eq. 517, p. 271.
Wilson v. Townsend, 2 Ves. 697, p. 783, 784.
Wilson v. Watts, 9 Md. 356, p. 1651.
Wilson v. Western etc. Co., 77 N. C. 445, p. 1372.
Wilson v. West Hartlepool R'y, 2 De Gex, J. & S. 475, p. 2766.
Wilson v. West Hartlepool R'y, 11 Jur., N. S., 124, p. 1452.
Wilson v. Wilson, 4 Abb. App. 621, p. 1762, 1763, 1764.
Wilson v. Wilson, 1 De Gex & S. 152, p. 800.
Wilson v. Wilson, 1 H. L. Cas. 538, 5 H. L. Cas. 40, 65, 14 Sim. 405, p. 669, 1521, 1680, 2765.
Wilson v. Wilson, 145 Mass. 490, 1 Am. St. Rep. 477, 14 N. E. 521, p. 2107.
Wilson v. Wilson, 93 Va. 546, 25 S. E. 546, p. 2291.
Wilson v. Wright, 72 Ga. 848, p. 1065, 1076.
Wilson's Case, L. R. 12 Eq. 516, 521, p. 2728.
Wilson's Estate, In re, 2 Pa. St. 325, p. 2574, 2575.
Wiltman's Appeal, 28 Pa. St. 376, p. 1776.
Wilton v. Harwood, 23 Me. 131, 133, p. 551, 552.
Wilton v. Mayberry, 75 Wis. 191 43 N. W. 901, 6 L. R. A. 61, 17 Am. St. Rep. 193, p. 2424, 2425.

Wiltshire v. Rabbitts, 14 Sim. 76, p. 1215.
Wimberly v. Bryan, 55 Ga. 198, p. 2782.
Wimberly v. Mayberry, 94 Ala. 255, 10 South. 157, 14 L. R. A. 305, p. 469.
Wimbish v. Montgomery etc. Ass'n, 69 Ala. 575, p. 1338, 1873.
Wimmer v. Ficklin, 14 Bush, 193, p. 1434.
Winans v. Wilkie, 41 Mich. 264, p. 2407.
Winans v. Winans, 22 W. Va. 678, 688, p. 1754, 1755.
Winborn v. Gorrell, 3 Ired. Eq. 117, 40 Am. Dec. 456, p. 1069.
Winch v. Brutton, 14 Sim. 379, p. 1909, 1925, 1929.
Winch v. Keeley, 1 Term Rep. 619, p. 157.
Winch v. Winchester, 1 Ves. & B. 375, 378, p. 1517, 1519, 1521, 1560.
Winchester v. Ball, 54 Me. 558, p. 2460.
Winchester v. B. & S. R. R., 4 Md. 231, p. 997, 1146, 1164.
Winchester v. Charter, 102 Mass. 272, 97 Mass. 140, 12 Allen, 606, 610, p. 1803.
Winchester v. Susquehanna R. R., 4 Md. 231, p. 1174, 1179.
Winchester's Estate, In re, 133 Cal. 271, 65 Pac. 475, 54 L. R. A. 281, p. 1959, 1972.
Wind v. Jekyl, 1 P. Wms. 572, p. 2547.
Windham v. Windham, Cas. t. Finch, 267, p. 890.
Windle v. Hughes, 40 Oreg. 1, 65 Pac. 1058, p. 2405, 2413.
Windsor v. Evans, 72 Iowa, 692, 34 N. W. 481, p. 2448.
Windwart v. Allen, 13 Md. 196, p. 2702.
Wineburgh v. U. S. etc. Co., 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261, p. 2127.
Winegar v. Newland, 44 Mich. 367, 6 N. W. 841, p. 2275.
Winfield v. Bacon, 24 Barb. 154, p. 229, 2647.
Winfield v. Henning, 21 N. J. Eq. 188, p. 1200.
Winfield Nat. Bank v. Croco, 46 Kan. 620, 26 Pac. 939, p. 1731, 1735.
Wing v. Ayer, 53 Me. 138, p. 550.
Wing v. Cooper, 37 Vt. 169, 179, p. 2367, 2373, 2380.
Wing v. Goodman, 75 Ill. 159, p. 2499, 2519.
Wing v. Hall, 44 Vt. 118, 123, p. 148.
Wing v. Harvey, 5 De Gex, M. & G. 265, p. 755, 756, 1466.
Wing v. McDowell, Walk. Ch. 175, p. 1363.
Wing v. Merchant, 57 Me. 383, p. 2237, 2240.
Wing v. Sherrer, 77 Ill. 200, p. 2748.
Wing v. Tottenham etc. R'y, L. R. 3 Ch. 740, p. 2529.
Wing & Evans v. Hartupee, 122 Fed. 897, (C. C. A.) p. 1755.
Wingate v. Haywood, 40 N. H. 437, 441, p. 2708.
Wingert v. Gordon, 66 Md. 106, 6 Atl. 581, p. 2193.
Wingerter v. Wingerter, 71 Cal. 105, 11 Pac. 853, p. 2034.
Wingfield v. Rhea, 73 Ga. 477, p. 2191.
Wingo v. Parker, 19 S. C. 9, p. 1105, 1148.
Winkfield v. Brinkman, 21 Kan. 682, p. 2005, 2024, 2028.
Winkle, In re, [1894] 2 Ch. 519, p. 2622.
Winkle v. Winkle, 8 Oreg. 193, p. 2285.
Winn v. Albert, 2 Md. Ch. 42, p. 220, 2706.
Winn v. Dillon, 27 Miss. 494, p. 1765.
Winn v. Winn, (Tex. Civ. App.) 80 S. W. 110, p. 1739.
Winnipiseogee etc. Co. v. Perley, 46 N. H. 83, p. 1541.
Winn's Adm'r v. Wier, 3 B. Mon. 648, p. 918.
Winona etc. R. R. v. St. Paul etc. R. R., 26 Minn. 179, p. 2017.
Winpenny v. French, 18 Ohio St. 469, p. 1699.
Winpenny v. Winpenny, 92 Pa. St. 440, p. 559.
Winship v. Jewett, 1 Barb. Ch. 173, p. 1549.
Winslow v. Cummings, 3 Cush. 358, 365, p. 538, 1958, 1979.

Winslow v. Gilbreth, 50 Me. 90, p. 2193.
Winslow v. Harriman, (Tenn. Ch. App.) 42 S. W. 698, p. 1156.
Winslow v. Hudson, 21 N. J. Eq. 172, p. 569.
Winslow v. Jenness, 64 Mich. 84, 30 N. W. 905, p. 376.
Winslow v. Leland, 128 Ill. 304, 21 N. E. 588, p. 2266, 2267, 2268.
Winslow v. Merchants' Ins. Co., 4 Met. 306, 38 Am. Dec. 368, p. 2581.
Winslow v. Urquhart, 39 Wis. 260, p. 2544.
Winslow v. Winslow, 52 Ind. 8, p. 2715.
Winstandley v. Second Nat. Bank, 13 Ind. App. 544, 41 N. E. 956, p. 2019.
Winston v. Burnell, 44 Kan. 367, 24 Pac. 477, 21 Am. St. Rep. 289, p. 2379.
Winston v. Gwathmey, 8 B. Mon. 19, p. 1560, 1588.
Winston v. Hodges, 102 Ala. 304, 15 South. 528, p. 1279.
Winston v. Prevost, 6 La. Ann. 164, p. 1146.
Winston v. Westfeldt, 22 Ala. 760, 58 Am. Dec. 278, p. 1079.
Winter v. Belmont M. Co., 53 Cal. 428, 432, p. 1240, 1241, 1247, 1253, 1382.
Winter v. Drury, 5 N. Y. 525, p. 2569.
Winter v. Easum, 2 De Gex, J. & S. 272, p. 2149.
Winter v. Elmore, 88 Ala. 555, 7 South. 250, p. 241, 294, 297.
Winter v. Kinney, 1 N. Y. 365, p. 1700.
Winter v. Lord Anson, 3 Russ. 488, 493, 1 Sim. & St. 434, p. 1160, 2510.
Winter v. Montgomery G. L. Co., 89 Ala. 544, 7 South. 773, p. 1220, 1257, 1258.
Winter v. Truax, 87 Mich. 324, 49 N. W. 604, 24 Am. St. Rep. 160, p. 2018.
Winter v. Winter, 5 Hare, 306, p. 2230.
Winterbottom v. Tayloe, 2 Drew. 279, p. 2436.
Wintermute v. Snyder, 3 N. J. Eq. 489, p. 1483, 1487, 1665.
Winters v. Franklin Bank, 33 Ohio St. 250, p. 2392.
Winters v. Henderson, 6 N. J. Eq. 31, p. 2447.
Winters v. Hub. Min. Co., 57 Fed. 287, p. 2413.
Winter's Appeal, 61 Pa. St. 307, p. 1591, 1596.
Winthrop Co. v. Clinton, 196 Pa. St. 472, 46 Atl. 435, 79 Am. St. Rep. 729, p. 1846.
Winton v. Sherman, 20 Iowa, 295, p. 2777.
Winton's Appeal, 87 Pa. St. 77, p. 243.
Winton's Appeal, 97 Pa. St. 385, p. 353.
Wintour v. Clifton, 8 De Gex, M. & G. 641, 649, 650, 21 Beav. 447, p. 785, 788, 789, 790, 809, 811, 815.
Wirsching v. Grand Lodge, (N. J. Eq.) 56 Atl. 713, p. 1541, 1542.
Wiscomb v. Cubberly, 51 Kan. 580, 33 Pac. 320, p. 1100, 1114.
Wisconsin Central R. R. Co. v. Wisconsin River Land Co., 71 Wis. 94, 36 N. W. 837, p. 1860, 1862.
Wisden v. Wisden, 2 Smale & G. 396, p. 2230.
Wise v. Mitchell, 100 Ga. 614, 28 S. E. 382, p. 1104, 1144.
Wise v. Perpetual Trustee Co., [1903] App. Cas. 139 (Priv. Coun.), p. 2101.
Wise v. Schwartzwelder, 54 Md. 292, p. 1739.
Wise v. Wise, 2 Jones & L. 403, p. 1213.
Wiseley v. Findlay, 3 Rand. 361, 15 Am. Dec. 712, p. 820, 828.
Wiseman v. Beak, 2 Vern. 121, p. 1742.
Wiseman v. Beckwith, 90 Ind. 185, 190, p. 612.
Wiseman v. Hutchinson, 20 Ind. 40, p. 1050, 1054, 1145, 2521.
Wiseman v. Roper, 1 Ch. Cas. Ch. 84, p. 634.
Wiseman v. Roper, 1 Ch. Rep. 158, p. 2601.
Wiseman v. Westland, 1 Younge & J. 117, p. 1108.
Wiser v. Allen, 92 Pa. St. 317, p. 1901.

Wiser v. Lawler, 189 U. S. 260, 23 Sup. Ct. 624, p. 1439.
Wishard v. Hansen, 99 Iowa, 307, 61 Am. St. Rep. 238, 88 N. W. 691, p. 982.
Wismer v. Ocumpaugh, 71 N. Y. 113, 117, p. 2714.
Wistar v. McManes, 54 Pa. St. 318, 327, 93 Am. Dec. 700, p. 229, 2708.
Wistar's Appeal, 54 Pa. St. 60, p. 1739, 1751, 1757.
Wistar's Appeal, 80 Pa. St. 484, p. 1502, 2761.
Wiswall v. Hall, 3 Paige, 313, p. 1529, 1533.
Wiswall v. McGovern, 2 Barb. 270, p. 222, 342.
Wiswall v. McGowan, Hoff. Ch. 125, p. 2779, 2782.
Wiswall v. Ross, 4 Port. 321, p. 1863.
Wiswell v. Starr, 48 Me. 401, p. 556.
Wiswell v. Wilkin, 4 Vt. 137, p. 2800.
Witbeck v. Van Rensselaer, 64 N. Y. 27, 2 Hun, 55, 4 Thomp. & C. 282, p. 1466.
Witczinski v. Everman, 51 Mass. 841, p. 2387, 2390.
Witham v. Brooner, 63 Ill. 344, p. 1828.
Withers v. Greene, 50 U. S. (9 How.) 213, p. 1226.
Withers v. Kennedy, 2 Mylne & K. 607, p. 2490.
Withers v. Leadon, 1 Rich. Eq. 324, p. 1921.
Withers v. Little, 56 Cal. 370, p. 1323.
Withers v. Withers, Amb. 151, p. 1992.
Withers v. Yeadon, 1 Rich. Eq. 324, 329, p. 1469, 1890.
Witherwax v. Riddle, 121 Ill. 140, 13 N. E. 545, p. 1566.
Withington v. Withington, 16 Sim. 104, p. 2106.
Withy v. Cottle, 1 Sim. & St. 174, p. 2601, 2763.
Witman v. Lex, 17 Serg. & R. 88, 17 Am. Dec. 644, p. 1954, 1977.
Witmer's Appeal, 45 Pa. St. 455, 84 Am. Dec. 505, p. 2693.
Witt v. Amis, 1 Best & S. 109, p. 2237.
Wittenbrock v. Parker, 102 Cal. 93, 101, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197, p. 1157, 1163, 1166, 1170, 1171, 1172.
Witter v. Dudley, 42 Ala. 616, 621, 625, p. 1007, 1010, 1050, 1057, 1058, 1144.
Witter v. McCarthy Co., (Cal.) 43 Pac. 969, p. 1159.
Witthaus v. Schack, 57 How. Pr. 310, p. 2725.
Wittkowsky v. Gedney, 124 N. C. 437, 32 S. E. 731, p. 1011.
Wittingham v. Lighthipe, 46 N. J. Eq. 429, 19 Atl. 611, p. 1873.
Witts v. Dawkins, 12 Ves. 501, p. 2157.
Witts v. Horney, 59 Md. 584, p. 2000.
Wixon v. Bear River etc. Co., 24 Cal. 367, 85 Am. Dec. 69, p. 2686.
Woerz v. Rademacher, 120 N. Y. 67, 23 N. E. 1113, p. 2004.
Wofford v. Bailey, 57 Miss. 239, p. 2749.
Wofford v. Wyly, 72 Ga. 863, p. 2374.
Wolbert v. Harris, 7 N. J. Eq. 605, p. 2656.
Wolbert v. Lucas, 10 Pa. St. 73, 49 Am. Dec. 578, p. 2403.
Wolcott v. Jones, 4 Allen, 367, p. 229.
Wolcott v. Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790, p. 2684.
Wolcott v. Robbins, 26 Conn. 236, p. 148, 212, 2737.
Wolcott v. Winchester, 15 Gray, 461, p. 2417.
Wolf v. Citizens' Bk. of Rogersville, (Tenn. Ch. App.) 42 S. W. 39, p. 1994.
Wolf v. Corby, 30 Md. 356, 360, p. 1904.
Wolf v. Fogarty, 6 Cal. 224, 65 Am. Dec. 509, p. 1095, 1114.
Wolf v. Great Falls Water Power etc. Co., (Mont.) 38 Pac. 115, p. 1449.
Wolf v. Haslach, 65 Nebr. 303, 91 N. W. 283, p. 1906.
Wolf v. Irons, 8 Ark. 63, 66, p. 215.
Wolf v. Schaeffner, 51 Wis. 53, 8 N. W. 8, p. 2293, 2300.
Wolf v. Smith, 36 Iowa, 454, p. 2787.
Wolf v. Underwood, 96 Ala. 329, 11 South. 344, p. 323.
Wolf v. Wolf's Ex'r, 2 Har. & G. 382, 18 Am. Dec. 313, p. 260, 275.
Wolf v. Zabel, 44 Minn. 90, 46 N. W. 81, p. 1034, 1048.
Wolf Creek Diamond Coal Co. v. Schultz, 71 Pa. St. 180, p. 727, 740.

Wolfe v. Citizens' Bank, (Tenn. Ch. App.) 42 S. W. 39, p. 1156.
Wolfe v. Frost, 4 Sand. Ch. 72, p. 1200.
Wolfe v. Matthews, L. R. 21 Ch. Div. 194, p. 2676.
Wolfe v. Scarborough, 2 Ohio St. 361, 368, p. 148, 212, 2737.
Wolff, In re, 99 Fed. 485, p. 2019, 2021.
Wolff v. Bluhm, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115, p. 1735.
Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295, p. 1906.
Wolford v. Herrington, 74 Pa. St. 311, 15 Am. Rep. 548, p. 1659.
Wolford v. Herrington, 86 Pa. St. 39, 1 Lead. Cas. Eq., 4th Am. ed., 350–364, p. 2039.
Wollaston v. King, L. R. 8 Eq. 165, p. 785, 796.
Wollenberg v. Rose, 41 Oreg. 314, 68 Pac. 804, p. 2534.
Wollstonecraft, Matter of, 4 Johns. Ch. 80, p. 2612, 2614.
Wolterbeek v. Barrow, 23 Beav. 423, p. 1887.
Wolverhampton etc. R'y v. London etc. R'y, L. R. 16 Eq. 433, p. 2674.
Womack v. Austin, 1 S. C. 421, p. 1775.
Womack v. Coleman, (Minn.) 93 N. W. 663, p. 760.
Womack v. Powers, 50 Ala. 5, p. 2702.
Womble v. Battle, 3 Ired. Eq. 182, p. 2504.
Wonson v. Fenno, 129 Mass. 405, p. 2778, 2780.
Wood, In re, [1894] 2 Ch. 577, p. 2214.
Wood v. Abrey, 3 Madd. 417, p. 1665, 1667, 1671.
Wood v. Amory, 105 N. Y. 281, 11 N. E. 636, p. 1609.
Wood v. Barker, L. R. 1 Eq. 139, p. 1790.
Wood v. Briant, 2 Atk. 521, p. 880.
Wood v. Burnham, 6 Paige, 513, 518, p. 1886.
Wood v. Casserleigh, 30 Colo. 287, 71 Pac. 360, 97 Am. St. Rep. 138, p. 2576.
Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62, p. 1111, 1278, 1324, 1355, 1364.
Wood v. Chetwood, 44 N. J. Eq. 66, 14 Atl. 21, p. 2195.
Wood v. Cone, 7 Paige, 471, 472, 476, p. 179, 615, 2326.
Wood v. Cox, 2 Mylne & C. 684, 1 Keen, 317, p. 1902, 1910, 1925, 1985, 1988.
Wood v. Craft, 85 Ala. 260, 4 South. 649, p. 1735.
Wood v. Downes, 18 Ves. 120, 123, 128, p. 1767, 1771, 1784.
Wood v. Dummer, 3 Mason, 308, p. 2011.
Wood v. Fisk, 63 N. Y. 245, 20 Am. Rep. 528, p. 684, 2608.
Wood v. Ford, 29 Miss. 57, p. 2278.
Wood v. Goff, 7 Bush, 59, 63, p. 1645.
Wood v. Griffith, 1 Swanst. 43, p. 1713.
Wood v. Hall, 1 Dev. Eq. 415, p. 1694.
Wood v. Hitchings, 2 Beav. 289, p. 2655.
Wood v. Holly Mfg. Co., 100 Ala. 326, 13 South. 948, 46 Am. St. Rep. 56, p. 1338, 2465.
Wood v. Hubbell, 10 N. Y. 479, 5 Barb. 601, p. 1460, 2729.
Wood v. Hudson, 96 Ala. 469, 11 South. 530, p. 251, 321, 326.
Wood v. Johnson, 13 Ill. App. 548, p. 2267.
Wood v. Keyes, 8 Paige, 365, 369, p. 129, 615, 2325.
Wood v. Krebbs, 30 Gratt. 708, p. 1007, 1050, 1149.
Wood v. Lake, 62 Ala. 489, p. 1103, 1861.
Wood v. Legg, 91 Ala. 511, 8 South. 342, p. 2256.
Wood v. Little, 35 Me. 107, p. 2739, 2742.
Wood v. McClelland, (Tex. Civ. App.) 53 S. W. 381, p. 1847.
Wood v. Mann, 1 Sum. 506, 507–509, 578, Fed. Cas. Nos. 17,951, 17,952, p. 266, 268, 295, 1333, 1345, 1384.
Wood v. Midgley, 5 De Gex, M. & G. 41, p. 1658, 1659.
Wood v. Missouri etc. R'y, 11 Kan. 323, p. 2749, 2751.
Wood v. Ordish, 3 Smale & G. 125, p. 2222.
Wood v. Orford, 52 Cal. 412, p. 2200.
Wood v. Paine, 66 Fed. 807, p. 509, 1942, 1954, 1980

Wood v. Partridge, 11 Mass. 488, 491, p. 1212.
Wood v. Patterson, 4 Md. Ch. 335, p. 1476, 1510.
Wood v. Perry, 1 Barb. 114, 131, 134, p. 1226, 2028, 2775.
Wood v. Polk, 12 Heisk. 220, p. 2144.
Wood v. Price, 46 Ill. 439, p. 1487.
Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640, p. 1658, 1779, 2024, 2040.
Wood v. Rayburn, 18 Oreg. 3, 22 Pac. 521, p. 63, 1333.
Wood v. Robinson, 22 N. Y. 564, p. 1330, 2004.
Wood v. Rowcliffe, 3 Hare, 304, 308, 2 Phill. Ch. 382, p. 2671, 2763.
Wood v. Scarth, 2 Kay & J. 33, p. 1517, 1518, 1519, 1520.
Wood v. Smith, 51 Iowa, 156, 50 N. W. 581, p. 2424.
Wood v. Stafford, 50 Miss. 370, p. 2130.
Wood v. Sullens, 44 Ala. 686, p. 2498, 2515.
Wood v. Sutcliffe, 2 Sim., N. S., 163, p. 696, 1450, 2684, 2685.
Wood v. Swift, 81 N. Y. 31, p. 2716.
Wood v. Trask, 7 Wis. 566, 76 Am. Dec. 230, p. 2362, 2392.
Wood v. Warner, 15 N. J. Eq. 81, p. 2633.
Wood v. Weightman, L. R. 13 Eq. 434, p. 2088.
Wood v. Wheeler, 106 N. C. 513, 11 S. E. 590, p. 2196.
Wood v. White, 32 Me. 340, 52 Am. Dec. 654, p. 553, 1544.
Wood v. Wood, 134 Ala. 557, 33 South. 347, p. 2421, 2423, 2437.
Wood v. Wood, 26 Barb. 356, p. 2488.
Wood v. Wood, 5 Paige, 596, 597, 601, 605, 28 Am. Dec. 451, p. 820, 832, 2612, 2614.
Woodall v. Kelly, 85 Ala. 368, 7 Am. St. Rep. 57, 5 South. 164, p. 981, 985, 988, 2498, 2509, 2516, 2521.
Woodard v. Wright, 82 Cal. 202, 22 Pac. 1118, p. 1994.
Woodbridge v. Bockes, 170 N. Y. 596, 63 N. E. 362, p. 1834.
Woodbridge v. Perkins, 3 Day, 364, p. 1212.
Woodburn v. Woodburn, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209, p. 2242.
Woodburn's Estate, 138 Pa. St. 606, 21 Am. St. Rep. 932, 21 Atl. 16, p. 849.
Woodburn's Will, In re, 1 De Gex & J. 332, 333, p. 2048, 2098.
Woodbury v. Bruce, 59 Vt. 624, 11 Atl. 52, p. 982.
Woodbury v. Gardner, 77 Me. 68, 75, p. 602, 613, 1658.
Woodbury v. Turner, Day & Woolworth Mfg. Co., 96 Ky. 459, 29 S. W. 295, p. 763.
Woodbury etc. Bank v. Ins. Co., 31 Conn. 517, p. 1494, 1541.
Woodcock v. Bennett, 1 Cow. 711, 13 Am. Dec. 568, p. 344, 345, 1603, 1607.
Woodcock v. Bostic, 118 N. C. 822, 24 S. E. 362, p. 2414.
Wooddy v. Old Dominion Ins. Co., 31 Gratt. 362, 31 Am. Rep. 732, p. 2764.
Wooden v. Haviland, 18 Conn. 101, p. 1515, 1523, 1541.
Wooden v. Wampler, 69 Ind. 88, p. 2192.
Wooden v. Wooden, 3 N. J. Eq. 429, p. 569.
Woodfin v. Marks, 104 Tenn. 512, 58 S. W. 227, p. 2034.
Woodfolk v. Blount, 4 Tenn. (3 Hayw.) 147, 9 Am. Dec. 736, p. 1066.
Woodford v. Charnley, 28 Beav. 96, 1878.
Woodford v. Leavenworth, 14 Ind. 311, 314, p. 585.
Woodford v. Stephens, 51 Mo. 443, p. 2143, 2144.
Woodhouse v. Meredith, 1 Jacob & W. 204, 222, p. 1753, 1763.
Woodhouse v. Shepley, 2 Atk. 535, 536, 539, 540, p. 1678, 1679.
Woodley v. Holley, 111 N. C. 380, 16 S. E. 419, p. 2058.
Woolley v. Preston, 82 Ky. 415, p. 2055.
Woodlief v. Merritt, 96 N. C. 226, 2 S. E. 350, p. 2300.
Woodman v. Freeman, 25 Me. 531, 532, 540, 543, p. 548, 551, 555, 556, 1637, 2782.
Woodman v. Higgins, 14 Jur. 846, p. 2429.
Woodman v. Saltonstall, 7 Cush. 181, p. 540, 1643.

Woodmeston v. Walker, 2 Russ. & M. 197, p. 1841, 2139, 2160.
Woodroffe v. Farnham, 2 Vern. 291, p. 1676, 1709.
Woodruff v. Adair, 131 Ala. 530, 32 South. 515, p. 2473, 2542.
Woodruff v. Boyden, 3 Abb. N. C. 29, p. 1753, 2082.
Woodruff v. Cook, 47 Barb. 304, p. 580, 2299.
Woodruff v. Cook, 2 Edw. Ch. 259, p. 1314.
Woodruff v. Fisher, 17 Barb. 224, p. 2705.
Woodruff v. Garner, 27 Ind. 4, 89 Am. Dec. 477, p. 2729.
Woodruff v. Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346, p. 1942, 1946, 1955, 1965, 1973.
Woodruff v. Morristown Inst., 34 N. J. Eq. 174, p. 1228, 1231.
Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 790, p. 1786.
Woodruff v. North Bloomfield G. M. Co., 8 Saw. 628, 636, 16 Fed. 25, p. 408, 419, 423, 456, 2686, 2746.
Woodruff v. Robb, 19 Ohio, 212, 214, p. 148, 212, 1860, 1861.
Woodruff v. Saul, 70 Ga. 271, p. 1791.
Woodrum v. Kirkpatrick, 2 Swan, 218, p. 2144.
Woods, In re, [1904] 2 Ch. 4, p. 2321.
Woods v. Bailey, 3 Fla. 41, p. 2499.
Woods v. Douglass, 52 W. Va. 517, 44 S. E. 234, p. 1073.
Woods v. Farmere, 7 Watts, 382, 387, 388, 32 Am. Dec. 732, 772, p. 986, 994, 1019, 1026, 1027, 1029, 1030, 1132.
Woods v. Fisher, 3 W. Va. 536, p. 2108.
Woods v. Garnett, 72 Miss. 78, 16 South. 390, p. 989, 1136, 1360.
Woods v. Hall, 1 Dev. Eq. 415, p. 1694.
Woods v. Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513, p. 2350.
Woods v. Hyde, 31 L. J. Ch. 295, p. 2314.
Woods v. McGraw, (C. C. A.) 127 Fed. 914, p. 761.
Woods v. Matlock, 19 Ind. App. 364, 48 N. E. 384, p. 1906.
Woods v. Monroe, 17 Mich. 238, p. 162, 385, 452, 2705.
Woods v. Wallace, 22 Pa. St. 171, p. 2370.
Woods v. Wilder, 43 N. Y. 164, 3 Am. Rep. 684, p. 1696.
Woods v. Woods, 1 Mylne & C. 401, p. 1919, 1921.
Wood's Appeal, 92 Pa. St. 379, 37 Am. Rep. 694, p. 1220, 1244.
Woodside v. Lippold, 113 Ga. 877, 39 S. E. 400, 84 Am. St. Rep. 267, p. 1402, 1404.
Woodson v. Collins, 56 Tex. 168, p. 1022, 1034, 1048.
Woodstock Iron Co. v. Extension Co., 129 U. S. 643, 9 Sup. Ct. 402, p. 1700.
Woodsworth v. Tanner, 94 Mo. 124, 7 S. W. 104, p. 211, 213.
Woodward v. Brown, 119 Cal. 283, 303, 63 Am. St. Rep. 108, 52 Pac. 2, 542, p. 1096, 1130, 1302, 2443, 2454.
Woodward v. City of Worcester, 121 Mass. 245, p. 541.
Woodward v. Cowing, 41 Me. 9, 12, 66 Am. Dec. 211, p. 554.
Woodward v. Gyles, 2 Vern. 119, p. 727, 736, 750.
Woodward v. Harris, 2 Barb. 439, p. 345.
Woodward v. Harris, 3 Sand. 272, p. 2601, 2763.
Woodward v. James, 115 N. Y. 346, 22 N. E. 150, p. 1896, 1909.
Woodward v. Lazar, 21 Cal. 448, 82 Am. Dec. 751, p. 2691.
Woodward v. Miller, 2 Coll. C. C. 279, p. 1694.
Woodward v. Seaver, 38 N. H. 29, p. 2195.
Woodward v. Woodward, 41 N. J. Eq. 224, 4 Atl. 424, p. 660.
Woodward v. Worcester, 121 Mass. 245, p. 542.
Woodworth v. Campbell, 5 Paige, 518, p. 2740.
Woodworth v. Guzman, 1 Cal. 203, p. 1095, 1111, 1357.
Woodworth v. Paige, 5 Ohio St. 70, 76, p. 980, 1006.
Woodyatt v. Grisley, 8 Sim. 180, p. 2097.
Woolaston v. Wright, 3 Anstr. 801, p. 2646.
Woolcocks v. Hart, 1 Paige, 187, p. 2787.

Wooldridge v. Norris, L. R. 9 Eq. 410, p. 2793.
Wooley v. Preston, 82 Ky. 415, p. 1828, 1844.
Wooley v. Schrader, 116 Ill. 29, 4 N. E. 658, p. 785, 814.
Wooley v. Stone, 7 J. J. Marsh. 302, p. 2789.
Woollam v. Hearn, 2 Lead. Cas. Eq. 920, 944–1040, 4th Am. ed., 7 Ves. 211, p. 1521, 1532.
Woollett v. Harris, 5 Madd. 452, p. 1986.
Woolley v. Holt, 14 Bush, 788, p. 2347.
Woolridge v. Boyd, 81 Tenn. (13 Lea) 151, p. 1068.
Woolridge v. Woolridge, 1 Johns. 63, p. 796.
Woolsey v. Judd, 4 Duer, 379, p. 2689.
Wooson's Adm'rs v. Scott, 1 Dana, 470, p. 2777.
Wooster v. Cavender, 54 Ark. 153, 15 S. W. 192, 26 Am. St. Rep. 31, p. 1495.
Wooten v. Bellinger, 17 Fla. 289, p. 2534.
Wooten v. Burch, 2 Md. Ch. 190, p. 283.
Wooters v. Hollingsworth, 58 Tex. 374, p. 2394, 2397, 2502.
Wooton v. Hinkle, 20 Mo. 290, p. 1692.
Worcester v. Eaton, 11 Mass. 368, p. 1712, 1721.
Worcester Bank v. Cheeney, 87 Ill. 602, p. 1398, 1403, 1406.
Worden v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161, p. 669, 1695.
Work v. Coverdale, 47 Kan. 207, 27 Pac. 984, p. 1335.
Work v. Harper, 24 Miss. 517, p. 1114.
Workingman's B. & S. Ass'n v. Williams, (Tenn. Ch. App.) 37 S. W. 1019, p. 1265.
Workman v. Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654, p. 1528.
Worley v. Taylor, 21 Oreg. 589, 28 Am. St. Rep. 771, 28 Pac. 903, p. 2494.
Worley v. Tuggee, 4 Bush, 168, 173, 182, p. 1489, 1523, 1529.
Wormack v. Rogers, 9 Ga. 60, p. 1072.
Wormald v. Maitland, 35 L. J. Ch., N. S., 69, p. 1142.
Wormley v. Lowry, 1 Humph. 468, p. 1330.
Wormley v. Wormley, 98 Ill. 544, p. 2762.
Wormley v. Wormley, 8 Wheat. 421, 449, 450, p. 1337, 1348, 1753.
Wormouth v. Johnson, 58 Cal. 621, p. 1894, 1911.
Worrall v. Harford, 8 Ves. 4, 8, Ames' Cas. on Trusts, 415, p. 2101, 2103.
Worrall v. Munn, 38 N. Y. 139, p. 615.
Worrall's Appeal, 110 Pa. St. 349, 1 Atl. 380, p. 1776.
Worrell's Appeal, 9 Pa. St. 508, p. 2077.
Worrill v. Coker, 56 Ga. 666, p. 2658.
Worsley v. Earl of Scarborough, 3 Atk. 392, p. 1062, 1065, 1089, 1166.
Worsley's Ex'r v. Worsley, 16 B. Mon. 470, p. 852.
Worth v. Board of Commissioners, 1 Winst. Eq. 70, p. 407.
Worth v. Case, 42 N. Y. 362, p. 1665, 1667.
Worth v. Hill, 14 Wis. 559, p. 2448.
Worth v. McAden, 1 Dev. & B. Eq. 199, p. 2096.
Wortham v. Boyd, 66 Tex. 401, 1 S. W. 109, p. 1066, 1069, 1074.
Wortham v. Pemberton, 1 De Gex & S. 644, p. 2169, 2621.
Worthen v. Badgett, 32 Ark. 496, p. 2678.
Worthen v. Griffith, 59 Ark. 562, 28 S. W. 286, 43 Am. St. Rep. 50, p. 2013.
Worthen v. Pearson, 33 Ga. 385, 81 Am. Dec. 213, p. 812, 821, 826.
Worthington v. Curtis, L. R. 1 Ch. Div. 419, 423, 424, p. 672, 674, 1713.
Worthington v. Evans, 1 Sim. & St. 165, p. 1686.
Worthington v. Moon, 53 N. J. Eq. 46, 30 Atl. 251, p. 765, 766.
Worthington v. Morgan, 16 Sim. 547, p. 1017, 1296, 1407.
Worthington v. Tormey, 34 Md. 182, p. 2463.
Worthington v. Wigginton, 20 Beav. 67, p. 853, 854, 856.
Worthington v. Wilmot, 59 Miss. 608, p. 2435.
Worthy v. Caddell, 76 N. C. 82, p. 1324.

Wortley v. Birkhead, 2 Ves. 571, 573, 574, p. 267, 1291.
Wortman v. Skinner, 12 N. J. Eq. 358, p. 1779.
Wotherspoon v. Currie, L. R. 5 H. L. 508, p. 2690.
Wotten v. Copeland, 7 Johns. Ch. 140, p. 2739, 2740.
Wragg v. Comptroller-General, 2 Desaus. Eq. 509, 520, p. 2502.
Wray v. Field, 2 Russ. 257, 6 Madd. 300, p. 886.
Wray v. Steele, 2 Ves. & B. 388, p. 1992, 1995.
Wray v. Wray, 32 Ind. 126, p. 1728.
Wren v. Bradley, 2 De Gex & S. 49, p. 1681.
Wren v. Followell, 52 Ark. 76, 12 S. W. 155, p. 2032.
Wren v. Kirton, 11 Ves. 377, p. 2060.
Wrexham etc. R'y Co., In re, [1899] 1 Ch. 440, p. 2606.
Wright, Ex parte, 19 Ves. 255, p. 2538.
Wright v. Arnold, 14 B. Mon. 513, 638, 61 Am. Dec. 172, p. 513, 1773.
Wright v. Atkyns, Turn. & R. 143, 157, 17 Ves. 255, 19 Ves. 299, p. 1922, 1925.
Wright v. Atkyns, 1 Ves. & B. 313, 315, p. 1930.
Wright v. Bates, 13 Vt. 341, 350, p. 1032.
Wright v. Bell, 5 Price, 325, 328, 329, p. 2601, 2760, 2763.
Wright v. Brown, 67 N. Y. 1, p. 1615.
Wright v. Brown, 44 Pa. St. 224, p. 2154, 2197.
Wright v. Bundy, 11 Ind. 398, 405, p. 1860.
Wright v. Carter, [1903] 1 Ch. 27, p. 1767, 1768, 1769.
Wright v. Dame, 22 Pick. 55, 60, p. 535, 537.
Wright v. Dobie, 3 Tex. Civ. App. 194, 22 S. W. 66, p. 730.
Wright v. Douglass, 10 Barb. 97, p. 1278, 1381.
Wright v. Douglass, 7 N. Y. 564, p. 1894, 1902.
Wright v. Dufield, 2 Baxt. 218, p. 2536.
Wright v. Ellison, 1 Wall. 16, 22, p. 514, 2585.
Wright v. Fisher, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886, p. 1732.
Wright v. Fleming, 76 N. Y. 517, p. 2703, 2283.
Wright v. Flinn, 33 Iowa, 159, p. 1625.
Wright v. Franklin Bank, 59 Ohio St. 80, 51 N. E. 876, p. 1105.
Wright v. Gay, 101 Ill. 233, p. 2380.
Wright v. Goff, 22 Beav. 207, p. 1543.
Wright v. Grover, 82 Pa. St. 80, p. 2796.
Wright v. Gully, 28 Ind. 475, p. 1591, 1594.
Wright v. Hazen, 24 Vt. 143, p. 1445.
Wright v. Henderson, 12 Tex. 43, p. 1860, 2361.
Wright v. Lassiter, 71 Tex. 640, 644, 10 S. W. 295, p. 1038, 1356.
Wright v. Linn, 9 Pa. St. 433, p. 1977.
Wright v. Lord Maidstone, 1 Kay & J. 701, 708, p. 1464.
Wright v. McCormick, 22 Iowa, 545, p. 1529.
Wright v. Miller, 8 N. Y. 9, 59 Am. Dec. 438, p. 1872.
Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731, p. 2693.
Wright v. Morley, 11 Ves. 12, 16, 22, p. 646, 2170, 2171.
Wright v. Oroville etc. Co., 40 Cal. 20, p. 2125.
Wright v. Pearson, 1 Eden, 119, 125, p. 1824, 1884, 1886, 1919.
Wright v. Pitt, L. R. 3 Ch. 809, 810, p. 286.
Wright v. Plumptre, 3 Madd. 481, p. 271.
Wright v. Proud, 13 Ves. 136, p. 1767.
Wright v. Pucket, 22 Gratt. 370, 374, p. 2762, 2781.
Wright v. Remington, 41 N. J. L. 48, 32 Am. Rep. 180, p. 1735.
Wright v. Rose, 2 Sim. & St. 323, p. 2313.
Wright v. Ross, 36 Cal. 414, p. 2460.
Wright v. Ryder, 36 Cal. 342, 95 Am. Dec. 186, p. 1688.
Wright v. Shumway, 1 Biss. 23, p. 2478.
Wright v. Snowe, 2 De Gex & S. 321, p. 663, 1448, 1725, 2087.
Wright v. Stewart, 130 Fed. 905, 921, p. 1717, 1718, 1719.
Wright v. Superior Court, 139 Cal. 469, 73 Pac. 145, p. 250, 251.

Wright v. Tatham, 2 Sim. 459, p. 296.
Wright v. Trustees etc. Hoff. Ch. 202, 205, 219, p. 2325, 2326.
Wright v. Vanderplank, 8 De Gex, M. & G. 133, 137, 146, 2 Kay & J. 1, p. 696, 1738, 1757, 1775, 1777, 1778, 1788, 2619, 2729.
Wright v. Walker, 30 Ark. 44, p. 1771.
Wright v. Ward, 4 Russ. 215–220, p. 2637, 2645, 2646.
Wright v. Weston, 26 Beav. 429, p. 2224.
Wright v. Wilkin, 4 De Gex & J. 141, p. 1635.
Wright v. Wood, 23 Pa. St. 120, 130, 131, p. 1036, 1042, 1048.
Wright v. Wright, 59 How. Pr. 176, p. 2800.
Wright v. Wright, 122 Iowa, 549, 98 N. W. 472, p. 2380.
Wright v. Wright, 2 Johns. & H. 647, 655, p. 2160, 2161.
Wright v. Wright, 31 Mich. 380, p. 2769.
Wright v. Wright, 54 N. Y. 437, 442, p. 586, 587.
Wright v. Wright, 1 Ves. Sr. 409, 411, p. 193, 2547, 2574.
Wright v. Wright, 16 Ves. 188, p. 2326.
Wrightman v. Spofford, 56 Iowa, 145, 8 N. W. 680, p. 1338.
Wrigley v. Swainson, 3 De Gex & S. 458, p. 2165.
Wuesthoff v. Seymour, 22 N. J. Eq. 66, p. 1603, 1604.
Wulbern v. Timmons, 55 S. C. 456, 33 S. E. 568, p. 2021.
Wurts's Ex'rs v. Page, 19 N. J. Eq. 365, p. 2310, 2315.
Wurzburger v. Meric, 20 La. Ann. 415, p. 1515.
Wyatt, In re, [1892] 1 Ch. 188, p. 1210, 1211, 1214, 1215.
Wyatt v. Barwell, 19 Ves. 435, 438, 439, p. 1122, 1137, 1139, 1141, 1357.
Wyatt v. Elam, 19 Ga. 335, p. 1104, 1145.
Wyatt v. Stewart, 34 Ala. 716, 721, p. 1104, 1144, 1274.
Wyble v. McPheters, 52 Ind. 393, p. 1873.
Wych v. Meal, 3 P. Wms. 311, 312, p. 265.
Wyche v. Greene, 16 Ga. 49, 2 Ames' Cas. Eq. Jur. 289, p. 1490.
Wycherley v. Wycherley, 2 Eden, 177, p. 619.
Wyckoff v. Hulse, 32 N. J. Eq. 697, p. 2130.
Wyckoff v. Victor etc. Co., 43 Mich. 309, p. 2704.
Wycombe R'y v. Donnington Hospital, L. R. 1 Ch. 268, p. 1518, 1539.
Wyeth v. Renz-Bowles Co., 23 Ky. Law Rep. 23, 38, 66 S. W. 825, p. 1175, 1336.
Wykham v. Wykham, 18 Ves. 418, p. 1396.
Wyld v. Pickford, 8 Mees. & W. 443, 461, 462, p. 2064.
Wylie v. Mausley, 132 Pa. St. 68, p. 559.
Wylie v. Welch, 51 Wis. 351, 8 N. W. 207, p. 2434.
Wylie's Appeal, 92 Pa. St. 196, p. 2574.
Wyllie v. Pollen, 3 De Gex, J. & S. 596, 601, p. 1160, 1166, 1171.
Wylly v. Collins, 9 Ga. 223, p. 2104, 2153.
Wyman v. Bowman, 127 Fed. 257, 262–265, p. 423, 445.
Wyman v. Brown, 50 Me. 139, 148, p. 1803.
Wyman v. Fort Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 72 Am. St. Rep. 259, p. 2570.
Wyman v. Mathews, 53 Fed. 678, p. 507.
Wyman v. Paterson, [1900] A. C. 271, p. 2059.
Wynch v. Grant, 2 Drew. 312, p. 2088.
Wynkoop v. Cowing, 21 Ill. 570, p. 2371.
Wynn v. Cory, 43 Mo. 301, p. 586.
Wynn v. Rosette, 66 Ala. 517, p. 1357.
Wynn v. Smith, 40 Ga. 457, p. 2762.
Wynne, In re, L. R. 7 Ch. 229, p. 2622.
Wynne v. Callander, 1 Russ. 293, 296, 297, p. 1709, 2729.
Wynne v. Humbertson, 27 Beav. 421, p. 2053.
Wynne v. Lumpkin, 38 Ga. 208, p. 2750.
Wynne v. Simmons Hardware Co., 67 Tex. 40, p. 1856.
Wynne v. Styan, 2 Phill. Ch. 303, 306, p. 2436.

Wynne v. Tunstall, 1 Dev. Eq. 23, p. 2742.
Wynstanley v. Lee, 2 Swanst. 333, 335, p. 2684, 2685.
Wythe v. City of Salem, 4 Saw. 88, p. 1438.
Wythes v. Labouchere, 3 De Gex & J. 593, p. 1160, 1622.
Wythes v. Lee, 3 Drew. 396, 406, p. 192, 2536.
Wyvill v. Bishop of Exeter, 1 Price, 292, p. 2774.

X.

Ximenes v. Franco, 1 Dick. 149, p. 2670.

Y.

Yale v. Dederer, 18 N. Y. 265, 72 Am. Dec. 503, 22 N. Y. 450, 456, 78 Am. Dec. 216, 68 N. Y. 329, p. 2152, 2186, 2188, 2196.
Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 42 Am. St. Rep. 159, 29 Atl. 303, 25 L. R. A. 90, p. 660, 1783, 2082, 2119, 2129.
Yancey v. Mauck, 15 Gratt. 300, p. 192, 2504, 2528.
Yancy v. Field, 85 Va. 756, 8 S. E. 721, p. 2242.
Yarborough v. Thompson, 3 Smedes & M. 291, 41 Am. Dec. 626, p. 2637, 2703.
Yarborough v. Wood, 42 Tex. 91, 19 Am. Rep. 44, p. 2502.
Yard v. Yard, 27 N. J. Eq. 114, p. 1738, 2729.
Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380, p. 1257, 1258, 1269, 1272, 1335.
Yarnell's Appeal, 70 Pa. St. 335, p. 1830.
Yaryan v. Shriner, 26 Ind. 364, p. 2499.
Yates v. Cole, 1 Jones Eq. 110, 59 Am. Dec. 602, p. 1544.
Yates v. Compton, 2 P. Wms. 308, p. 615.
Yates v. Hambly, 2 Atk. 237, 360, p. 331, 334.
Yates v. Hoffman, 5 Hun, 113, p. 683.
Yates v. Madden, 3 Macn. & G. 532, p. 2219.
Yates v. Monroe, 13 Ill. 212, p. 265.
Yates v. Stuart's Adm'r, 39 W. Va. 124, 19 S. E. 423, p. 314, 321.
Yates v. Tisdale, 3 Edw. Ch. 71, p. 2637, 2639.
Yates v. Village of Batavia, 79 Ill. 500, p. 389, 452.
Yates v. Yates, 28 Beav. 637, p. 2321, 2322.
Yates v. Yates, 21 Wis. 473, p. 2376.
Yauger v. Skinner, 14 N. J. Eq. 389, p. 1726, 2758.
Yazel v. Palmer, 81 Ill. 82, p. 2191.
Yeackel v. Litchfield, 13 Allen, 417, 90 Am. Dec. 207, p. 2086.
Yeakel v. McAtee, 156 Pa. St. 600, 27 Atl. 277, p. 1779.
Yearly v. Long, 40 Ohio St. 27, p. 2489.
Yeates v. Groves, 1 Ves. 281, p. 195, 2561, 2565.
Yeates v. Roberts, 7 De Gex, M. & G. 227, 3 Drew. 170, p. 2054.
Yeatman v. Savings Inst., 95 U. S. 764, p. 1332.
Yeaton v. Lenox, 8 Pet. 123, p. 437.
Yellowly v. Beardsly, 76 Miss. 613, 71 Am. St. Rep. 536, 24 South. 973, p. 2050.
Yenner v. Hammond, 36 Wis. 277, p. 727, 729, 738.
Yeomans v. Williams, L. R. 1 Eq. 184, p. 634.
Yerkes v. Perrin's Estate, 71 Mich. 567, 39 N. W. 758, p. 1902.
Yetter v. Fitts, 113 Ind. 34, 14 N. E. 707, p. 2499.
Yingling v. Miller, 77 Md. 104, 26 Atl. 491, p. 1971.
Yingling v. Redwine, 12 Okla. 64, 69 Pac. 810, p. 2361, 2380.
Yoakum v. Yoakum, 77 Ill. 85, p. 2762.
Yockney v. Hansard, 3 Hare, 620, 622, p. 890.
Yonley v. Lavender, 21 Wall. 276, p. 510.
Yoe v. Montgomery, 68 Tex. 341, 4 S. W. 622, p. 1269, 1279.
Yolo County v. City of Sacramento, 36 Cal. 193, 195, p. 2252, 2686.
Yonge v. Reynell, 9 Hare, 809, p. 2794.
Yordan v. Hess, 13 Johns. 492, p. 278.
York v. Conde, 147 N. Y. 486, 42 N. E. 193, 61 Hun, 26, 15 N. Y. Suppl. 380, p. 1212, 1254.
York v. Eaton, Freem. 23, p. 680.
York v. Farmers' Bank, (Mo. App.) 79 S. W. 968, p. 2014

York v. Gregg, 9 Tex. 85, p. 1583.
York v. Hinkle, 80 Wis. 624, 50 N. W. 895, 27 Am. St. Rep. 73, p. 1735.
York v. Landes, 65 N. C. 535, p. 2796.
York v. McNutt, 16 Tex. 13, 67 Am. Dec. 607, p. 1191, 1229.
York v. Merritt, 77 N. C. 213, p. 1712.
York Bank's Appeal, 36 Pa. St. 458, p. 1148.
York's Appeal, 110 Pa. St. 69, 1 Atl. 162, 2 Atl. 65, p. 2286.
Yorkshire Inv. & Am. Mortgage Co. v. Fowler, 78 Fed. 56, p. 1868.
York & Cumberland R. R. v. Myers, 41 Me. 109, 119, p. 548, 550, 555.
York & Jersey S. Ferry Co. v. Jersey Co., Hopk. Ch. 460, p. 2786.
York Buildings Co. v. Mackenzie, 8 Brown Parl. C. 42, p. 2083.
York & N. M. R'y Co. v. Hudson, 16 Beav. 485, p. 2028.
Yost v. First Nat. Bank, 66 Kan. 605, 72 Pac. 209, p. 2373, 2376.
Youde v. Cloud, L. R. 18 Eq. 634, p. 2045, 2056, 2065.
Youell v. Allen, 18 Mich. 107, p. 2772.
Youmans v. Youmans, 26 N. J. Eq. 149, 154, p. 181, 335, 580, 2282, 2299.
Youn v. Lamont, 56 Minn. 216, 57 N. W. 478, p. 1733.
Young, Ex parte, 2 Ves. & B. 242, p. 2483.
Young v. Burton, 1 McMull. Eq. 255, p. 234.
Young v. Charnquist, 114 Iowa, 116, 86 N. W. 205, p. 1338.
Young v. Coleman, 43 Mo. 179, p. 2726.
Young v. Colt, 2 Blatch. 373, p. 272.
Young v. Covell, 8 Johns. 23, 5 Am. Dec. 316, p. 1577.
Young v. Daniels, 2 Iowa, 126, 63 Am. Dec. 477, p. 2776.
Young v. Devries, 31 Gratt. 304, p. 1272.
Young v. Drake, 8 Hun, 61, p. 2125, 2126.
Young v. Frier, 9 N. J. Eq. 465, p. 2011.
Young v. Frost, 1 Md. 377, 403, p. 2631.
Young v. Gaunt, 69 Ark. 104, 61 S. W. 372, p. 739.
Young v. Glendenning, 194 Pa. St. 550, 45 Atl. 364, p. 2021.
Young v. Graff, 28 Ill. 20, p. 2155.
Young v. Grote, 4 Bing. 253, p. 1422, 1442.
Young v. Guy, 87 N. Y. 462, p. 612, 1328.
Young v. Harris, 36 Ark. 162, p. 2498, 2508.
Young v. Hassard, 1 Jones & L. 466, 472, p. 2222.
Young v. Hughes, 32 N. J. Eq. 372, p. 1609, 1613, 1616, 1625, 1750, 1752, 1762, 1763, 2729.
Young v. Miles, 10 B. Mon. 287, p. 1852.
Young v. Miller, 10 Ohio, 85, p. 1489.
Young v. Morgan, 89 Ill. 199, p. 2424.
Young v. Morgan, 9 Nebr. 169, p. 1550.
Young v. Peachy, 2 Atk. 254, 256, p. 1655, 1778, 2379.
Young v. Pickens, 49 Ind. 23, p. 812.
Young v. Pooler, 3 Woods, 342, Fed. Cas. No. 18,171, p. 214.
Young v. Omohundro, 69 Md. 424, 16 Atl. 120, p. 2428.
Young v. Reynolds, 4 Md. 375, p. 304.
Young v. St. Mark's Lutheran Church, 200 Pa. St. 332, 49 Atl. 887, p. 1941, 1956, 1977.
Young v. Schofield, 132 Mo. 650, 34 S. W. 497, p. 1355, 1365, 1390, 1391.
Young v. Smith, 9 Bush, 421, p. 2192.
Young v. South Tredegar Iron Co., 85 Tenn. 189, 4 Am. St. Rep. 752, p. 1223.
Young v. Tarbell, 37 Me. 509, p. 1280.
Young v. Upson, 115 Fed. 192, p. 1207.
Young v. Vough, 23 N. J. Eq. 325, p. 1436.
Young v. Walter, 9 Ves. 364, p. 1549.
Young v. White, 5 Watts, 460, p. 747.
Young v. Williams, 17 Conn. 393, p. 2440.
Young v. Wood, 11 B. Mon. 123, p. 2513.
Young v. Young, 9 B. Mon. 66, p. 214.
Young v. Young, 7 Cold. 461, p. 2155, 2198.
Young v. Young, 5 I. R. Eq. 615, p. 956.
Young v. Young, 3 Jones Eq. 216, p. 2146.
Young v. Young, L. R. 3 Eq. 801, p. 1375, 2382.

Young v. Young, 80 N. Y. 422, 436, 36 Am. Rep. 634, p. 1869, 1877, 1907, 1912.
Young v. Young, 68 N. C. 309, p. 1920, 1926.
Youngblood v. Sexton, 32 Mich. 406, 410, 20 Am. Rep. 654, p. 226, 434, 436.
Youngblood v. Vastine, 46 Mo. 239, 2 Am. Rep. 509, p. 1101.
Youngblood v. Youngblood, 54 Ala. 486, p. 217, 564, 1643.
Younge v. Furse, 8 De Gex, M. & G. 756, p. 1681, 1683.
Younghusband v. Gisborne, — ——, —, p. 1841, 1842.
Youngman v. Elmira etc. R. R., 65 Pa. St. 278, 285, p. 2352.
Young Men's Christian Ass'n v. Croft, 34 Oreg. 106, 55 Pac. 439, 75 Am. St. Rep. 568, p. 2414.
Youngs v. Carter, 10 Hun, 194, 197, p. 570.
Youngs v. Lee, 12 N. Y. 551, p. 1326, 1331.
Youngs v. Public School Trustees, 31 N. J. Eq. 290, p. 2410.
Youngs v. Wilson, 27 N. Y. 351, reversing 24 Barb. 510, p. 1126, 1127, 2384, 2387.
Youngson v. Bond, (Nebr.) 95 N. W. 700, p. 2280.
Younkin v. Milwaukee etc. Co., 112 Wis. 15, 87 N. W. 861, p. 374, 398, 453.
Youst v. Martin, 3 Serg. & R. 423, p. 1334.
Yovatt v. Winyard, 1 Jacob & W. 394, p. 2670.
Yule v. Yule, 10 N. J. Eq. 138, 143, p. 2176.
Yundt's Appeal, 13 Pa. St. 575, 53 Am. Dec. 496, p. 908.

Z.

Zabriskie v. Cleveland R. R., 23 How. 381, 395, 398, p. 1453.
Zabriskie v. Jersey City etc. R. R., 13 N. J. Eq. 314, p. 2683.
Zabriskie v. Morris etc. R. R. Co., 33 N. J. Eq. 22, p. 1850.
Zabriskie v. Salter, 80 N. Y. 555, p. 2440, 2447, 2451, 2452.
Zabriskie v. Smith, 13 N. Y. 322, 333, 64 Am. Dec. 551, p. 2552.
Zabriskie's Ex'rs v. Wetmore, 26 N. J. Eq. 18, p. 2049.
Zahrt, Matter of, 94 N. Y. 605, p. 785, 821, 830.
Zambaco v. Cassaretti, L. R. 11 Eq. 439, p. 2096.
Zane v. Fink, 18 W. Va. 693, p. 1899.
Zang v. Adams, 23 Colo. 408, 53 Am. St. Rep. 249, 48 Pac. 509, p. 1566.
Zanhizer v. Hefner, 47 W. Va. 418, 35 S. E. 4, p. 427, 444.
Zear v. Boston Safe Dep. & T. Co., 2 Kan. App. 505, 43 Pac. 977, p. 1051, 1121.
Zehner v. Johnston, 22 Ind. App. 452, 53 N. E. 1080, p. 1303.
Zeigler v. Beasley, 44 Ga. 56, p. 308, 2670.
Zeigler v. Eckert, 6 Pa. St. 13, 18, 47 Am. Dec. 428, p. 881, 882, 935, 938, 939.
Zeigler v. Hughes, 55 Ill. 288, p. 1769.
Zeile, Estate of, 74 Cal. 127, 133, 15 Pac. 455, p. 888, 921.
Zeis v. Potter, 105 Fed. 671, 44 C. C. A. 665, p. 1156.
Zeisweiss v. James, 63 Pa. St. 465, 3 Am. Rep. 558, p. 1933, 1939, 1961, 1976.
Zeiter v. Zeiter, 4 Watts, 212, 28 Am. Dec. 698, p. 908.
Zellenkoff v. Collins, 23 Hun, 156, p. 2679.
Zerelly v. Casper, 160 Ind. 455, 67 N. E. 103, p. 2125.
Zetelle v. Myers, 19 Gratt. 62, 67, p. 225, 331.
Ziegler v. Long, 2 Watts, 205, p. 2786.
Zimmer, In re, 15 Hun, 214, p. 2624.
Zimmer v. Sennott, 134 Ill. 505, p. 25 N. E. 774, p. 1920.
Zimmerman v. Anders, 6 Watts & S. 218, 40 Am. Dec. 552, p. 1977.
Zimmerman v. Fraley, 70 Md. 561, 17 Atl. 560, p. 2051, 2071, 2089, 2097.
Zimmerman v. Kinkle, 108 N. Y. 282, 287, 15 N. E. 407, p. 1717, 2017, 2018.
Zimmerman v. Makepeace, 152 Ind. 199, 52 N. E. 992, p. 1838.
Zimmerman v. Streeper, 75 Pa. St. 147, p. 1872.
Zimmerman v. Zimmerman, 7 Mont. 114, 14 Pac. 665, p. 569.

Zinn v. Zinn, (W. Va.) 46 S. E. 202, p. 235.
Zion Church v. Parker, 114 Iowa, 1, 86 N. W. 60, p. 1940, 1974.
Zoeller v. Riley, 100 N. Y. 108, 2 N. E. 388, 53 Am. Rep. 157, p. 1344, 1345, 1384.
Zoll v. Carnahan, 83 Mo. 35, p. 2501.
Zollman v. Moore, 21 Gratt. 311, 313, 321, p. 1291, 1314, 1348, 1365, 1373, 1380, 1482, 1500.
Zorger v. Township of Rapids, 36 Iowa, 175, 180, p. 407, 408.
Zorn v. Livesley, (Oreg.) 75 Pac. 1057, p. 1107.
Zorn v. R. R. Co., 5 S. C. 90, p. 1327.
Zuber v. Johnson, 108 Iowa, 273, 79 N. W. 76, p. 1279.
Zuchtmann v. Roberts, 109 Mass. 53, 12 Am. Rep. 663, p. 1435.
Zuver v. Lyons, 40 Iowa, 510, p. 1908, 2381.

INDEX.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

A

ABATEMENT,
- order of, appropriating assets of decedents, 1135.
- what is, and nature of, 1136.
- certain classes of legacies preferred to others, 1136.
- an application of maxim, Equality is equity, 411, 1136.
- of specific legacies, 1137.
  - demonstrative, 1133, 1138.
  - general, 1139.
  - annuities, 1138, note, 1139.
- doctrine of, subject to testator's intention, 1135, 1140, 1141.
  - language showing intention, 1140, note.
- no exemption from, of general legacies in favor of legacies to near relatives, 1141.
  - subject to testator's intention, 1141.
  - rule changed by statute in certain states, 1141.
- general legacies for valuable consideration preferred in, 1142.
- where fund appropriated for payment with, and without, legatee's consent, 1143.

ACCIDENT,
- fraud, mistake, and, as basis of equity classification, 119.
- not embraced entirely in concurrent jurisdiction, 138, 140, note, 175, note, 188, 822.
- inadequacy of legal remedies in, as occasion of exclusive jurisdiction, 140, note, 188, 221, 824.
- fraud, mistake, and, as occasions of concurrent jurisdiction, 140, 174, 188.
- ground for enlarging equity jurisdiction where discovery asked, 224–226.
- equity jurisdiction in cases involving, not abridged by jurisdiction subsequently acquired at law, 278, 824.
- equity jurisdiction of courts of Maine over cases involving, 330.
- equity jurisdiction over penalties and forfeitures, whether embraced in that of, 433, note.
- definition of, 823.
- distinction between, and mistake and fraud, 823, 839, 873.
- early origin and comprehensiveness of equity jurisdiction over, 824.
- *rationale* of equity jurisdiction over, 824.

ACCIDENT — *Continued.*
general limitations on equity jurisdiction over, 825.
instances in which jurisdiction occasioned by, does not exist, 826-829.
non-performance of contracts occasioned by, 826.
supplying lost or destroyed records, 827.
where, is result of negligence or fault, 828.
where party has no vested right, but expectancy or hope, 828.
testator prevented by, from making bequest, 828.
entire non-execution of powers through, not supplied, 590, 828, note, 834, 1002.
aided when accompanied with trust, 828, note, 835, 1002.
jurisdiction on ground of, not exercised against *bona fide* purchaser, 776, 829.
not exercised against one with equal equity, 829.
instances in which jurisdiction occasioned by, exists, 830-837.
jurisdiction, when, in general, exercised, 830.
in suits on lost bonds and sealed instruments, 831.
grounds of jurisdiction: profert, indemnity, 831.
whether jurisdiction abridged by legislation, 831.
in suits on lost or destroyed unsealed instruments, 832.
negotiable and non-negotiable paper, 832.
grounds of jurisdiction; indemnity, 832.
jurisdiction is concurrent, 832.
effect of legislation and reformed procedure on jurisdiction, 832.
penalties incurred through, relieved against, 826, 833.
where payment accelerated, 439, 833, note.
forfeitures occasioned by, relieved against, 451, 454, 456, note, 826, 833.
relief, what and how granted, 833.
defective execution of powers through, aided, 589, 590, 834, 835. See POWERS.
judgments set aside or enjoined, when defense prevented by, 836, 1364, 1377.
relief, how obtained under reformed procedure, 836.
executors and administrators relieved, when deficiency of assets, 837.
relief, where consideration for payment of large sum of money fails through, 837.
dispositions of public securities becoming impossible by, 837, note.
jurisdictions for adjustment of disputed boundaries rests partly on, 837, note.
indorsement of negotiable paper omitted by, compelled, 837, note.
parol evidence to show, 858-867. See EVIDENCE.
ground for exercise of remedy of cancellation, 1377.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

ACCOUNTING,
remedy of, well established, 110, 112.
belongs to concurrent jurisdiction, 140, 174, 186, 1416, 1420.
where remedy at law adequate, no jurisdiction, because, needed, 178, 1420.
[not abrogated by statute providing jury trial in actions for recovery of money only, 182, note, 279, note.]
ground for enlarging equity jurisdiction where discovery sought, 224–226, [227, note], 234, 1421, note.
[suit for, retention for full relief, 241, note.]
suit by ward for, not abridged by jurisdiction given to law courts, 280.
power of courts of New Hampshire to grant remedy of, 303, 306.
of courts of Massachusetts, 319.
of courts of Maine, 332.
maxim, He who seeks equity must do equity, applied in suits for, 393.
remedy of, may be had in case of fraud, 910.
illegality may not defeat a suit for, 940, note.
equitable rights and remedies in fiduciary relations are not applications of, 1088.
jurisdiction of equity to compel, in administration suits, 1154, 1421, note.
by mortgagee in possession, for rents and profits, 1190, 1218.
where deed absolute in form is mortgage, 1196.
of personal property after sale, where inequitable conduct, 164, 1230.
pledgor may sue to redeem where, needed, 1231.
jurisdiction of equity over assignments where, necessary, 1277.
may be had of profits where patent rights or copyrights infringed, 1352, 1421, note.
origin of equitable jurisdiction for, 1420.
jurisdiction, when exercised; inadequacy of legal remedies, 178, 1420, 1421.
extent of equity jurisdiction, 186, 1421.
where mutual accounts, [186, note], 1421.
in complicated accounts, [186, note], 1421.
in fiduciary relations, 186, 1097, 1421.
trustees, express or implied, 1058, 1063, 1097, 1421.
directors of corporations, 881, 1092, 1421, note.
between partners and part owners, 1421.
guardians, 78, 1097, 1313, 1421, note.
executors and administrators, 1154, 1421.
principal and agent, 186, 1421, note.
tenants in common and joint tenants, 1421, note.
banker and customer, 1421, note.
applications of, general average, apportionment, etc., 186.
plea of stated account a bar to, 1421.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

ACCOUNTS,
manner of making discovery of, 204.
estoppel, when settlements of, are acquiesced in, 820
settlement of, under mistake, relieved against, 871.
duty of trustees to render, 1063.
stated, may be opened for fraud or error, 1421.
See ACCOUNTING.

ACCUMULATION,
trust for, a class of active trusts, 992.
trust for, by statute, and rules concerning, 1004, 1005, note.

ACQUIESCENCE,
as working an estoppel, 816-821. See ESTOPPEL.
nature of, 965.
See LACHES.

ACTIONS,
Roman law, early, 3.
new, invented by prætors, 5, 7.
English law, early, 22.
new, invented by statutes Edw. I.; case; trover; assumpsit, 23-29.
distinction between, at law, and suits in equity abolished by reformed procedure, 40, 84, 183, 354. See REFORMED PROCEDURE.
in what states, 40, note.
retained in United States courts and in what states, 41, 42.
at law, when restrained, 1360-1365. See INJUNCTIONS.
equitable defenses to legal, as substitute for injunctions against legal judgments and, 1366-1374. See INJUNCTIONS.

ADEMPTION,
what is, and when takes place, 1131.
distinction between, and satisfaction, 524, 554, 1131.
does not apply to demonstrative or general legacies, 1131, 1133.
depends on testator's intention, 524, 1131, note.

ADEQUACY,
of legal remedies, as affecting equitable jurisdiction. See REMEDIES.

ADMINISTRATIONS,
suits for, are pecuniary remedies, 112, 187.
statutes allowing suits against personal representatives, not abridging equity jurisdiction over, 280.
[statute giving probate court jurisdiction of claims against estates, does not exclude jurisdiction to enforce trusts, 280, note.]
[statute authorizing probate court to put life tenant in possession, does not oust equity of jurisdiction, 280, note.]
election, whether embraced in jurisdiction over, 518.

ADMINISTRATIONS — *Continued.*
order of administering assets, 1135.
jurisdiction of equity over, 77, 156, 187, 346-351, 1152-1154.
discovery as foundation of, 234, 235, 346, 1128.
gained by once attaching for any purpose, 235, 351, 1154.
practically exclusive on ground of trusts, 156, 346, 1127, 1152.
statutory changes concerning, 77, 156, 187, 235, 347-350, 1152-1154.
exists where full equity jurisprudence adopted, unless expressly abrogated, 77, 156, 350, 1153.
[as administered in United States courts, 293, note.]
[no jurisdiction to probate will, 293, note.]
[no jurisdiction to interfere with property in custody of probate court, 293, note.]
[jurisdiction to establish claims against estate, 293, note.]
as administered in the several states, 178, 346-351, 914, note, 1154.
states where ordinary jurisdiction abolished, 310, 320, 348, 1154.
where practically obsolete, 349, 1154.
where unimpaired and concurrent with probate courts, 350, 1154.
special subjects of equitable cognizance in aid of, 235, 348, 349, 351, 352, 914, note, 1154.
receivers when appointed in administration suits, 1334, note.

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.

ADULTERY,
rights under marriage settlements in case of, 1110.
as affecting equity to a settlement, 1116, note, 1117, note.

ADVANCEMENTS,
to child, when in satisfaction of debts, 540.
satisfaction of legacies by, 553-564. See SATISFACTION.
presumption of, where property is purchased by parent in child's name, 981, 1039, 1041.
See PORTIONS.

ÆQUITAS,
growth of, in Roman law, 2-9, 17. See ROMAN LAW.

AFFIDAVIT,
necessary to accompany bill of interpleader, 1328.

AGENT. See PRINCIPAL AND AGENT.

ALABAMA,
law and equity systems distinct in, and administered by separate tribunals, 42, note.

ALABAMA — *Continued.*
seal, presumptive evidence of consideration in, 70, note.
equity jurisdiction, extent of, generally, in, 285, 342, 345.
statutory provisions concerning, 285, note.
inadequacy of legal remedies as affecting, 342, 344.
rules governing election of widow concerning dower in, 494, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
[priority between judgments and secret equities, in, 722, note.]
statute of uses in, 986, note.
deeds of trust in, 995, note.
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate estates and contracts, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, notes.
jurisdiction of equity over administration of decedents' estates in, 351, note, 1154.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance exists in, 1249.
remains, although debt barred by statute of limitations, 1252, note.
whether assignable, 1254, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
interpleader in legal actions in, 1329, note.

[ALASKA,]
[mortgages of land in, 1188, note.]

ALIENS,
contracts with alien enemies void, 934.
could not inherit by Roman law, 976.
whether can be beneficiaries, 987, note.
bequest of land to, when converted, valid, although otherwise void, 1164.

ALIMONY,
as an equitable remedy by statute, 171.
what is, 1120.
jurisdiction of equity to award, 1120, 1299.

ANNUITIES,
election between, and dower, where charged on lands devised to others, 500.
annuitant relieved where accidental failure of income, 837, note.
what are, 1134.
are for life if no time specified, 1134.
comprised in term "legacies" in construing wills, 1134, note.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

ANNUITIES — *Continued.*
may be governed by rules of demonstrative or general legacies, 1134, 1138, note, 1139. See ABATEMENT; ADEMPTION.
receivers appointed in suits to enforce payment of, 1334.

ANTICIPATION, RESTRAINT ON. See RESTRAINT ON ANTICIPATION.

APPOINTMENTS. See POWERS.

APPORTIONMENT,
an application of accounting, 186.
maxim, Equality is equity, applied to, of liens, 411, 1222.

ARBITRATION,
discovery cannot be had to aid voluntary, 196.
can be had to aid involuntary, 196.
agreements to submit to, not specifically enforced, 1405, note.
See AWARDS.

ARIZONA,
distinction between legal actions and suits in equity abolished in, 40, note.
[recording in, 646, note.]
assignments of things in action in, 705, note.
[mortgages of land in, 1188, note.]
statutory suit to quiet title in, 1396, notes.

ARKANSAS,
law and equity systems distinct, but administered by same tribunal in, 41, note.
equity jurisdiction, extent of, generally, in, 287, 342, 345.
statutory provisions concerning, 287, note.
inadequacy of legal remedies as affecting, 342, 344.
reformed procedure adopted in, 287.
equity jurisdiction over administration of decedents' estates in, 349, note, 1154.
rules governing election of widow concerning dower in, 494, note, 513, note.
recording in, 646, note.
effect of other kind of notice in absence of record, 664, note.
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, note.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance exists in, 1249.
whether assignable, 1254, note.
equitable remedies and decrees operating *in rem* in, 1317, note.

ARKANSAS — *Continued.*
interpleader in legal actions in, 1329, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.

ASSESSMENTS,
distinct proprietors relieved from illegal, to prevent multiplicity of suits, 258-260, 265, 266, 270, 273, 1345. See TAXES.
removed as constituting cloud on title, 259, 265, 1345, 1399, note. See CLOUD ON TITLE.

ASSETS,
executors and administrators relieved when unexpected deficiency of, 837.
relief of unpaid legatee against others when deficiency of, 837, note.
order of appropriating of decedents, 1135.
donations *causa mortis* liable for testator's debts where deficiency of, 1147.
lands directed to be sold are, in hands of executors or administrators, 371, 1165.
equitable, reached by creditors' suits, 1415.
marshaling of. See MARSHALING OF ASSETS.

ASSIGNMENTS,
interests created by, of things in action, are permanent equitable interests, 148.
of things in action when restrained, 221, 1340, 1363, note.
jurisdiction of equity over, of things in action not abridged by jurisdiction subsequently acquired at law, 278.
when will not be entertained, 281.
not entertained in Massachusetts, when, 320.
how affected by reformed procedure, 356, 1273.
effect of unauthorized recording of, of mortgages, 651, note.
of contracts tainted with fraud, whether right of relief passes, 899.
for benefit of creditors, 993, 994.
are not conveyances on valuable consideration, 749.
do not create trusts in England, 993.
create active trusts in America, 992, note, 994.
when revocable, 993, 994.
are valid even when creditors are preferred, 994.
powers and rights of different parties in, 993, 994.
not possible in case of deeds of trust to secure debts, 995.
imperfect voluntary, are not trusts, 997, 998, note.
trusts resulting in, of things in action, where another advances the consideration, 1038, note.
of mortgages, 733, 734, 1209-1214. See MORTGAGES OF LAND.
equitable liens by express contract may arise from, 1237.
grantors' liens on conveyances, whether assignable, 1254.
by reservation, whether assignable, 1259.

ASSIGNMENTS — *Continued.*
vendors' liens on contracts of sale, whether assignable, 1261.
of things in action; estates and interests arising from, 168, 1270–1279.
operation on, of maxim, Equity regards as done what ought to be done, 373, 1270.
things in action not assignable at ancient common law, 137, 168, 1270, 1297.
assignable in equity for valuable consideration, 168, 1270, 1297.
assignee acquired no right at ancient common law, 137, 168, 1270.
acquires an equitable ownership, 137, 168, 693, 1271.
assignee finally permitted to sue in assignor's name at law, 113, 137, 1272.
not allowed to sue in his own name, 113, 137, 1272, note.
legislation regarding, 168, 1273, 1297.
assignee allowed to sue in own name, and interest legal, 137, 168, 281, 356, 1273, 1277.
assignments in writing allowed in England, 168, 1273.
real party in interest to sue where reformed procedure adopted, 356, 1273.
effect of, on assignability, 1273.
what are and are not assignable, 1275.
those which pass to, or create liability against, personal representatives, are assignable, 1275.
what do and do not thus survive, 1275.
what forbidden by public policy, 1276.
emoluments, pensions, salaries, etc., paid by government, 1276.
favoring champerty or maintenance, 1276.
of right to procure transaction set aside for fraud, 1276.
jurisdiction of equity over, former importance, 150, 168, 1271.
when exercised at present day, 168, 281, 1274, note, 1277, 1278.
remedy at law, by statutes, ordinarily adequate, 168, 1271, 1272, 1277, 1278.
nature of the equitable remedy given in cases of, 1416.
notice to debtor, holder, or trustee, requisite to establish rights of priority in, 693–702, 1279. See PRIORITIES.
are subject to equities in favor of debtor and third persons, 703–715, 1279. See PRIORITIES.
of debts, whether carry securities or guaranties, 1279, note.
of a fund by order or otherwise, 169, 1280–1284.
equitable, belong to exclusive jurisdiction, 150, 169, 219.
effect of legislation on, 168, 169, 1277.
no action at law unless debtor has assented to appropriation, 169, 1280.

ASSIGNMENTS — *Continued.*
operation on, of maxim, Equity regards as done what ought to be done, 373, 1270.
interest enforceable in equity without debtor's assent to transfer, 169, 1280.
regarded as property and not as lien, 1280, note.
when equitable and enforceable without debtor's assent, 169, 219, 1274, note, 1280.
fund or debt must exist *in præsenti* or *in futuro* to be equitable, 1280.
agreement or order must in effect assign the fund, 1280, 1283, note.
criterion to determine whether orders are assignments, 1280.
part as well as whole of debt may constitute equitable, 169, 1280.
fund followed by assignee as long as it can be identified, 1280.
notice to assignees essential to absolute, 1281, 1282.
to debtor or holder necessary as against subsequent assignees, 695. See PRIORITIES.
mere mandates to agents or depositaries directing payment, not, but revocable, 1282.
what constitute equitable, are questions of intention, 1282.
mere promise or executory agreement whether equitable, 1283, note.
fund need not be in existence, if exists in potentiality, 1275, note, 1283.
bills of exchange and checks not in general equitable, 1284.
nature of remedy furnished by equity in case of, 1416.
of possibilities, expectancies, and property to be acquired in future, 168, 1285-1291.
operation on, of maxim, Equity regards as done what ought to be done, 369, 373, 1270.
formerly not allowed at law, 168, 369, 1297.
permitted at law by statute when coupled with interest, 168, 1283, note, 1285, 1287.
jurisdiction of equity over, formerly and at present, 168, 1270, 1271, 1285, 1287.
grades of contingencies, expectancies, and possibilities, 1286.
of possibilities, 1287, 1297.
of personal property to be acquired in future, 1288-1291.
doctrine at law: "potential" existence, 1288.
in equity, 1288.
whether operate as contracts specifically enforceable, 1288.
correct *rationale* of doctrine, 1288.
of future cargoes of freight, 1289.
of future wages, payments, demands, etc., 1275, note, 1283, 1289, note.
distinction between, and mere powers to deal with such property, 1290.
present transfer or present agreement necessary in, 1290.

ASSIGNMENTS — *Continued.*
lien extends to substituted property, 1291.
avail against what persons, 1291.
effect of statutes on, 1291, 1297.
mortgages of future acquired personal property, operating as, 1236, note, 1288-1291. See LIENS.
specific performance of, 1403, note.
specific performance of contracts to assign things in action when decreed, 1402, 1403, note.

ASSIGNMENTS FOR BENEFIT OF CREDITORS. See ASSIGNMENTS; BANKRUPTCY AND INSOLVENCY.

ASSIGNOR AND ASSIGNEE,
estoppel from conduct of debtor towards intended assignee, 704, 820.
rights of assignee of mortgage when assignment unrecorded, 734.
payment of charge by life tenant makes him assignee, 799.
rights of assignee of one of several notes secured by mortgage, 1201-1203. See MORTGAGES.
assignee of thing in action acquired no right at ancient common law, 137, 168, 1270.
acquired an equitable ownership in equity, 137, 168, 693, 1271.
assignor, and not assignee, of thing in action to sue at common law, 113, 137, 1272.
assignee allowed by statute to sue in his own name, and interest legal, 137, 168, 281, 356, 1273, 1277.
assignor to be made a party in certain states, 113, note.
notice to debtor, holder, or trustee, of assignment of thing in action necessary as against subsequent assignees, 693-702, 1279. See PRIORITIES.
notice to creditor-assignee of fund, necessary for absolute assignment, 1281.
See ASSIGNMENTS.

ASSUMPSIT,
action of; origin and development of, 25, 29.
effect of development of, on jurisdiction of equity, 182.
action on implied, to recover money equitably belonging to another, 1047.

ATTACHMENTS,
[injunction against numerous, on property claimed by plaintiff, 261, note.]
equitable, or sequestration not abridged by jurisdiction obtained at law, 280.
when aided in equity, 1415.
equity suits in nature of, where debtor removes or absconds, 1415, note.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

ATTORNEY AND CLIENT,
communications between, whether privileged from discovery, 199, 203.
notice to attorney constructive notice to client, 666, note, 668.
duty to disclose in transactions between, 902-904.
validity of dealings between, 960.
constructive trust where attorney purchases property with client's funds, 1049.
attorney's wrongful appropriation or conversion of client's property, 1051.
wrongful acquisition of client's property, 1052.
attorney must not deal with client's property for his own advantage, 1075.
must not act inconsistently with client's interests, 960, 1077.
must not sell client's property to, nor buy from, himself, 960, 1078.
[may be beneficiary under a will, 960, note.]
attorney's compensation where also a trustee, 1084.
attorney when may interplead client, 1326, 1327.
when restrained by injunction by client, 1340, note.

ATTORNEY-GENERAL,
interference of, in *ultra vires* transactions of directors, 1093.
suits by, against wrong-doing officers where corporation is municipal, or trust charitable, 1096.
suit by, to restrain public nuisance, 1349.

AUCTION,
fraud not inferred from mere inadequacy in sale at, 926.
agreements interfering with bidding at, are illegal, 934.
employment of "puffers" whether illegal, 934.
where sale without reserve, 934.

AUXILIARY JURISDICTION,
objects and definition of, 82, 142, 190.
practical abolition of, in America, 83, 142, 143.
branches of; discovery; examination of witnesses, 82, 142, 143, 190-215.
discovery, 143, 144, 190-209. See DISCOVERY.
perpetuation of testimony, 82, 142, 190, 210-212. See PERPETUATION OF TESTIMONY.
testimony *de bene esse*, 82, 142, 190, 210, 213-215. See TESTIMONY DE BENE ESSE.

AWARDS,
no discovery of grounds of, 199.
when set aside or corrected for mistake or fraud, 871, 919, 1376, 1377.
when specifically enforced, 1402.
See ARBITRATION.

B

BAILOR AND BAILEE,
owner of stock estopped where wrongful transfer by bailee, 710, 711.
constructive trust where wrongful conversion of property by bailee, taking title in his own name, 1051.
bailee, when may interplead bailor, 1320, note, 1326, 1327.
See PLEDGOR AND PLEDGEE.

BANKER,
not liable to account in equity, 1421, note.

BANKRUPTCY AND INSOLVENCY,
secret bargain made by insolvent in fraud of assignment, relieved against, 403, note, 967, note.
maxim, Equality is equity, applied in settling estates of insolvents, 410.
concealments by insolvent buyers, when fraudulent, 906.
fraudulent intent in conveyances inferred from, 970, note, 971-973.
assignments in, as a class of express trusts, 992, note.
for benefit of creditors, covered by laws of, 993, note.
equitable liens and assignments available against assignees in, 1291.
receivers appointed in suits and proceedings in, 1334.
whether excuses necessity of preliminary steps in creditors' suits, 1415.
contribution where one or more co-sureties are insolvent, 1418, note.

BANKS,
valid passive trusts in deposits in, 988, note.
control over passive trusts in deposits in, by trustee or administrator, 989, note.
declarations of trusts in deposits in, 998, note, 1008, note.
trust moneys deposited in, by trustees, 1067, 1068, note, 1070, note.
pass-books of, as subjects of donations *causa mortis*, 1148.

BENEVOLENCE,
trusts for purposes of, 1022. See TRUSTS.

BEQUESTS. See LEGACIES.

BETTERMENTS,
equitable lien for, 1240-1242.
compensation awarded in partition for, 1240, note, 1389.
See IMPROVEMENTS.

BILL,
originally not used in proceedings before chancellor, 32.
from what time used, 35, 39.
See PLEADING.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

BILLS OF EXCHANGE. See NEGOTIABLE PAPER.

BILLS OF PEACE,
nature of remedy of, 138, 171, 1378, note, 1393.
rationale of, 249–251. See MULTIPLICITY OF SUITS.
kinds of, 246, 1394.
to establish general right between single party and numerous persons, 246, 1394.
community of interest requisite, 255–261, 264–270, 273, 274, 1394. See MULTIPLICITY OF SUITS.
to quiet complainant's title against ejectment suits, 246, 253, 254, 272, 274, 1394.
grounds and purposes of, 248.
title to be established at law, 248, note, 252, 253, 263, 267, 272, 1394.
effect of judgments in ejectment, by statute, 1394, note.

BILLS QUIA TIMET,
brought by surety before payment, 1417.
See BILLS OF PEACE; CLOUD ON TITLE.

BONA FIDE PURCHASER,
distinction between rights of priority and rights of, 727, note, 729.
prior mortgage recorded before assignment of subsequent to, 734, 767.
general meaning, scope of, and limitations on doctrine of, 735.
effect of recording acts on doctrine of, 736, 744, 772.
rationale of doctrine of, 737–744.
equitable origin, nature, and operation of doctrine of, 738.
doctrine not a rule of property or of title, 739.
what kinds of estates protected, 740–743.
conflicting opinions, 740, 741.
formula of Lord Westbury, 742.
summary of conclusions, 743.
what constitutes a, 745–762.
general statement of rule, 200, 745.
essential elements constituting, 745.
element of valuable consideration, 746–751.
what is valuable consideration: illustrations, 747–749.
antecedent debts whether valuable consideration, 747–749, 1048.
rules of negotiable paper whether applied to, 748.
security for, or satisfaction of, antecedent debts, 749.
extending time of payment, 749, note.
assignments for benefit of creditors, 749.
payment of consideration, 200, 750, 751.
must be paid before notice of prior claim, 691, 750, 755.
part payments before notice, 750, 755.
payment must be actual, 200, 751.

BONA FIDE PURCHASER — *Continued.*
element of absence of notice, 200, 752–761.
effects of notice, 753, 754.
general rule, 200, 753.
after rights acquired and perfected, 753.
notice inhering in form of conveyance, 753.
quitclaim deeds, 631, note, 753.
[rule that purchaser under cannot be *bona fide* purchaser, 753, note.]
[rule that there is no distinction between quitclaim and other deeds in this regard, 753, note.]
[rule that purchaser is put on inquiry, 753, note.]
[distinction between conveyance of land and of "right, title and interest," 753, note.]
[rule that unrecordable equities are not cut off by, 753, note.]
[affect only immediate grantee with notice, 753, note.]
second purchaser without, from first purchaser with notice, 754.
reconveyance to first purchaser, 754.
second purchaser with, from first purchaser without notice, 754.
on, of equitable interests, 756.
time of giving notice, 691, 755.
before consideration paid, 691, 750, 755.
before conveyance made, 691, 755.
where interests equitable, 756.
recording in connection with notice, 757–761.
interest under prior unrecorded conveyance, 758.
requisites to protection from first record by subsequent purchaser, 659, 759.
[burden of proof as to *bona fide* purchase, 759, note.]
with apparent record title from grantor with notice of prior unrecorded conveyance, 754, note, 760.
break in record title; when purchaser still charged with notice of prior unrecorded title, 658, 761.
element of good faith, 754, 762.
effects of *bona fide* purchase as defense, 763–778.
suits by holder of legal estate against, under auxiliary jurisdiction, 742, 743, 764.
kinds of suits embraced, 764.
whether discovery can be had against, of equitable estate, 200, 764.
whether will be compelled to deliver up title-deeds, 764.

BONA FIDE PURCHASER — *Continued.*
where defendant in ejectment, not prevented from setting up outstanding terms, 764.
whether defense of, will defeat suit for perpetuation of testimony, 764.
suits by holder of legal estate against, under concurrent jurisdiction, 765.
not a defense where legal relief sought, 740, 742, 743, 765.
suits for dower and to establish tithes, 765.
foreclosure by legal mortgagee, 740, 741, 765.
rule as affected by recording acts, 765.
suits by holder of equitable, against purchaser of legal estate, 766–774.
cases where questions arise, 766.
where legal estate acquired by original purchase, 740, 767.
purchaser must record deed, 766, 767, note.
cases arising, 767, note.
[as to grantees claiming under forged or undelivered deed, 767, note.]
mortgagee can come within rule, 734, 767.
where legal estate subsequently acquired by purchaser of equitable, 740, 768.
tacking mortgage, 768.
extent and limitations of rule, 769.
where purchaser acquires legal estate from trustee, 728, 729, 769, 770, 773.
rule as applied in America, 771–773.
where purchase made at execution sale, 724, 774.
assignees of things in action perfecting legal title, 698, note, 701, 712, 713, 774.
suits against, by holder of an equity, 775–778.
for relief against accident or mistake, 776, 829, 871.
for relief against fraud upon creditors, 777, 968.
against fraud upon subsequent purchasers, 974.
against conveyance obtained by fraud, 754, note, 777.
against fraudulent sales of chattels, 778.
for fraud in general, 899, 918.
when not a defense in fraud, 915, note, 918.
affirmative relief to, 779–783.
special instances when given on account of fraud, 738, 779.
where unrighteous conduct toward, by holder of prior title, 780, 782.
prior encumbrancers who have misled, 781, 782.
in removing cloud from title, 783.
mode and form of defense of, 784, 785.
pleadings in chancery under reformed procedure, 784.
necessary allegations, 785.
protected in conveyance by trustee of express statutory trust, 1003, 1005, note.

BONA FIDE PURCHASER — *Continued.*
trust follows legal estate, except into hands of, 767, note, 988, note, 1043, 1048, 1051, 1058, 1080.
evidence to show deed absolute in form to be mortgage, not allowed against, 1196.
grantor's lien avails against all except, 1253.
vendor's lien avails against, 1260.

BONDS,
may be reformed or canceled, 871, 936, note, 1376, 1377.
See SEALED INSTRUMENTS.

BOUNDARIES, ESTABLISHMENT OF DISPUTED,
remedy of, belongs to concurrent jurisdiction, 140, 174, 185, 735, note, 1379.
substantially the same at law and equity; estate or right directly established or recovered, 110, 140, 174, 180, 1378.
based upon inadequacy of legal remedy, 1379.
[upon avoidance of a multiplicity of suits, 261, note.]
jurisdiction for, rests partly on accident, 837, note.
origin of jurisdiction, 1384.
special equitable incident required for, 1379, 1384, 1385.
illustrations; fraud; multiplicity of suits, etc., 1385.
portion of lands must be in possession of defendant, 1385.
parties in suits for, 1385, note.

BROKERAGE,
marriage, contracts, illegal, 931.
cancellation or recovery back of money paid on, decreed, 941, note.

BUILDING,
agreements not to build, when enforced by injunction, 1344, note.
specific performance of, contracts, 1402, note, 1405, note.

BURDENS,
public, relieved against, to prevent multiplicity of suits, 258-260, 265, 266, 270, 273, 1345. See TAXES.

C

CALIFORNIA,
distinction between sealed and unsealed instruments abolished in, 70, note.
lost instruments: changes made by statute as to actions on, in, 71, note.
when injunction can be had to prevent multiplicity of suits in, 275.
equity jurisdiction co-extensive with English chancery in, 285, 342, 345.
reformed procedure adopted in, 40, note, 287.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.
CALIFORNIA — *Continued.*
dower abolished in, 503.
community property in, 503.
notice of *lis pendens* in, 640, note.
recording in, 646, note, 733, note.
effect of other kind of notice in absence of record, 664, note.
assignments of things in action in, 705, note.
definition of mistake in code of, 839.
definition of fraud in code of, 873, note.
definition of duress and menace in code of, 950, note.
[spendthrift trusts in, 989, note.]
deeds of trust in, 995, note.
express trusts in, 153, note, 1003, note, 1004.
charitable trusts in, 1029, note.
"voluntary and involuntary" trusts in, 1030, note.
powers, duties, and liabilities, etc., of express trustees in, 1061, note, 1086, note.
passive trusts for married women abolished in, 1098, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
contracts in, 1126, notes.
ademption of legacies in, 1131, note.
distinction between real and personal property in appropriating assets abolished in, 1135, note.
legacies to near relatives, preferred in abatement in, 1141, note.
lapsed devises and legacies in, 1145, note.
donations *causa mortis* in, 1146, notes, 1150, note.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1188.
definition of, 1191.
levying on interest of mortgagor in, 1204, note.
resort to land in foreclosing, where different mortgages given, 1224, note.
remedies of pledgee in, 1231, note.
chattel mortgages in, 164, 1232.
grantor's lien on conveyance exists in, 1249.
[judgment waives in, 1252, note.]
whether assignable, 1254, note.
vendor's lien for purchase-money adopted in, 1263, note.
real party in interest to sue, 1273, note.
authorization and regulation of assignments of things in action in, 1273, note.
assignments of possibilities and expectancies in, 1285, note, 1287, note.
identity of claims, and privity of titles in interpleader suits in, 1324, note.
interpleader in legal actions in, 1329, note.

CALIFORNIA — *Continued.*
appointment of receivers in, 1335, note.
granting of injunctions in, 1337, note.
assignment of good-will in, 1355, note.
new trials in, 1365, note.
uniting of legal and equitable defenses in same answer, 1368, note.
restraining actions at law in; multiplicity of suits, 1371, note, 1472, note.
statutory suit to quiet title in, 1396, note.
scope of writs of execution in, enlarged, 1415, note.

CANCELLATION,
remedy of, well established, 110, 112.
effects may be indirectly obtained in legal actions, 110.
belongs to exclusive jurisdiction, 171, 188.
preliminary to final relief, 171, 1375.
obtained on behalf of legal or equitable interest by legal or equitable owner, 138, 221, 1375, 1377.
when depends upon inadequacy of legal remedies, 221, 911, 914, 1377.
jurisdiction attaching for purpose of, extending to whole controversy, 235, 237, 240, [241, note].
damages may be granted, 237.
[jurisdiction, when exercised for purpose of preventing multiplicity of suits, 261, note, 251½, 251¾.]
[jurisdiction of United States courts to grant, not abridged by state legislation, 293, note.]
power of courts of New Hampshire to grant remedy of, 303.
remedy of delivery-up of instruments included in, 1375, note, 1377, note.
of rescission included in, 1375, note.
when granted, 836, 870, 899, 910–974, 1377. See ACCIDENT; MISTAKE; FRAUD.
occasions giving rise to exercise of jurisdiction, 1377.
when instrument void at law, 1377.
as a relief against penalty or forfeiture, 434.
for accident, 836, 1377.
for mistake, 870, 1377.
instrument fails to express intention, 845, 870.
where reasonable diligence not used, 856.
by defendants in legal actions under reformed procedure, 868.
for fraud, 899, 910–921, 926–928, 944–974, 1377. See FRAUD.
fraudulent representations or concealments, 899, 910.
non-disclosure of facts may not be ground for, 905.
when inadequacy of legal remedies governs, 221, 911, 914, 1377.
where plaintiff *particeps doli*, 916.
when for inadequacy of consideration, 926–928.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

CANCELLATION — *Continued.*
contracts of persons incapacitated, 944-954. See MARRIED WOMEN; INFANTS; LUNATICS, etc.
contracts of persons in fiduciary relations, 955-963. See TRUSTEE AND CESTUI QUE TRUST; PRINCIPAL AND AGENT, etc.
contracts fraudulent against creditors, 966-974. See FRAUD.
for illegality, 929-942. See ILLEGALITY.
when in general given, 929.
parol evidence in suits for, 859.
delay in acquiescence preventing, 817, 856, 917, 965.
not given against *bona fide* purchaser, 776, 777, 871, 918.
particular instances where remedy granted, 836, 871, 912-914, 1377.
instruments concerning land, 869, 871, 912, note, 914, note, 1377.
negotiable paper, 914, note, 1377.
bonds, 1377.
policies of insurance, 912, note, 914, note, 1377.
settlements and compromises, 871, 1001, note, 1377.
judgments and awards, 836, 871, 914, note, 919, 1377.
fraudulent wills, 913, 919.
action at law enjoined where, necessary, 1363.
present jurisdiction to enjoin judgments, incidental to that of, of same, 1365.
remedy of, in removing clouds from title, 1398, note.

CARGOES,
to be obtained on voyage contracted for, are possibilities coupled with interest, 1286, 1289.
assignment of future, at law and in equity, 1289.
persons claiming, whether may be interpleaded, 1327, note.

CASE,
action of: origin and development of, 25, 29.
effect of development of action of, on jurisdiction of equity, 182.

CESTUIS QUE TRUSTENT. See TRUSTEE AND CESTUI QUE TRUST.

CHAMPERTY,
contracts constituting or amounting to, illegal, 936.
assignments not permitted in equity when violating policy of law against, 1276.

CHANCELLORS,
ancient office of, 12, 31.
early ordinary jurisdiction of, 32.
extraordinary jurisdiction of; grace, 33-35.
commencement of, 33.

CHANCELLORS — *Continued.*
rapid growth of: statute 22 Edw. III. concerning, 34, 35.
principles upon which decisions of, based, 35, 50.
notion of equity as adopted by earliest, 43, 45, note, 46, 48–54. See EQUITY.
correct notion at the present day, 47.
sources from which early, took their doctrines, 55–58.
notions of "conscience" as ground of authority of, 55, 58. See CONSCIENCE.

CHANCERY, COURT OF. See COURTS.

CHARGES,
distinction between property given for, and subject to, or charged with, particular purpose, 1033, 1224.
no trust results in devises or bequests charged with debts, 1033, note.
jurisdiction of equity exclusive where land charged with debts and legacies, 156, 1128.
equitable liens arising from, by will or by deed, 1244–1248. See LIENS.

CHARITIES,
defective execution of powers aided on behalf of, 588, 589, 834.
trusts for, 154, 1018–1029. See TRUSTS.

CHATTELS,
equitable suit to recover, a branch of concurrent jurisdiction, 174, 185.
will not be entertained except in extraordinary cases, 177, 1402. [See REPLEVIN.]
[on ground of avoiding multiplicity of suits, 261, note.]
[jurisdiction not lost by statutory enlargement of action of detinue, 279, note.]
when transfer of, restrained in equity, 221, 1340, 1363, note.
sum to be paid if contract concerning, is violated, whether penalty, 442, note.
rule of *lis pendens* whether extends to suits concerning, 636.
effect of record of deed transferring, 651, note.
lien on, by contract, inferior to subsequent perfected mortgage, 726.
tendency of American courts to apply doctrines of *bona fide* purchaser to, 735.
bona fide purchaser of, protected against prior equitable interest, 767, note.
when a defense in fraudulent sales of, 778.
owner of, when estopped from setting up title to, 805, note.
cannot be divested of title to, through mere negligence, 811.
may be estopped, although intention was that acts should not be relied upon, 811.
delivered under mistake, whether can be recovered back in equity, 869.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

CHATTELS — *Continued.*
conditions and limitations in restraint of marriage annexed to gifts of when valid, 933.
sales of, to be acquired in the future, 168, 369, 373, 1285-1291. See ASSIGNMENTS.
partition of, in equity, 1391, 1392. See PARTITION OF PERSONAL PROPERTY.
specific performance of contracts concerning, when decreed, 1402.
mortgages of. See MORTGAGES OF PERSONAL PROPERTY.
See MONEY.

CHECKS. See NEGOTIABLE INSTRUMENTS.

CHILDREN. See PARENT AND CHILD.

CIRCULARS,
of corporations, statements in, constituting estoppel, 819.
when fraudulent, 879, 881.
kinds of relief given, 881, 1092.

CIVIL ACTION. See REFORMED PROCEDURE.

CLASSIFICATION OF EQUITY,
importance and difficulty of a correct, 118.
different grounds which might be taken for, 119, 120.
according to the nature of the jurisdiction, 121-125.
in the three divisions of exclusive, concurrent, and auxiliary, 121.
different modes of carrying out this system by various writers, 122, 123.
objections to this system of, 124, 125.
true principles of, in present condition of equity, 126, 127.
plan and order of arrangement adopted in present treatise, 128.

CLOUD ON TITLE,
nature of remedy in suits to remove, 171, 1378, note, 1395.
bona fide purchaser may have remedy of removal of, 783.
statutory suits to remove, 1397.
jurisdiction to remove, well settled, 1398.
[application of maxim, "He who seeks equity must do equity," to, 393, note.]
exercised on the principle *quia timet,* 1395, note, 1398.
may be prevented as well as removed, 1345, 1398, note.
cancellation and injunction the remedies given, 1398, note.
when exercised, 1399.
inadequacy of legal remedies, when governs; legal and equitable estates, 138, 1399.
instruments void on face, 1399.
where extrinsic evidence necessary, 1399.
possession by plaintiff, when necessary, 1399, note.

CLOUD ON TITLE — *Continued.*
instances; deeds; mortgages; tax assessments, 259, 265, 1345, 1399, notes.
judgments; executions, etc., 1399, note.

CODES. See REFORMED PROCEDURE.

CODICILS,
effect of, on satisfaction of legacies, 561.

COLORADO,
reformed procedure adopted in, 40, note, 287.
statutory provisions concerning equity jurisdiction in, 287, note.
[notice of *lis pendens* in, 640, note.]
recording in, 646, note.
[effect of other kind of notice in absence of record, 664, note.]
[charitable trusts in, 1029, note.]
married women's separate property and contracts in, 1099, note, 1126, note.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance exists in, 1249.
real party in interest to sue in, 1273, note.
interpleader in legal actions in, 1329, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
statutory suit to quiet title in, 1396, notes.

COMMITTEES. See LUNATICS; GUARDIAN AND WARD.

COMMON LAW,
early Saxon governed by customs, 10, 13.
growth and development of English, 13.
division of, into *scripta* and *non-scripta,* 13.
influence of Roman law on English, 14, 15.
causes tending to retard this influence, 16–21.
artificial character of English, 16, 17.
feudal origin of rules concerning real property, 18, 19.
hostility to papal authority, 20.
common-law procedure, 21.
kinds of actions at, 22.
meager system of remedies furnished by, 23.
new actions invented by statute Edw. I.; case, trover, assumpsit, 24, 29.
supplied and corrected by equity during its formative period, 48–54. See EQUITY.
corrected and modified by equity as now administered, 54.
effect of moral precepts upon, 63–66.
equity more just and moral than, 67.
present relations of equity with, 68–88. See EQUITY.

COMMUNICATIONS,
discovery of privileged, not compelled, 203.
disclosure of confidential, restrained, 1340, note.

COMMUNITY PROPERTY,
from whence derived, 503.
what embraced in, nature of ownership, and disposition of, 79, 503.
election in devises of, 503-505.

COMPENSATION,
in cases of election, rules governing, 468, 469.
right to recover, under executory contracts, whether assignable, 1275, note.
expected to be earned under contracts not made, whether assignable at law, 1275, note.
whether assignable in equity, 1275, note, 1283, 1289, note.
of military officers, judges, etc., whether assignable, 1276, note.
to become due under existing contracts, is possibility coupled with interest, 1286.
on partition of lands, 1240, note, 1389.
specific performance with, where complete, impossible, 889, 899, note, 1403, note, 1407, note.
See IMPROVEMENTS.

COMPOSITIONS,
secret bargains in fraud of, with creditors relieved against, 403, note, 967.

COMPROMISES,
mistake of plain rule of law in family, whether relieved against, 846, note.
made under mistake as to legal rights, whether relieved against, 850, 871, 1376, 1377.
mistake of fact in, of doubtful claims, not relieved against, 855, 871, 1376, 1377.

CONCURRENT JURISDICTION,
what embraced in, 139-141, 173-175.
where primary right, estate, or interest is legal, and legal and equitable remedies are alike, 139, 173, 222.
cases how classified, 140, 174, 175, 184.
fraud, accident, and mistake as occasions of, 140, 174, 188. See ACCIDENT; MISTAKE; FRAUD.
cases may include both, and exclusive jurisdiction, 141.
remedies must be legal, that suits may fall within, 175, 1379, 1416.
when does not exist, 176-179.
when, in general, law courts can do complete justice, 176.
limitations on rule, 176, 177, 182.
legal remedy must be complete, certain, and not doubtful, 176, 180.

CONCURRENT JURISDICTION — *Continued.*
not exercised merely to recover possession, or try title to chattels or land, 177, 735.
possession of land decreed when incidental, 177.
not exercised to recover money merely as debts or damages, 178.
special cases with equitable features where equitable cognizance refused, 178.
where law court has first taken jurisdiction, 179.
where matters distinctly equitable exist, 179.
effect of right of jury trial, 179.
exists when legal remedy is inadequate, 139, 173, 176, 180, 217, 222.
particular instances, 180.
acquired for one purpose, retained for all, 181, 231-242. See JURISDICTION OF EQUITY.
exercised to prevent multiplicity of suits, 139, 181, 243-275. See JURISDICTION OF EQUITY.
not abridged by jurisdiction subsequently acquired by law courts, 176, 182, 276-281. See JURISDICTION OF EQUITY.
where statutes have conferred jurisdiction on law courts, 182.
effect of reformed procedure on, 84-88, 183. See REFORMED PROCEDURE.
principal matters coming within, 184-189.
suits for recovery of lands or chattels, 185, 1379. See PARTITION OF LAND; ASSIGNMENT OF DOWER; BOUNDARIES, ESTABLISHING DISPUTED; CHATTELS.
for pecuniary recoveries, 186-188, 1416. See ACCOUNTING; CONTRIBUTION; EXONERATION, etc.
special cases, 189.
enlarged by discovery, 143, 181, 223, 227.

CONDITIONS,
forfeiture in contracts for land depending upon, precedent and subquent, whether relieved against, 455, 456, note.
specific performance of, as not enforcing forfeitures, 460.
in restraint of marriage, annexed to gifts, when valid, 933. See MARRIAGE.

CONNECTICUT,
judicial organization for administering law and equity in, 40, note, 41, note.
equity jurisdiction, extent of, generally, in, 285, 342, 345.
inadequacy of legal remedies as affecting, 342, 344.
reformed procedure adopted in, 40, note, 287.
time to exercise right of election in, 513, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kinds of notice in absence of record in, 664, note.
[spendthrift trusts in, 989, note.]

CONNECTICUT — *Continued.*
doctrine of precatory trusts restricted in, 1015, note.
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedents' estates in, 349, note, 1154.
statute 7 Geo. II. concerning mortgages of land re-enacted in, 1179, note.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance does not exist in, 1249.
equitable remedies and decrees operating *in rem* in, 1317, note.

CONSCIENCE,
as a principle on which early chancellors based decisions, 35, 36, note, 50.
power of probing, as extending chancery jurisdiction, 37.
notions of early chancellors of the term, 49, 55–58, 873.
"discovery," a name given to process of probing defendant's, 144.
operation of equity upon, of a party, 430, 431.
as a basis of doctrine of *bona fide* purchaser, 738.
relief given in equity for fraud referable to original jurisdiction of, 873.

CONSIDERATION,
seals in what states presumptive evidence of, 70, note.
jurisdiction of equity to relieve for failure of, not abridged by jurisdiction acquired at law, 280.
agreements partly performed, founded on meritorious or imperfect, enforced, 588–590.
what is meritorious or imperfect, 588.
agreements against, and in favor of whom, enforceable, 588.
surrender of copyholds against heir supplied, 588.
defective execution of powers may be aided, 589, 590, 834. See POWERS.
inadequacy of, whether constitutes actual notice, 600.
want of valuable, in first conveyance, as affecting priority at law, 679.
valuable, important in determining superiority of equities, 684, 685.
time of payment of, to obtain rights of priority, 691.
should be parted with before notice, to obtain rights of *bona fide* purchaser, 691, 750, 755.
failure or illegality of, good defense to suit on thing in action assigned, 704, note.
valuable, in *bona fide* purchase, 746–751. See BONA FIDE PURCHASER.
relief when failure of, through accident, 837.

CONSIDERATION — *Continued.*
inadequacy of, as constituting constructive fraud, 925-928. See FRAUD.
requisite by statute 13 Eliz., 969.
equitable theory of, the basis of resulting uses and trusts, 981, 1031, 1033, 1035, 1037.
not required in conveyances of land prior to statute of uses, 981.
conveyances after statute of uses, based on equitable theory of, 985, note.
valuable, not required in creation of trusts, 996.
trust resulting in conveyances without, 1033, 1035.
recital of pecuniary, as rebutting resulting trust, 1035, 1036.
trust resulting where conveyance to one, price paid by another, 1037-1043. See TRUSTS.
valuable, necessary in equity to enforcement of executory contracts, 370, 1293, 1405.
want of, may be shown in equity; effect of seal, 370, note, 379, 383, 1293.
in suits for specific performance, 1293, 1405, note.
payment of, whether part performance sufficient to enforce verbal contract, 1409, note.

CONTINGENCIES,
assignments of, 168, 1285-1291. See ASSIGNMENTS.

CONTRA BONOS MORES,
discovery must be in aid of object not, 202.
contracts illegal because, 402, 936.
for past or future illicit sexual intercourse, 936.
for past illicit intercourse where contract sealed, 936, note.
promoting or furnishing opportunities for unlawful cohabitation or prostitution, 402, 936.
constituting or amounting to champerty or maintenance, 936.
forbearance or abandoning of criminal prosecution, 402, 936.

CONTRACTS,
rights arising from, are embraced in domain of equity, 100.
disputes growing out of complicated, settled to prevent multiplicity of suits, 271, 274.
sums to be paid on violation of, when liquidated damages, 441, note.
when forfeitures arising from, relieved against, 455, 456, 826, note. See FORFEITURES.
interests created by, *in rem,* superior to those by gift or judgment, 685, 691, 720.
purchaser with notice of, to sell or lease, bound, 688, 692.
non-performance of, through accident, not relieved against, 826.
made through mistake or fraud. See MISTAKE; FRAUD.
trusts arising from express or implied, 1046.
of married women, 1221, 1226. See MARRIED WOMEN.

CONTRACTS — *Continued.*
theory of equitable liens as founded in, 1234.
equitable liens arising from express and implied, 1235–1243. See LIENS.
effect of executory, for sale of land, at law, 105, 367.
in equity, 105, 368, 372, 1161, 1260, 1261, 1263. See VENDOR AND VENDEE.
conversion by, 1159, 1161, 1163. See CONVERSION.
what claims arising from, are assignable, 1275.
assignments of possibilities whether, to convey on vesting of property, 1287.
for sale of chattels not in existence, 1288–1291. See ASSIGNMENTS.
in equity, 1292–1297.
essential elements of, the same as at law, 1293, 1294.
exception in married women's contracts, 1293.
modification as regards consideration, 370, 1293, 1405.
statute of frauds construed and applied as at law, 1293.
arising from representations and acts in pursuance thereto, 1294.
character of representations, 1294.
distinction between, and offers accepted by acts, 1294.
intention to be bound unnecessary, 1294.
covenants creating equitable servitudes, 689, 1295, 1342.
effects of, in general, 368, 1296.
enforcement of, 1297.
when no action at law can be maintained, 103, 1297, 1409.
where plaintiff has not performed all conditions on his part, 1297, 1409.
where law does not recognize contracts as existing, 103, 1297, 1409.
particular instances, 1297.
violation of, prevented by injunctions, 1341–1344. See INJUNCTIONS.
specific performance of. See SPECIFIC PERFORMANCE.

CONTRIBUTION,
equitable relief of, wholly pecuniary, 112, 140, 1416.
is branch of concurrent jurisdiction, 139, 140, 174, 186, 1416.
where remedy at law adequate, equity jurisdiction not exercised because asked, 178.
equity jurisdiction exists in suits for, although law courts have acquired jurisdiction, 278, [280, note], 1418, note.
maxim, Equality is equity, applied to, 406, 407, 411, 1418, note.
among co-trustees for breach of trusts, 1081.
on redemption of mortgages, 1221–1226. See REDEMPTION.
estate of deceased surety liable to co-sureties for, 409, 1302.
in general among co-sureties, and persons jointly or jointly and severally liable, 1418.
right of, controlled or modified by agreement, 1418.
advantages of equity suit for, 1418, note.
in case of insolvency, etc., 1418, note.
among tort-feasors, 1418, note.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

CONVERSION,
estates and interests resulting from, belong to exclusive jurisdiction of equity, 161, 1159.
definition and description of, 161, 371, 1159.
is an application of maxim, Equity regards that as done which ought to be done, 161, 371, 1159.
notice of estate arising from, binds subsequent purchasers, 692.
practical questions concerning, connected with devolution and transfer, 1159.
doctrine of, of small importance in America, 1159, note.
words sufficient to effect, 1159, 1160.
intention the only essential requisite for, 1159, 1160.
does not occur if act of converting is left optional, 1160.
direction for, may be implied, 1160.
under a contract of sale of lands, 105, 368, 372, 1161, 1260, 1261, 1263.
rights of vendor and vendee flowing from, 105, 368, 372, 1161, 1260, 1261, 1263, 1406. See VENDOR AND VENDEE.
requisites of the contract, 372, 1161.
where contract is at option of purchaser, 1161, 1163.
time from which, takes place, 1162, 1163.
at time specified, if any, 1162.
from death in wills, and date in deeds, when time not specified, 1162.
in contracts of sale with option, 1163.
effects of, 1164-1166.
where land directed to be sold, 161, 371, 992, 1159, 1164.
corporations and aliens may take, although otherwise not, 1164.
where money directed or agreed to be laid out in land, 161, 371, 992, 1159, 1165.
limitations on, 1166.
effects extend to what persons, 1163, 1166.
evasion of statutes of mortmain not permitted, 1166.
in case of lands of partnerships, 1166, note.
in compulsory sale of land by statute, 1167.
money remains land if owner not *sui juris*, 1167.
of land sold under order of court, 1167.
as between life tenant and remainderman, 1168.
resulting trust on failure of purposes of, 1169-1174.
object and extent of doctrine of, 1169.
in total failure, to whom results, 1170.
in partial failure, to whom results, 1171-1174.
where wills direct conversion of land into money, 1171.
where wills direct conversion of money into land, 1172.
where deeds direct conversion of land into money, 1173.
where deeds direct conversion of money into land, 1174.
reconversion, 1175-1178.
definition of, 1175.
doctrine of, of small importance in America, 1175, note.

CONVERSION — *Continued.*
depends on election of person entitled to the property, 1175.
parties *sui juris* who may elect to have a, 1176.
party may elect to have a, where he owns entire interest, 1176.
when may elect, where he owns partial interest, 1176.
mode of election; express or implied, 1175, 1177.
entry on land directed to be sold, 1177, note.
receiving money, etc., directed to be laid out in land, 1177, note.
presumption arising, 1177, note.
double, what is, and rules concerning, 1178.
dower assigned out of money when, of land, 1383.

COPYHOLDS,
bills of peace by copyholders against landlord, 247.
whether election applied in cases of devises of unsurrendered, 486.
equity will supply surrenders of, against the heir, 588.

COPYRIGHTS,
injunction when granted to restrain infringement of, 1352.

CORPORATIONS,
statutory suits to wind up insolvent, as equitable remedies, 112, 138, 171.
removing and appointment of officers of, as equitable remedy, 112, 138, 171.
officers of, joined with, for purposes of discovery, 199.
maxim, Equality is equity, applied in settling up affairs of, 410.
notice to officers of, is constructive notice to, 667.
when the notice must be received, 670.
whether rule applies when officers are guilty of fraud, 675, note.
may be estopped by statements in circulars and prospectuses, 819.
prospectuses, reports, and circulars issued by, when fraudulent, 879, 881.
kinds of relief furnished, 881, 1092.
contracts interfering with election and appointment of officers of, illegal, 935, note.
when estopped from setting up illegality in executed contracts, 940, note.
contracts of, illegal by statute, or *ultra vires,* may be enforced on implied contract, 942, note.
dealings between directors and, 963.
distinction between gifts to, and charitable trusts, 154, 1020, note.
gifts to, excepted from statutes abolishing charitable trusts, 154, 1029, note.
property of private, a trust fund for creditors, 1046.
hold the full title to corporate property, 1090.
suits against directors, when to be brought by, 1091, 1094.

CORPORATIONS — *Continued.*
when defendants in suits by stockholders against directors, 1093, 1095.
actions by, against promoters of, 1096.
suits by attorney-general against wrong-doing officers of municipal, 1096.
bequest of lands to, when converted, valid, although otherwise void, 1164.
may interplead opposing claimants of stock, 1327, note.
receivers appointed in suits against, 1334.
restrained from committing illegal or *ultra vires* acts, 1345.
from expelling person from membership, 1345.
suits against, to compel transfer or issue of stock, 1412.
transfer and issuing of new certificates to assignee compelled, 1412.
replacement of stock and issuing of new certificates compelled, 1412.
See DIRECTORS; STOCK; STOCKHOLDERS.

COSTS,
in equity suits are within discretion of court, 1328, note.
when allowed plaintiff in interpleader suit, 1328.

COUNTERCLAIMS,
distinction between, and defense to thing in action assigned, 706.
right of defendant by means of, to enforcement of contract as varied, 860.
union by defendant of reformation and specific performance or pecuniary relief by means of, 862.
reformation or cancellation for mistake by means of, 868.
affirmative equitable relief in legal actions obtained by, 1368.
effect of, on injunctions restraining actions at law, 1368.
when expressly required to be set up, 1371, note.
when relief cannot be obtained by, 1373.

COURTS,
Anglo-Saxon, and early English, 10–13.
Anglo-Saxon, guided in decisions by customs, 10, 13.
superseded by king's court, 11.
king's bench, origin of, 12.
common bench, origin of, 12.
exchequer, origin of, 12.
character of law administered by, 13.
ancient office of chancellor, 12, 31.
causes making chancery necessary, 16–23. See EQUITY.
common-law writs originally issued by clerks of chancery, 21.
new writs drawn by clerks of chancery by statute Edw. I., 24–29. See WRITS.
commencement and progress of jurisdiction of chancery, 12, 30–42. See JURISDICTION OF EQUITY.

COURTS — *Continued.*
chancery abolished in England and most American states, 12, 40.
systems of procedure in English and American, 40-42.
discovery cannot be had to aid inferior, 196.
jurisdiction of American state and national, whence derived, 35, note, 282.
See PROBATE COURTS; UNITED STATES COURTS; JURISDICTION OF EQUITY.

COVENANT,
action of, at common law, 22, 29.

COVENANTS,
sum to be paid on violation of, not to carry on trade, is liquidated damages, 442, note.
on violation of, in leases, 442, note.
forfeitures arising from breaches of, in leases, when relieved against, 450, 451, note, 453, 454, 826, note.
performance, how arises from breach of, 578-586. See PERFORMANCE.
notice of lease is notice of, 628.
"to stand seised" raising use between relatives, 985, note, 1035.
creating equitable servitudes enforced or violation restrained against persons having notice, 689, 692, 1295, 1342.
forfeitures are not enforced thereby, 400.
need not "run" with the land, 689, 1295, 1342.
injunction to restrain violation of, granted almost as matter of course, 1342.
continuing, not specifically enforced, 1405, note.

COVERTURE. See MARRIED WOMEN; HUSBAND AND WIFE.

CREDITORS AND DEBTORS,
common-law rule exempting lands from liability for simple contract debts, not relieved against in equity, 53.
rules of equity concerning joint, antagonistic to common law, 104, note.
creditors of married woman may proceed in equity against separate estate, although remedy at law, 280.
pro rata distribution and contribution among, result of maxim, Equality is equity, 406, 407, 411.
whether creditors must elect where gift made in trust for them, 491.
satisfaction of debts by legacies given to creditors, 527-540. See SATISFACTION.
defective execution of powers aided on behalf of creditors, 589, 834.
notice of conveyance to defraud creditors, whether affects subsequent purchaser, 692.
of assignment of thing in action unnecessary as against assignor's judgment creditors, 694.
where assignment is of shares of stock, 700.

CREDITORS AND DEBTORS — *Continued.*
assignments for benefit of creditors subject to equities, 704, note.
whether conveyances on valuable consideration, 749.
judgment creditors not purchasers within meaning of recording acts, 721.
priorities where judgment creditor has notice of prior unrecorded mortgage, 723.
bona fide purchase defense to suit for relief against fraud on creditors, 777.
secret bargains in fraud of compositions with creditors relieved against, 403, note, 967.
conveyances when in fraud of creditors, 968–973. See FRAUD.
trust or settlements free from claims of creditors, 989, 1098.
assignment for benefit of creditors, a frequent kind of active trust, 992, note, 993, 994. See ASSIGNMENTS.
deeds of trust to secure creditors, 995.
trusts for benefit of creditors by statute, 1004.
liability of express statutory trust estates to creditors, 1005.
resulting trust to creditors where debtor pays the price and conveyance taken in another's name, 1042.
partnership and corporate property after insolvency or dissolution as a trust fund for creditors, 1046.
constructive trust in creditor's favor where property transferred with intent to defraud, 1057, 1291, note.
lien of creditors where money advanced to trustees, 1085.
gifts and post-nuptial settlements, subject to husband's creditors' rights, 973, 1101.
creditors of decedents preferred to volunteers, in distribution, 1135.
general legacy to creditor in lieu of debt, preferred in abatement, 1142.
judgment creditors when may sue in equity in administrations, 1154.
creditor of estate when may sue in equity without administration, 1154.
maintaining "creditor's bill," to subject property to administration, 1154, 1415, note.
cannot maintain suits to construe wills, 1156.
creditors entitled to redeem from mortgages, 1220, note.
whether grantor's lien available to judgment creditors, 1254.
equitable assignments, liens, or mortgages on future-acquired property available against subsequent judgment creditors, 1291.
whether, by statute, available against creditors, 1291, note.
equitable debt exists against representatives of deceased joint debtor, 104, note, 409, 1301.
when may be sued in equity, 104, note, 409, 1301.
where joint debtor is surety, 409, 1302.
receivers when may be appointed in suits by creditors, 1334.
judgment creditors may reach widow's right of dower, 1383.
when parties in suits for partition, 1387, note.

CREDITORS AND DEBTORS — *Continued.*
marshaling of securities among creditors, 396, 1414. See MARSHALING OF SECURITIES.
creditors' suits in aid of executions and attachments, 1415. See CREDITORS' SUITS.
contribution among joint debtors, 1418.

CREDITORS' SUITS,
nature of, 171, 1413.
whether statutory proceedings supplementary to execution have done away with, 280, note, 281, note.
jurisdiction of courts of New Hampshire to entertain, 309.
of courts of Massachusetts, 317.
of courts of Maine, 328.
[of United States courts, not abridged by statutory remedies in state courts, 293, note.]
[of United States courts, enlargement of by state statute, limitations of, 293, note.]
receiver may be appointed in, 1334, 1335.
when maintained for purposes of administration, 1154, 1415, note.
origin of, 1415.
when brought; discovery of assets; equitable assets; fraudulent conveyances, 1415.
necessity for, obviated by statutes increasing scope of writs of execution, 1415.
efficiency of, increased by statute, 1415.
jurisdiction, when exercised; adequacy of legal remedy, 1415.
steps to be taken preliminary to bringing, 1415.
judgment obtained, 296, note, 1415.
when unnecessary; insolvency; debtor absconding, etc., 1415, note.
execution, when must be returned unsatisfied, 1415, note.
in aid of attachments, 1415.
See CREDITORS AND DEBTORS.

CRIMES,
criminal jurisdiction of early chancellors, 36.
criminal actions, not aided by discovery, 197.
discovery subjecting to criminal punishment not compelled, 202.
contracts for forbearance or abandoning prosecution for, illegal, 402, 936.
relief denied where knowledge that money or property will aid, 940, note.
injunction not granted to restrain, 1347, note.
criminal proceedings not enjoined, 1361, note.

CROSS-BILL,
defendant must file, to obtain discovery, 198.
[not dependent upon validity of bill, 241, note.]
not required to enforcement of contract as varied by defendant, 860.

CROSS-COMPLAINT,
affirmative relief demanded by, on ground of mistake, 868.
precluding necessity for injunction restraining action at law, 1372.
where relief cannot be obtained by, 1373.

CURTESY,
in trust estates of wife, 990, 1098, note.
in money of wife directed to be laid out in land, 1165.
interest of mortgagor, in equity, subject to, 1204.

CUSTOMS,
early Saxon laws embodiment of prior, 10, 13.

CY-PRES,
meaning and extent of doctrine of, 1026, note, 1027.
distinction between doctrine of, and uncertainty, 1027.
American states which have adopted doctrine of, 1027, 1029.

D

DAKOTA,
distinction between legal actions and suits in equity abolished in, 40, note.
preventing multiplicity of suits in, 275, note.
recording in, 646, note.
assignments of things in action in, 705, note.
deeds of trust in, 995, note.
express trusts in, 1003, note.
passive trusts for married women abolished in, 1098, note.
married women's separate property and contracts in, 1099, note.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance exists in, 1249.
real party in interest to sue in, 1273, note.
interpleader in legal actions in, 1329, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.
statutory suit to quiet title in, 1396, notes.

DAMAGES,
allowed by early chancellors by statute in certain cases, 37.
character of award of, as an equitable remedy, 112.
suits in equity where result is award of, belong to concurrent jurisdiction, 140, 175, 189.
usually regarded as a fund, 170, 175.
suits for mere recovery of, not branch of equity jurisdiction, 178.
awarded, in general, when equitable relief impracticable, 237.
in suit for specific performance, 181, note, 237, 1410.
[not, when right to equitable relief not made out, 237, note.]

DAMAGES — *Continued.*
[unliquidated, New Jersey chancery courts will not decree, 241, note.]
whether awarded by courts of equity in Maine, 326, 336.
penalties and forfeitures relieved against on payment of, 381, 433.
See LIQUIDATED DAMAGES; [MONEY].

DE BENE ESSE, TESTIMONY. See TESTIMONY DE BENE ESSE.

DEBT,
action of, at common law, 22, 29.

DEBTS,
jurisdiction of equity exclusive where land charged with or devised subject to payment of, 156.
suits for mere recovery of money as, not branch of equity jurisdiction, 175, 178.
when exercised in equity, 180.
satisfaction of, by legacies, 527–543. See SATISFACTION.
antecedent, whether valuable consideration in *bona fide* purchase, 747–749. See BONA FIDE PURCHASER.
trust results in remainder, where property is given to pay debts, 1033, note, 1034, note.
does not result where given subject to or charged with, 1033, note.
antecedent, paid by trustees in violation of trust, 1048.
duties and liabilities of trustees in collecting and paying, 1067.
legacies of, and evidences of, when specific, 1130, note.
as subjects of donations *causa mortis,* 1148.
equitable liens arising from charges of, on property, 1244–1248. See LIENS.
assignments of, whether carry grantors' liens, 1254, 1279, note.
whether carry grantors' liens by reservation, 1259.
whether carry securities or guaranties, 1279, note.
equitable assignments of, 169, 1280–1284, 1297, note. See ASSIGNMENTS.
equitable, 1298–1302.
what are, 1298.
husband's liability for wife's necessaries constitute, 1299.
money advanced for necessaries of person incapable of contracting, constitute, 1300.
on death of one joint debtor, 104, note, 409, 1301.
on death of joint surety, 409, 1302.
contracts for assignment of, when specifically enforced, 1402, note. See CREDITORS AND DEBTORS.

DECREES,
when no jurisdiction, 129, 130.
general pecuniary, seldom granted, 170, 175.

DECREES — *Continued.*
when for recovery of money for mistake or fraud, 851, 869, 871, 910, 912, note, 914. See MONEY.
act *in personam* and not *in rem*, 134, 135, 170, 428, 1317, 1318.
argument that because, equity jurisdiction is wholly remedial, 134, 135.
meaning and limits of rule that, 135, 170, 428, 429.
decrees originally not self-executing, 170, 428, 1317.
injunctions operate *in personam*, 135, note, 170, 1360.
decrees by statute operate *ex proprio vigore*, or executed by officer, 135, 170, 428, 1317.
abstract of legislation, 1317, note.
power of equity to enforce obedience to, notwithstanding, 1317.
when legislation does not apply, in general, 135, 1317.
operation of, in United States courts, 1317.
when equity has jurisdiction of parties, but not of subject-matter, 135, 428, 1318.
whether originally constructive notice, 641.
statutory changes, 641.
notice arising from recording of, 641-643.
See JUDGMENTS.

DEEDS,
of conveyance wanting seals, or otherwise formally defective, how treated in equity, 381, note, 383.
doctrine of election as applied to, 470. See ELECTION.
absence or non-production of title, constituting constructive notice, 606, 612.
constructive notice by recital or reference to, 626, 631. See NOTICE.
by registration, or recording of, 644-665. See NOTICE.
grantees holding under quitclaim, whether *bona fide* purchasers, 631, note, 753.
may be corrected or canceled, 866, 869, 871, 914, note, 1376, 1377.
of married women, when reformed, 1376, note.
voluntary, when reformed, 1376, note.
effect of false statement of consideration in, and evidence to impeach or sustain, 928, 1036.
bargain and sale, use raised in grantee by, 985, note, 986, note, 1035.
when used, no trust results, 1035.
covenant to stand seised in, raising use in grantee, 985, note, 1035.
when used, no trust results, 1035.
extrinsic evidence in case of, to show resulting trust, 1036.
conversion by, takes place from date of, 1162.
resulting trusts on total failure of purposes of conversion in, 1170.
on partial failure, 1173, 1174.
with agreements to repurchase distinguished from mortgages, 1194, 1195. See MORTGAGES OF LAND.
absolute in form may be mortgages, 1196.
evidence to show, 866, note, 1196.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

DEEDS — *Continued.*
warranty, as influencing contribution or exoneration on redemption, 1224, 1225.
equitable liens arising from charges by, 1244-1248. See LIENS.
grantors' liens by reservation in, 167, 1255-1259. See LIENS.
tender of, whether prerequisite to enforcement of vendors' liens, 1262.
when removed as constituting cloud, 1399.
See GRANTOR AND GRANTEE; TITLE-DEEDS.

DEEDS OF TRUST,
to secure debts: definition and description, 995.
when reformed, 1376, note.

DEFENDANTS. See PARTIES.

DEFENSES,
equitable, to legal action permitted by the reformed procedure, 85, 86, 183, 357.
[equitable, fraud in obtaining judgment an equitable defense under reformed procedure, 86, note.]
assignments of things in action subject to, 703-715. See PRIORITIES.
intentional omissions of stipulations from written agreements set up by way of, 854, note.
parol evidence of fraud, mistake, or surprise, admissible in, to suits for specific performance, 860.
equity jurisdiction occasioned by mistake may be invoked by way of, 868.
requisites of fraudulent representations as, to suits for specific performance, 889.
fraudulent concealments are, to suits for specific performance, 905.
fraudulent judgments whether, in another court, 919.
inadequacy when a defense, 926-928.
that contracts are illegal constitute, 929, 934.
usury constitutes, 391, 393, note, 937.
omission or failure of valid, at law, not relieved against, 1361.
negligence, ignorance, or mistake in setting up, whether relieved against, 856, note, 1361, note.
judgments enjoined where, prevented through accident, fraud, or mistake, 221, 836, 871, 899, note, 914, note, 919, 1364.
equitable, to legal actions as substitute for injunctions against legal actions and judgments, 1366-1374. See INJUNCTIONS.

DELAWARE,
law and equity systems distinct, and administered by separate tribunals in, 42, note.
equity jurisdiction, extent of, generally, in, 285.
statutory provisions concerning, 285, note.
inadequacy of legal remedies as affecting, 342, 344.

DELAWARE — *Continued.*
election of widow, concerning dower in, 494, note.
recording in, 646, note.
[spendthrift trusts in, 989, note.]
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, note.
mortgages of land in, 163, note, 1187, 1188, note.
grantor's lien on conveyance does not exist in, 1249.
equitable remedies and decrees operating *in rem* in, 1317, note.

DELAY. See ESTOPPEL; LACHES.

DELIVERY-UP,
bona fide purchaser not compelled to deliver up title deeds, 742, note, 764.
remedy of, of instruments, included in cancellation, 1375, note, 1377, note.
special jurisdiction of equity to order, of instruments, 185, 1377, note, 1402, note.
See CANCELLATION.

DETINUE,
action of, at common law, 22.
equity may maintain suit for chattels where remedy by, inadequate, 185.

DEVISEES AND LEGATEES,
interest of vendee under executory contract for sale of land passes to devisee, 105.
right of discovery by devisee against heir, and *vice versa*, 198, note.
are not *bona fide* purchasers, 747.
mistakes in names of, may be corrected, 871.
post obit contracts made with, when relieved against, 954.
relief to unpaid legatee when others paid in full, 837, note.
when trust created for children of, 1012, note.
resulting trusts enforced against, 1043.
constructive trusts enforced against, 1048.
legatee in specific legacies acquires title from will, 1130.
entitled to income and profits of article, 1130.
when may maintain action to construe wills, 1156.
suits in equity by devisees in possession to establish wills, 351, 1154, 1158.
resulting trust to devisees on total failure of purposes of conversion of land, 1170, note.
to residuary legatees on partial failure in wills, of purposes of conversion of land, 1171, note.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

DEVISEES AND LEGATEES — *Continued.*
devisee of mortgagor subrogated on payment of mortgage debt, 798, 1212, note.
entitled to redeem from mortgages, 1220, note.
grantor's lien avails against grantee's devisees, 1253.
whether avails in favor of grantor's, 1254.
See DEVISES; LEGACIES.

DEVISES,
election under, 461-519. See ELECTION.
[satisfaction of, 553, note.]
may be impressed with trust on account of fraud, 430, 919, 1054.
rewards for procuring, are illegal, 931.
conditions or limitations in restraint of marriage annexed to, when valid, 933. See MARRIAGE.
are always specific, 1130, note.
lapsed, when occur, and result, 1144, 1145.
money directed or agreed to be laid out in land passes under, 371, 1165.
interests of mortgagors, in equity, pass under, 73, 74, 162, 1180-1182, 1188, 1204.

DIRECTORS,
notice to, is constructive notice to corporation, 667.
when the notice must be received, 670.
whether rule applies when one guilty of fraud, 675, note.
prospectuses, circulars, reports, etc., issued by, when fraudulent, and what remedies given, 879, 881, 1092.
stronger case of fraud against, necessary than against company, 881.
dealings between, and company or stockholders, validity of, 963, 1077.
[contracts between corporation and, 1077, note.]
purchasing property with corporate funds; constructive trust, 422, 587, 1049.
charter and by-laws the source of fiduciary power and duty of, 1062, note.
must not act inconsistent with corporation's interests, 963, 1077.
jurisdiction of equity over, 157, 158, 1088.
are *quasi* trustees, 157, 963, note, 1088, 1089.
are *quasi* trustees and agents, 1089, 1090.
powers of, derived from function of agency, 1089.
are *quasi* trustees for corporation with respect to corporate property, 1090.
for stockholders with reference to shares of stock, 1090.
liability of, to stockholders, as corporate agents, 1091.
liability of, for a violation of their trust, 1091-1096.
where guilty of fraudulent misrepresentations or concealments, 879, 881, 1092.
promptness requisite in applying for relief, 881, 965, note.
where proceedings of, are *ultra vires*, 1093.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

DIRECTORS — *Continued.*
wrongful dealings of, with corporate property, 1094, 1095.
corporation when to sue, 1091, 1094.
stockholders when to sue, 1091–1093, 1095.
pledgee may sue to protect his own interests, 1096.
injunction may be granted alone, or with other remedies, 1345, note.
may be restrained from committing illegal or *ultra vires* act, 1345.
accounting by, in equity, 881, 1092, 1421, note.
See CORPORATIONS; STOCKHOLDERS.

DISCHARGE,
of instruments by mistake, whether relieved against, 871.

DISCOVERY,
description of suits for, 82.
where needed, equity will take jurisdiction from law courts, 179.
embraced in auxiliary jurisdiction of equity, 142, 190.
different significations of term, 83, note, 144, 191.
definition, and object of suit for, 143, 191.
by what parties maintained, 191.
when proper, 191, 201, note.
origin and development of, 192.
entire or practical abolition of, 83, 142, 193, 194, 209, 281.
equitable jurisdiction, where not expressly abolished, 193, 197, 280.
[statutes making parties competent witnesses, effect of, 193, note.]
rules concerning, recognized in statutory proceedings of, 194, 198, note, 209.
when enforced, 191, 195–209.
what proceedings, in what courts aided by, 196, 197.
[in action for negligence, 197, note.]
[in actions for personal torts, 197, note, 202, note.]
[in aid of future action, 197, note.]
[but not for mere "fishing" purposes, 197, note.]
relations of parties to each other, that may be granted, 191, 198–200.
plaintiffs in suits for, 198.
defendants in suits for, 199, 200.
[against corporations, 199, note.]
where *bona fide* purchasers, 193, note, 200, 742, note, 764.
[not against mere witnesses, 199, note.]
matters which may be subject of, 201–203.
[not, when facts within plaintiff's knowledge, 191, note.]
confined to facts material to plaintiff's title or cause of action, [191, note], 201.
defendant's evidence may be incidentally disclosed, 201.
must be in aid of object regarded with approval, 202.
defendant need not criminate himself, 197, 202.
bound to disclose frauds, 199, 201–203.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

DISCOVERY — *Continued.*
what privileged from, 203.
[requisites of bill, 191, note.]
[not necessary that discovery be indispensable, 191, note.]
[must set forth facts sufficient to entitle complainant to maintain an action, 198, note.]
manner in which defendant must make, 204.
production and inspection of documents, 205–207, 209, note.
[of other property, 205, note.]
use of answer in suit for, governed by rules of evidence, 208.
modern statutory methods of, 209.
as source or occasion of equitable jurisdiction, 224–226.
early and modern English rules, 224–226.
American rule as to deciding whole controversy, where asked, 227–230, 234, 302, 335.
concurrent jurisdiction enlarged, 143, 181, 223, 227, 231.
limitations on rule, 228, 229.
[requisites of bill, 229, note.]
[cannot be used as mere pretext for bringing legal causes into equity, 229, note.]
true meaning of rule, 230.
effect of legislation, 230.
jurisdiction of equity over administrations exclusive where, needed, 234, 235, 1128.
jurisdiction of courts of New Hampshire to entertain suits for, 302.
of courts of Maine, 335.
pledgor may sue to redeem where, needed, 1231.
actions at law enjoined, where needed in aid of defense, 1362, note.
dower assigned where, needed, 1381.
creditors' suits to obtain, of assets, 1415.
accounting where, needed, 224–226, 234, 1421, note.

DISTRIBUTION,
maxim, Equality is equity, applied to *pro rata,* 406–407.

DISTRICT OF COLUMBIA,
recording in, 646, note.
married women's power of disposition of separate estate in, 1105, note.
equity jurisdiction over administration of decedents' estates in, 1154.
grantor's lien on conveyance exists in, 1249.

DIVORCE,
statutory proceedings for, are remedial, 98, 112, 171.

DOCTRINES OF EQUITY,
what are, 361. See PENALTIES; FORFEITURES; ELECTION; NOTICE, etc.

DOCUMENTS,
production and inspection of, 205–207, 209, note.

DONATIONS CAUSA MORTIS. See GIFTS CAUSA MORTIS.

DOWER,
widow's election between, and gifts by husband's will, 492-502. See ELECTION.
purchase-money mortgage superior to right of, 725.
merger does not occur when widow entitled to, pays off charge, 799.
not allowed in uses, 982.
in trust estates of husband, 990.
general legacy in lieu of, preferred in abatement, 1142.
in money of husband directed to be laid out in land, 1165.
interest of mortgagor in equity subject to, 1204.
one entitled to, may redeem from mortgage, 1220, note, 1383.
contribution on redemption where life-tenant, 1221.
redemption when mortgage and equity of redemption are united, 1223, note.
assignment of, 1380-1383. See DOWER, ASSIGNMENT OF.
may be reached by transferee or judgment creditor before assignment, 1383.

DOWER, ASSIGNMENT OF,
remedy of, belongs to concurrent jurisdiction, 140, 174, 185, 735, note, 1379, 1382.
substantially the same at law and equity; estate or right directly established or recovered, 110, 140, 174, 180, 1378.
based upon inadequacy of legal remedies, 174, 180, 1379.
has almost displaced legal remedy, 1379.
legal remedy where retained in modified form, 110, note.
"ejectment" used for purpose of, under reformed procedure, 110, note.
equity jurisdiction for, exists although remedy given by statute, 280.
bona fide purchaser, a defense to suit for, 765.
early origin of equitable jurisdiction, 1380.
jurisdiction for what purpose at first invoked, 1381.
growth of the jurisdiction, 1380, 1381.
advantages of equitable remedy of, over legal remedy, 1382.
exclusive jurisdiction for, in equitable estates, 1383.
widow entitled to, may have fraudulent conveyances canceled, 1382, 1383.
out of money when husband's estate converted, 1383.
to transferee or judgment creditor of widow, 1383.
how effected, and procedure concerning, 1383.

DRUNKARDS,
determining persons to be confirmed, are remedial rights, 98, 112.
are exclusively equitable, 171.
jurisdiction of equity over persons and property of, 1311-1314. See NON COMPOTES MENTIS.
See INTOXICATION.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

DURESS,
assignment procured by, subject to equities of original owner, 709.
illegal contract relieved against, when, 942.
relief in general where contract or conveyance is obtained by, 950.

DUTIES. See RIGHTS.

E

EASEMENTS,
injunction to restrain infringements upon, to prevent multiplicity of suits, 271.
enforcing stipulations in nature of conditions creating, are not enforcing forfeitures, 460.
structures constituting actual notice of, 600.
constituting constructive notice of, 611.
doctrine of merger may apply to, 789.
purchaser with notice of covenants creating equitable, bound, 689, 692, 1295, 1342. See COVENANTS.
interference with, not restrained where estoppel by acquiescence, 817.
violation of, restrained or enforced by injunction, 689, 1295, 1342.
nuisances, violating, restrained; ancient lights; excavating; diverting and polluting streams, etc., 1351, 1357, note.

EDICTS,
form and nature of, in Roman law, 5, 8.

EDUCATION,
trusts for purposes of, 1023.
of infants, supervised by court of equity, 1307, 1308.

EJECTMENT,
action of, superseded real actions, 22.
at common law did not necessarily adjudge the title, 109.
actions supplying, in the various states, 109, note.
in Georgia by person having "complete equity," 137, note, 219, note.
equity suit not maintainable to take place of, 177, 735.
restrained to prevent multiplicity of suits, 246, 248, 253, 254, 272, 274, 1394. See BILLS OF PEACE.
defendant in, when *bona fide* purchaser, not prevented from setting up outstanding terms, 764.
mortgagee may maintain, where double system of mortgages exists, 1182, 1187.
mortgagor cannot maintain, 1182, 1187.
mortgagee cannot maintain, where equitable theory of mortgages alone exists, 1188, 1189, 1190.
mortgagor cannot maintain when mortgagee obtains possession, 1189, 1190.
taking place of actions for partition, assignment of dower, etc., 110, note, 1379, note.
statutory suit to quiet title, as taking place of, 1395, note, 1397.

ELECTION,
doctrine of, originates in inconsistent or alternate gifts, with intention that one shall be substitute for other, 395, 461.
two cases in which principle applies, 395, 461.
rationale of doctrine of, 462-465.
germ of doctrine found in Roman law, 463.
whether doctrine of, depends on donor's intention, 462, 464.
foundation on maxim, He who seeks equity must do equity, 395, 461, 465.
meaning, scope, and effects of, 466-470.
in conformity with instrument of donation, 466, 517.
in opposition to instrument, 467-469.
compensation made to disappointed third person, 467, 468, 517.
no, unless compensation can be made, 469.
applies to all instruments of donation, 470.
applies to interests, whether remote or certain, 470.
necessity for, when does or does not arise, 471-505.
fundamental rule of interpretation, 472.
must be an intention to dispose of another's property, 472.
gifts must be irreconcilable, 472.
immaterial whether donor knew or conceived property to be his own, 472.
interpretation where donor has only a partial interest, 473, 474, 488.
strong leaning against, by courts, 473, 488.
extrinsic evidence of intention, whether admissible, 473.
where donor makes a general gift, 474.
where donor is doubtful whether he owns the property, 475.
erroneous recitals and misconception as to rights of others, 475.
donor gives property to real owner, in addition to other property, 475.
cases arising where donor gives property wholly another's, 476-486.
gift of specific property, 473, 477.
under appointments in pursuance of powers, 478-480.
testator ineffectually attempting to dispose of his property by will, 481-486.
infancy and coverture of testator, 482.
will valid as to personal estate, but invalid as to lands, 483.
will invalid in another country or state, 484.
will devising after-acquired lands, 485.
will of unsurrendered copyholds, 486.
cases arising where donor gives property in which he has partial interest, 487-505.
general doctrine, 473, 474, 488.
donor owns only an undivided share, 489.
donor owns only future interest, 490.

ELECTION — *Continued.*
devise of lands encumbered, 491.
devise in trust for payment of creditors' debts, 491.
dower and benefits given by husband's will, 492-502.
general rule when widow compelled to elect, 493.
presumption in favor of widow's having both gift and dower, 493.
rule changed by statute in certain states, 494.
express declaration of gift in lieu of dower, 493, 496.
devise of a part to widow, and rest to others, 497.
where devise to third person is specific, 497.
devise to widow for life, 498.
devise in trust to sell or with power of sale, 499.
annuity or rent-charge given to widow charged on lands devised to others, 500.
where power of occupying, managing, etc., is given to devisees, 501.
devise generally, and intention that one part should not be subject to dower, 501.
devise to widow and others in equal shares, 502.
in devises of community property, 503-505.
who may elect, 507-510.
persons *sui juris* entitled and bound to elect, 507.
married women may elect, 508.
court elects for infants, 509.
court elects for lunatics, 510.
rights and privileges of persons bound to elect, 511, 512.
right to examination of the two properties, 512.
made under mistake, 512.
time of, 513.
acquiscence of one entitled to, 513.
statutes limiting, 513.
mode of, express or implied, conduct amounting to, 514, 515.
implied, rules concerning, 515.
effects of, 516, 517.
party himself, heirs and representatives bound, 516.
remainderman not bound by, of holder of precedent estate, 516.
by one of several constituting a class, not binding on rest, 516.
on donees when in conformity with and against instrument, 466-468, 517.
equitable jurisdiction in matters of, 518, 519.
part of or step in administration suits in England, 518.
how affected by probate jurisdiction in America, 518, 519.
suits to compel, 518.
suits to have accounts taken for purposes of, 519.
principle underlying, the same as that governing satisfaction, 395, 461, 520.
creditor when put to, between debt and legacy, 527-540. See SATISFACTION.

ELECTION — *Continued.*
by beneficiary between portion and subsequent legacy, 568.
right of, does not exist when performance, 778.
reconversion depends on, 1175-1177. See CONVERSION.

ENEMIES,
contracts of trading with, illegal, 934.

[EQUITABLE DEFENSES. See DEFENSES.]

EQUITABLE ESTATES,
cases concerning, embraced in exclusive jurisdiction, 137, 146.
may exist in things real and personal, 146.
may be of various amounts and degrees, 146.
distinction between, and "equities," 146.
defined and described, 147-149.
require two estates vested in different persons, 147.
are regarded in equity as the real ownerships, 147, 685, 975.
two classes of, permanent and temporary; examples of, 148.
may be regarded as trusts, 149.
distinction between certain doctrines governing, and, 150.
enumeration of, 150.
various, described: trusts, married women's separate property, mortgages, liens, etc., 151-169, 975-1291. See TRUSTS; MARRIED WOMEN, etc.
derived from maxim, Equity regards as done what ought to be done, 370-377.
effect on, of maxim, Equity looks at intent rather than at the form, 380.
maxim, Equity follows the law, applied to, 426.
are embraced within the recording acts, 649.
doctrine of priorities applies to, and interests alone, 681.
priorities among, 716-732. See PRIORITIES.
doctrines of *bona fide* purchaser applied to, 737-785. See BONA FIDE PURCHASER.
merger of, 787, 788. See MERGER.

EQUITIES,
as distinguished from equitable estates, interests, and rights in property, 146.
what are superior and equal, 683-692. See PRIORITIES.
assignments of things in action subject to, 703-715. See PRIORITIES.
priorities among, 716-732. See PRIORITIES.
bona fide purchaser of land takes free of, 754.
defense of *bona fide* purchase in suits by holders of, 755-778. See BONA FIDE PURCHASER.
one with equal equity protected in case of accident, 829.
as regards contribution and exoneration on redemption of mortgages, 1221-1226. See REDEMPTION.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

EQUITY,
necessity of an historical review of, 1.
æquitas in the Roman law, 2-9. See ROMAN LAW.
analogies and differences between growth of, in English and Roman law, 9.
origin and growth of, in English law, 10-42.
primitive condition of the law and the courts, 10-13.
influence of Roman law on, 14, 15, 55.
causes which made a court of, necessary, 16-23.
the rigid character of the common law, 16, 17.
the feudal origin and nature of certain laws, 18, 19.
the position and policy of king's parliament, and the nation to the Romish church, 20.
the common-law procedure, 21-23. See PROCEDURE.
statute Edw. I., concerning new writs, and limited results of same, 24-29. See WRITS.
commencement and progress of jurisdiction of, 12, 30-42. See JURISDICTION OF EQUITY.
as principle upon which early chancellors based decisions, 35, 50, 873.
nature of, 43-67.
importance of a correct notion of, 43.
various meanings given to the word, 44, 45.
true meaning of, 46, 47.
theories of early chancellors concerning, as both supplying and correcting common law, 43, 45, 46, 48-54.
antagonism to the common law, 48, 50, 54.
chancellors guided by conscience, 49. See CONSCIENCE.
growth of precedents: effect of, 49.
jurisdiction extended to matters not remediable at common law; latitude of this maxim, 50.
jurisdiction supplementary to and corrective of common law, 48, 50, 51.
illustrations of remedies granted, where refused at common law, 51.
different and more efficient remedies given than at common law, 52, 108.
unfinished work of chancellors in reform, 53, 54.
reform, how accomplished, 53.
the law corrected and modified by, as now administered, 54, 101.
source from which early chancellors took their doctrines, 55-58.
"conscience," notions of early chancellors of, as ground of authority, 55-58, 873.
finally established on basis of settled principles, 59-61.
expansive and flexible nature of precedents, 59-61, 67.
equitable jurisdiction, how determined at present day, 62.
recapitulation, 63-67.
how affected by moral precepts, 49, 55, 63-67, 424.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

EQUITY — *Continued.*
present relations of, with law, 68-88.
importance of correctly understanding, 68.
the law changed by statutes and decisions, 69.
important instances of such changes; effect of seal, lost instruments, reformed procedure, etc., 70-88.
constituent parts of, 89-117.
rights classified and kinds embraced in, 90-117. See RIGHTS.
classification of, 118-128. See CLASSIFICATION OF EQUITY.
jurisdiction of, 129-358. See JURISDICTION OF EQUITY.

EQUITY JURISDICTION. See JURISDICTION OF EQUITY.

EQUITY OF REDEMPTION,
meaning of, 162, 376, 1180.
is an estate in land, 73, 162, 376, 382.
based on maxim, Equity regards as done what ought to be done, 376.
maxim, Equity regards as done what ought to be done, applied to, 382.
development of theory of, 162, 1180.
a misnomer, as used under American equitable theory of mortgages, 74, 1188.
mortgagor cannot, in instrument, deprive himself of, 382, 1193, 1219.
may sell or release, by separate instrument, 1193, note.
does not exist in sales with contracts of repurchase, 1194.
foreclosure of. See FORECLOSURE.
in mortgages of personal property, 164, 1230.
See MORTGAGES.

EQUITY TO SETTLEMENT. See MARRIED WOMEN.

ESCHEAT,
estate of beneficiary not subject to, 990.

ESTATES OF DECEDENTS,
suits to settle and distribute, are pecuniary remedies, 112, 187.
order of administering assets of, 1135.
See ADMINISTRATIONS.

ESTOPPEL,
maxim, He who seeks equity must do equity, applied to equitable, 390, 816.
party entitled to forfeiture may be estopped from asserting it, 451, 454.
of party entitled to election, 513.
effect of, where record, on assignee of title subsequently acquired, 658, note.
debtor may be estopped from setting up equities in assignments of things in action, 704, 820.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.
ESTOPPEL — *Continued.*
effect of, on equities between successive assignors and assignees, 710, 711.
nature of rights created by equitable, 801.
rights arising from, are of property or contract, 801, 802.
doctrine of equitable, not a branch of evidence, 801.
early recognition of, at common law, 802.
equitable, arises from matters *in pais,* or conduct of party, 802.
objects and effects of, 802.
distinction between legal and equitable, 802.
doctrine of equitable, administered by courts of law, 802.
fraud, how far essential in equitable, 803, 805–807.
meaning of "fraud," as used in this connection, 803, 805.
theory that fraudulent intent is essential, 806.
fraudulent intent necessary in an, affecting legal title to lands, 805, note, 807, 821.
equitable, upon what principle rests, 803.
definition of equitable, 804.
essential elements constituting equitable, 805.
in case of chattels, 805, note.
in lands, 805, note, 807.
requisites of equitable, illustrated, 808–812.
nature of conduct of party creating, 808.
of the facts, present and future, 808, 877, note.
knowledge of the truth by the party estopped, 809.
acquiescence, ignorance, mistake, negligence, etc., 809.
ignorance of truth by party claiming benefit of, 810.
time when ignorance must exist, 810.
record as furnishing means for ascertaining truth, 810.
intention of party estopped, 811.
may be absent in certain cases, 811.
where third person holds apparent title to chattels or things in action, 811.
owner of chattels and things in action, divested of title by, though not by negligence, 811.
conduct must be relied upon and be inducement to act, 812.
condition must be altered for worse unless, enforced, 812.
affirmative action unnecessary, 812.
operation and extent of equitable, 813–815.
party benefited by, in what position placed, 813.
operates between immediate parties and their privies, 813.
stranger neither bound nor aided by, 813.
diligence, good faith, and absence of fraud necessary to claim benefit of, 813.
whether applies to married women, 814.
to infants, 815.
important applications of, in equity, 816–821.
acquiescence as working, 816–821.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

ESTOPPEL — *Continued.*
as preventing rights of remedy, 817, 897, 917, 965, 1359, 1376, note.
injunctions against nuisances, trespasses, etc., 817, 1359.
mandatory injunctions, 1359.
against fraud, in general, 817, 897, 917, 965.
right to reformation, 1376, note.
effect of mere delay, 817, 965.
as an, to rights of property or contract, 818.
owner permitting another to deal with property as though his own, 390, 731, 818, 1241, note.
corporations estopped by statements in prospectuses, 819.
stockholders estopped from setting up *ultra vires* acts, 819.
in settlements of accounts or other dealings, 820.
where parties stand in confidential relations, 820.
from conduct of debtor towards intended assignee of thing in action, 704, 820.
owner estopped from asserting legal title to land, 821.
when doctrine of, does not apply in fraudulent transaction, 918.
corporations estopped from setting up illegality in executed contracts, 940, note.
grantor's lien may be lost by, 1252.
See LACHES.

EVIDENCE,
in what states seals are presumptive, of consideration, 70, note.
sealed instruments modified by parol, 70.
discovery of, 190–209. See DISCOVERY.
suits for preservation of, 210–215. See PERPETUATION OF TESTIMONY; TESTIMONY DE BENE ESSE.
extrinsic, whether admissible to show intention creating necessity for election, 473.
extrinsic, when admissible to show satisfaction, 525, 569–577. See SATISFACTION.
to show actual notice, 595–603. See NOTICE.
to show notice of prior unrecorded instrument, 664.
parol, to show merger, 792.
equitable estoppel is not a branch of law of, 801.
whether allowed of stipulations intentionally omitted from written instruments, 854, note.
parol, to show mistake, accident, or fraud, 857–867.
where entire transaction may be parol, 857.
not in general admissible to vary written instrument, 858.
may be admitted to show mistake, accident, fraud, or surprise, 858.
not shut out by statute of frauds, so as to commit fraud, 858, 859.
admitted in suits for reformation and cancellation, 859.
character of the, 859.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

EVIDENCE — *Continued.*

admitted in defense to show fraud, surprise, or mistake, in suits for specific performance, 860.
inequitable conduct of plaintiff, whether essential, 860.
whether terms of instrument, or something collateral, may be contradicted, 860, note.
nature of mistake, fraud, etc.; materiality, etc., 860.
by defendant, to show fraud, surprise, or mistake, and contract then enforced, 860.
to prove additional parol stipulation and contract then enforced, 860.
counterclaim under reformed procedure, 860, 862.
by plaintiff in suits for specific performance to show fraud, surprise, or mistake, 861-863.
not in general admitted in England, 861.
admitted in America, 862.
contract reformed and enforced, 862.
character of the, 862.
proceedings by plaintiff and defendant under reformed procedure, 862.
admissible to prove parol variation part performed, and contract then enforced, 861, 863.
effect of statute of frauds upon use of, 864-867.
two classes of cases: omissions; insertions, 865.
conflicting opinions, as to admission of, in both classes, 865.
doctrine of admissibility of, in both classes, 866.
no relief except, when mistake, fraud, or surprise, 866.
limitations on admissibility; Glass v. Hulbert, 867.
extrinsic, to correct wills, whether and for what admissible, 871, 1036.
admissibility of, to impeach or sustain consideration recited in deeds, 928, 1036.
nature of, necessary to show illegality to constitute defense, 940, note.
to show undue influence, 951.
parol, to show trust resulting to donor, 1036.
where conveyance to one, price paid by another, 1040, 1041.
character of, to show resulting and constructive trusts, 1058.
nature of, to establish gifts *causa mortis,* 1146, 1147, note.
to show a transaction a mortgage, or a conveyance with agreement to repurchase, 1195.
to show deeds absolute in form to be mortgages, 866, note, 1196.
omission to obtain or present, or error in admitting, at law, not relieved against, 1361.
necessity for offering, as test for removing cloud from title, 1399.
See PRESUMPTIONS.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

EXCLUSIVE JURISDICTION,
what embraced in, 137, 138, 146.
embraces cases where primary estate, right, or interest is equitable, 137, 146, 222.
cases where the remedy is purely equitable, 138, 146, 222.
statutory enlargement of, 138.
cases may fall both in, and concurrent jurisdiction, 141.
auxiliary jurisdiction really a special case of, 142.
equitable estates and interests coming within, 146-169. See EQUITABLE ESTATES.
remedies belonging to, 170-172. See REMEDIES; INTERPLEADER; RECEIVERS; INJUNCTIONS; SPECIFIC PERFORMANCE, etc.
how far depends on inadequacy of legal remedies, 137, 138, 139, note, 173, 218-222. See REMEDIES.
when acquired for any purpose is retained for all, 181, 232-242. See JURISDICTION OF EQUITY.
not abridged by jurisdiction subsequently acquired by law courts, 176, 182, 276-281. See JURISDICTION OF EQUITY.
where statutes have conferred jurisdiction on law courts, 182.
discovery as enlarging, 223.
to prevent a multiplicity of suits, 243-275. See MULTIPLICITY OF SUITS.

EXECUTIONS,
[injunction against numerous, or property claimed by plaintiff, 261, note.]
imperfect levies by, aided in equity although relief at law, 280.
bona fide purchaser at sale under, rights of, 724, 774.
interest of mortgagor, in equity, liable to be sold under, 1204.
claimants of property seized on, when may be interpleaded, 1327, note.
when removed as constituting cloud, 1399, note.
when aided in equity, 1415. See CREDITORS' SUITS.

EXECUTORS AND ADMINISTRATORS,
can sue co-executor or co-administrator in equity, but not in law, 51.
jurisdiction of equity over, on what based, 156.
cannot sue co-executor in equity for part of commissions, 178.
statutes allowing actions against, do not abridge equity jurisdiction over administrations, 280.
bound by election, 516.
appearing in conveyance, notice of rights of third persons, 630.
when relieved from liabilities, caused by unexpected events, 837.
held a trustee when probate obtained by fraud, 919.
prohibited from purchasing or making profits with property of estate, 963, 1075, 1077, 1078.
trust inferred from powers given to, and duties required of, 1011.
in order that, may carry out terms of a will, 1013.
resulting trust enforced against, 1043.

EXECUTORS AND ADMINISTRATORS — *Continued.*
constructive trusts enforced against, 1048.
purchasing property with funds of estate, constructive trust, 422, 587, 1049.
wrongful acquisition of trust property by, constructive trust, 1052.
trust devolving on, on death of last trustee, 1060.
what constitutes the charter of power of, 1062.
must not act inconsistently with interests of estate, 1077.
compensation of, 1084.
are *quasi* trustees, 157, 1088.
when trustees in gifts *causa mortis,* 1147, 1151.
equity jurisdiction in administrations, in fraud or waste committed by, 235, 351, 352, note, 1154.
to compel accounting in administrations, 1154, 1421.
may maintain suits in equity to construe wills, 1156.
lands directed to be sold, assets in hands of, 371, 1164.
resulting trust to, on total failure of purposes of conversion of money, 1170.
on partial failure of purposes of conversion of land, in wills, 1171, note.
on partial failure of purposes of conversion of money, in wills, 1172.
of land, in deeds, 1173.
mortgagees' interests, in equity, pass to, 73, 162, 1180–1182, 1188, 1204.
things in action which survive and pass to, or create liability against, are assignable, 1275.
what do survive or create liability against, 1275.
whether, of joint debtor may be sued at law, 104, note, 409, 1301.
English and American rules as to suing in equity, 104, note, 409, 1301.
receiver appointed during litigation, before appointed, 1332.
in suits against, for breach of trust, 1334.

EXONERATION,
equitable relief of, wholly pecuniary, 112, 140, 1416.
is branch of concurrent jurisdiction, 140, 174, 186, 1416.
suit on implied contract at law, 1417, note.
equity jurisdiction exists in, although law courts have acquired jurisdiction, 278, 1417, note.
remedy of, on grantor's paying mortgage, assumed by grantee, 1207, note.
on redemption of mortgages, 1221–1226. See REDEMPTION.
of surety paying obligation, 1417.
extent of the jurisdiction, 1417, note.
quia timet suit before payment, 1417.
where surety discharged by creditor's acts, 1417, note.

EXPECTANCIES,
not sufficient interests to maintain suits to perpetuate testimony, 211.
dealings with persons entitled to, when set aside, 953.
assignments of, 168, 1285-1291. See ASSIGNMENTS.
specifically enforced, 1403, note.

EXPERTS,
opinions of, when may be misrepresentations, 878.

F

FIDEI-COMMISSA,
general notion of uses borrowed from Roman law, 151, 977.
description of, 151, 976, 977.
rights of beneficiary under, 151, 967, 977.

FIDUCIARY RELATIONS. See TRUSTEE AND CESTUI QUE TRUST; GUARDIAN AND WARD; PRINCIPAL AND AGENT, etc.

FLORIDA,
law and equity systems distinct, but administered by same tribunal in, 41, note.
equity jurisdiction co-extensive with English chancery in, 285, 342.
statutory provisions concerning, 285, note.
time within which widow must elect in, 513, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, note.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance exists in, 1249.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.

FORECLOSURE,
nature of relief of, of mortgages, pledges, liens, etc., by sale, 112, 171, 1413.
nature of relief of strict, 112, note, 171, 1378, note, 1395.
[title must be established at law, when, 177, note.]
[retention of suit for money judgment, 241, note.]
[not, where right to equitable relief not made out, 237, note.]
[jurisdiction of United States courts to grant, not abridged by state legislation, 293, note.]
jurisdiction of courts of New Hampshire in, 301.
of courts of Massachusetts, 316.
of Maine, 324.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

FORECLOSURE — *Continued.*
rule of *lis pendens* extends to suits of, 635.
bona fide purchaser, no defense where, brought by prior legal against subsequent equitable, 740, 741, 765.
in conveyances with separate agreements when mortgages, 1194.
absolute in form when mortgages, 1196.
by assignee of one of several notes secured by same mortgage, 1202.
strict, conception on what based; nature and object of, 1227.
the common form in England, 1183, 1227.
where used in America, 1187, 1188, 1227.
form of decree, 1227.
by judicial sale, conception on what based; nature and object of, 1190, 1228.
not common in England, 1183, 1227.
the common form, in America, 1187, 1188, 1190, 1228.
form of decree, 1228.
personal judgment on deficiency; surplus remaining, 1228.
of pledges and mortgages of personal property, 164, 1230, 1231.
of grantors' liens by reservation, 1257, note, 1259.
of vendors' liens by contract, 1260, note, 1262.
of liens created by deposit of title deeds, 1267.
See MORTGAGES; LIENS.

FORFEITURES,
relieved against by early chancellors in opposition to legal dogmas, 51.
equitable doctrines concerning, adopted by courts of law, 72, 434.
equitable relief against, as applied to mortgages, 162, 382, 433, 1180.
discovery subjecting to, not compelled, 202.
jurisdiction of courts of Maine to relieve from, 325.
enforced by the common law, 72, 379, 381.
maxim, Equity looks at the intent rather than the form, applied to, 381, 433.
equitable jurisdiction over, whether embraced in that of accident, 433, note.
original extent and growth of doctrine of relief against, 381, 433.
damages, how ascertained when relief against, given, 433.
form of relief against, 434.
when equity will relieve against, 449–458.
whether governed by same rules as penalties, 449, 456.
relieved against when agreement secured is one for payment of money, 381, 433, 450, 456.
whether relieved against when agreement is for performance of act *in pais,* 381, 433, 450.
whether depends on fact that compensation can be made, 381, 433, 450.
[not, of life insurance policy for non-payment of premiums, 450, note.]
occasioned by fraud, accident, surprise, or ignorance, 451, 454, 456, note, 826, 833.

FORFEITURES — *Continued.*
right to, may be expressly or impliedly waived, 451, 454.
disregarded or set aside, when agreement substantially performed, 451.
no relief when willful, or occasioned through negligence, 452, 856, note.
arising from covenants in leases, 450, 451, note, 453, 454, 826, note.
from contracts for sale of land, 455, 456, note.
not relieved against where time is of essence of contract, 455.
where contract depends on conditions precedent or subsequent, 455, 456, note.
from other contracts, 456.
not relieved against when in nature of liquidated damages, 456.
of shares of stock, 457.
statutory, not relieved against, 458.
equity will not enforce, 459, 460.
See PENALTIES; LIQUIDATED DAMAGES.

FORGERY,
assignment accomplished by, subject to equities of original owner 709.
assignee through, when protected, 712.
owner deprived of title through; relief against *bona fide* purchaser, [767, note], 918.
owner deprived of title to stock by; relief against corporation, 1412.

FORMULA,
nature and definition of, in Roman law, 3, 4.

FRAUD,
accident, mistake, and, as basis of equity classification, 119.
not embraced entirely in concurrent jurisdiction, 138, 140, note, 175, note, 188, 822, 911, 914.
inadequacy of legal remedies in, as occasion of exclusive jurisdiction, 140, note, 188, 221.
accident, mistake, and, as occasions of concurrent jurisdiction, 140, 174, 188.
where remedy at law adequate, equity jurisdiction not exercised because of, 178, 911, 914.
cognizance of case in concurrent jurisdiction by law court, not preventing equitable cognizance when, 179.
when discovery of facts constituting, may be had, 199, 201–203.
a ground for enlarging equity jurisdiction, where discovery asked, 224–226, 234, 911.
equity jurisdiction in cases involving, not abridged by jurisdiction subsequently obtained at law, 278, 280.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

FRAUD — *Continued.*

equity jurisdiction of courts of New Hampshire in cases involving, 303.
of courts of Massachusetts, 318.
of Maine, 327.
maxim, He who seeks equity must do equity, applied where relief sought from, 392, 910, 953.
He who comes into equity must come with clean hands, applied to cases of, 401, 916, 940, 941.
Equity aids vigilant, not those who slumber on rights, applied to suits involving, 418.
statutes, in general, not allowed to be instruments of, 431.
accelerating time of payment relieved against where, involved, 439.
forfeitures occasioned by, relieved against, 451, 454.
entire doctrine of notice, whether based upon, 591.
one object of notice may be to regard it as badge of, 592.
whether foundation of rule that subsequent recorded, postponed to prior unrecorded instrument where notice, 660, 665.
notice to agent whether notice to principal where agent commits, 674, 675.
order of time among legal estates, how affected by statutes concerning fraudulent conveyances, 680.
equities may be superior by reason of, 686.
notice of conveyance to defraud creditors, whether affects subsequent purchaser, 692.
assignment procured by, subject to equities of original owner, 709.
inhering in prior mortgage or lien postpones it to subsequent lien, 726.
effect of, upon priorities, 716, 727, 731, 732.
or inequitable conduct as defeating *bona fide* purchase, 762.
the ground for affirmative relief to *bona fide* purchaser, 738, 779–782. See BONA FIDE PURCHASER.
merger never prevented when, would result, 794.
how far essential in equitable estoppel, 803, 805–807. See ESTOPPEL.
absence of, necessary to claim benefit of estoppel, 813.
mistake of law accompanied with, relieved against, 847.
parol evidence to show, 858–867. See EVIDENCE.
various reliefs possible at law and in equity on ground of, 872.
when reformation possible, 847, 870, 872, 910, 1376. See REFORMATION.
equitable theory of, how differs from legal conception, 872, 885.
relief given in equity for, referable to original jurisdiction of "conscience," 873.
description of; essential elements, 873.
distinction between, and accident and mistake, 823, 839, 873.
four forms and classes of, in equity, 874.
what classes included in actual, and what in constructive, 874.
difference between actual and constructive, 874, note, 922.

FRAUD — *Continued.*
actual, 875-921.
nature of, 875.
forms of, are misrepresentations and concealments, 875.
misrepresentations constituting, 876-899.
essential elements which must contain, 876.
must be affirmation of fact, 877, 878.
may consist of language, conduct, experiments, etc., 877.
alteration of agreement in reducing to writing as being, 877, note.
of law is not a, 877.
statement of intention, whether may be, 877.
of future fact, whether may be, 877.
whether may be of matter of opinion, 877, 878.
opinions of experts, 878.
opinions stated as facts, 878.
statements concerning value, 878.
"puffing" by sellers, 878.
representation, purpose for which must be made, 879-881.
to induce other party to act, 879.
preliminary to conclusion of transaction, 879.
as made during and forming part of negotiation, 879, 881.
connection with the transaction, 879.
presumption of design to induce action, 880.
whether should all be untrue, 880.
nature of, illustrated by false prospectuses, reports, circulars, etc., 881.
statements in prospectuses, when fraudulent, 879, 881.
kinds of relief furnished, 881, 1092.
promptness in applying for relief, 881, 965, note.
untruth of statement necessary, 882.
intention, knowledge, or belief of party making statement, 883-889.
three forms of misrepresentations at law, 884, 886, 887.
at law, *scienter* necessary, 884, 922.
rule in Derry v. Peek, 805, note, 807, note, 884, note.
in equity; no incident of moral culpability, 885.
forms of misrepresentations in equity, 886-888.
untrue statement with knowledge of untruth, 886.
without knowledge or belief of truth, 886.
without knowledge of, or reasonable ground for, believing truth, 887.
with honest belief of truth; laches; duty of knowing truth, 888.
requisites of misrepresentation as defense to specific performance, 889. See SPECIFIC PERFORMANCE.

FRAUD — *Continued.*
reliance upon misrepresentations necessary, 890-896.
general rule as to reliance and inducement, 890.
party must be justified in relying, 891.
when party is, or is not, justified in relying, 891-896.
cases which may arise, 892.
may rely on statement of fact, 891, 895, 896.
cannot rely on opinions, commendations, etc., 891.
where but vague statements, 891.
when information or means of information are possessed, 893.
possession of knowledge; patent defects, 894.
when knowledge or information must be proved and not presumed, 891, 895.
[false statements as to boundaries, etc., may be relied upon, although vendee might examine records, 895, note.]
effect of words of general caution or advice, 896.
in sale of thing "with all its faults," 896.
when party can insist that another should not have relied, 810, note.
prompt disaffirmance necessary for relief in general, 817, 897, 917.
must be material, 879, 890, 896.
effects of; defensive and affirmative reliefs, 899.
specific enforcement; cancellation, 899, 910, 1377.
burden passes to all but *bona fide* purchasers, 890, 918.
right of relief, whether passes, 899.
concealments constituting, 900-907.
imply knowledge and intention, 900.
of material fact, when duty to disclose, constitutes, 901.
of every material fact does not constitute, 901.
words or acts in addition to silence, 901.
when duty to disclose exists, 902-904.
in existing fiduciary relations, 902-904.
where trust or confidence expressly reposed, 902-904.
in contracts or transactions essentially fiduciary, 902, 904, 907.
by vendee in contracts of sale, 903.
by vendor, 904.
a defense to specific performance, 905.
non-disclosure of facts a defense to specific performance, 900, 905.
by buyers on credit, 901, 906.
where contract or transaction is essentially fiduciary, 902, 907.
insurance; suretyship, 902, 907.
principal's liability for agent's, 908, 909.

FRAUD — *Continued.*
jurisdiction of equity in cases of, 910–921.
conflict in decisions, 910.
kinds of relief given; legal and equitable, 910.
kinds and forms of equitable reliefs; cancellation, reformation, specific enforcement, 847, 870, 872, 899, 910, 1376, 1377.
fundamental principles of the jurisdiction, 911.
in England extended over every case of, 912.
fraudulent wills the exception, 913, 919.
in America, 914.
inadequacy of legal remedies as governing, 914.
cases illustrating, 914, note, 919.
incidents of jurisdiction and relief, 915–918.
contracts and transactions voidable through, not void, 915.
whether void where different instrument from that intended executed, 915, note, 918.
if contract repudiated for, considered a nullity, 915.
plaintiff *particeps doli;* no relief where *in pari delicto,* 401, 916. See IN PARI DELICTO.
where not *in pari delicto,* 403, 916.
ratification, 916, 964.
cannot be of part only, 916.
when imputed by doing of act, 897, 916.
promptness in asserting rights necessary, 418, 419, 817, 897, 917, 965.
delay through ignorance, 917.
relief given against all participants, 899, 918.
bona fide purchasers universally protected, 754, note, 777, 778, 899, 918.
when not protected, 915, note, 918.
particular instances of, 919, 920.
relief against judgments obtained by, 914, note, 919, 1364, 1377.
judgments aided in cases of, 919, note.
relief against awards obtained by, 919, 1377.
in case of fraudulent devises or bequests, 430, 919, 1054.
where acts for another's benefit prevented by, 919, 1055, 1056.
suppressing instruments, 919.
fraudulent appointments under powers, when relieved against, 920.
conveyances or settlements in, of marital rights, 920, 1113.
constructive trusts, 920, 1044–1058. See TRUSTS.
statute of frauds not an instrument for, 431, 858, 859, 921, 1293.
constructive, 922–974. See FRAUD, CONSTRUCTIVE.

FRAUD — *Continued.*
trusts for fraudulent purposes not enforced, 987.
presumed as against creditors where price paid by debtor, and title taken in another, 1042.
constructive trusts referred to, 155, 981, 1044.
where legal title procured through, 919, 1053-1056.
devise or bequest procured through, 430, 919, 1054.
whether fraud in procuring is essential to the raising of such trust, 1054, note.
purchase on fraudulent verbal promise, 919, 1055.
no trust from mere verbal promise, 1056.
except where conveyance thereby obtained by person in confidential relation, 1056, note.
trust in favor of judgment creditors where property fraudulently transferred, 1057, 1291, note.
liabilities for, of property appointed by married woman, 1106.
appointed by a man, 1106, note.
in administration suits, equity jurisdiction in case of, 914, note, 1154.
the principle by which deeds absolute in form held mortgages, 1196.
claims arising from, whether assignable, 1275.
assignments of right to have transaction set aside for, not permitted, 1276.
right to relief from acknowledgment or promise obtained by, not determined in interpleader suit, 1326.
transfer of negotiable instruments obtained by, restrained, 221, 899, note, 1340, 1363.
judgments or actions at law enjoined where, in execution of instruments, 221, 899, note, 914, note, 1363.
where, on trial itself, 221, 914, note, 919, 1364.
fraudulent conveyances set aside in aid of assignment of dower, 1382, 1383.
boundaries established, where confused, through, 1385.
fraudulent conveyances removed by creditors' suits, 1415.

FRAUD, CONSTRUCTIVE,
what the term, means and embraces, 922.
three principal classes of, 923.
apparent from intrinsic nature and subject of transaction itself, 924-942.
inadequacy of consideration amounting to, 925-928.
when and how may occur, 925.
effect of inadequacy pure and simple, 926.
in sales at public auction, 926.
gross inadequacy amounting to, 927.
whether must be conclusive evidence of, 927, note.
inadequacy at what time must exist, 927, note.
inadequacy coupled with other inequitable incidents, 928.
want of professional advice, consultation, etc., 928, 948.

FRAUD, CONSTRUCTIVE — *Continued.*
misrepresentations, concealments, sickness, incapacity, oppression, etc., 928, 948.
in transactions between near relatives, 928, note.
when contract is executed, 928.
false statements of consideration in conveyance, 928, 1036.
illegal contracts and transactions permitting equitable interposition, 929–942. See ILLEGALITY; IN PARI DELICTO.
inferred from condition and relation of parties to transaction, 943–963.
absolute consent wanting, 943.
regular execution of instrument raises presumption of consent, 943.
transactions void or voidable with persons incapacitated, 944–954.
with married women and infants, 945.
liabilities for fraud, 945, 1104, note.
with lunatics, monomaniacs, and idiots, 946.
persons of weak mind, 947.
persons *in vinculis;* illiterate or ignorant, 928, 948.
persons intoxicated, 949.
persons under duress or undue influence, 950, 951.
sailors, 952.
expectants, heirs, and reversioners, 953.
post obit contracts, 954.
transactions presumptively invalid between persons in fiduciary relations, 955–963.
element of mental weakness, ignorance, etc., unnecessary, 955.
undue influence in connection with, 955.
general principles, 956.
classes of cases; parties dealing with each other, and on one side only, 957.
gifts and contracts, 957.
trustee and beneficiary, 958, 1044–1052, 1075–1078. See TRUSTEE AND CESTUI QUE TRUST.
principal and agent, 959, 1049–1052, 1075–1078. See PRINCIPAL AND AGENT.
attorney and client, 960, 1049–1052, 1075–1078. See ATTORNEY AND CLIENT.
guardian and ward, 961, 1049–1052, 1075–1078. See GUARDIAN AND WARD.
parent and child, 962.
miscellaneous relations, 963.
confirmation and ratification of transactions, preventing relief, 916, 964.
what contracts may be ratified: illegality, 964.
requisites for ratification, 916, 964.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

FRAUD, CONSTRUCTIVE — *Continued.*
acquiescence and lapse of time, preventing relief, 418, 419, 817, 917, 965.
against third persons not parties to the transaction, 966-974.
secret bargains in, of compositions with creditors, 967.
kinds of relief to which debtor entitled, 403, note, 967.
conveyances in fraud of creditors, 968.
[suit to set aside, retention for full relief, 241, note.]
voidable at common law, 968.
existing rules are founded on statute, 968.
consideration requisite by statute, 969.
fraudulent intent requisite, 970.
how ascertained, presumptions, 970, 971.
existing creditors, 971, 972.
subsequent creditors, 971, 973.
conveyances in fraud of subsequent purchasers, 974.
See FRAUD.

FRAUDS, STATUTE OF. See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES. See FRAUD.

FREIGHT,
to be earned on voyage contracted for is possibility coupled with interest, 1286, 1289.
assignment of future, at law and in equity, 1289.

FUND,
assignments of a, 169, 1280-1284. See ASSIGNMENTS.

G

GAMING,
contracts may be illegal by statute, 402, 930.
that contract is, constitutes defense, 938, 940.
contracts when executed not canceled, or money recovered back, 938, 940.
when executory canceled or negotiation restrained, 938, 940.

GEORGIA,
law and equity systems distinct, but administered by same tribunal in, 41, note.
person having "complete equity" may maintain ejectment in, 137, note, 219, note.
equity jurisdiction co-extensive with English chancery, 285, 342, 345.
statutory provisions concerning, 285, note.
election of widow concerning dower in, 494, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
[time within which mortgage must be recorded, 722, note.]

GEORGIA — *Continued.*
passive trusts in, 986, note.
[spendthrift trusts in, 989, note.]
express trusts in, 1003, note.
charitable trusts in, 1029, note.
implied trusts in, 1042, note.
statutory provisions concerning married women's separate property, and contracts, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedent's estate in, 349, note, 1154.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance does not exist in, 1249.
whether formerly assignable, 1254, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
statutory suit to quiet title and remove cloud from title in, 1396, note, 1397, note.

GIFTS CAUSA MORTIS,
suits for, are pecuniary reliefs belonging to concurrent jurisdiction, 187.
what are; general nature and essentials of, 1146.
if article delivered, donee a trustee for donor, until donor's death, 1146, 1150.
gifts made in last sickness, presumed to be, 1146.
nature of evidence to establish, 1146, 1147, note.
not testamentary: donee's title obtained directly from donor, 1147.
imperfect testamentary and *inter vivos* gifts not supported as, 1147.
liable for testator's debts in deficiency of assets, 1147.
to whom may be made, 1147.
property capable of being subject of, 1148.
delivery, an essential of, 1146, 1149.
must be accompanied by intention to give, and intention by delivery, 1149.
to whom must be made, 1149.
actual or constructive, 1149.
acceptance necessary: presumption of, 1149.
inchoate, nature of, 1146, 1150.
revocation of, before death, by language indicating intent, 1146, 1150.
by recovery from sickness or escape from peril, 1146, 1150.
donor must die of very sickness or peril feared, 1146, 1146, note, 1150.
not possible by donor's will; satisfaction of, by legacy, 1150.

GIFTS CAUSA MORTIS — *Continued.*
jurisdiction of ecclesiastical courts over, 1151.
of equity concurrent, 187, 1151.
exclusive, where right and interest equitable, 1151.
of probate courts in America concerning, 1151.

GIFTS INTER VIVOS,
distinction between, and testamentary gifts, where made in fiduciary relations, 957, note, 960, note.
imperfect, not supported as valid gifts *causa mortis,* 1147.
property the subject of, 1148, note.
delivery and intention necessary in, 1149, note.
distinction between, and gifts *causa mortis* as regards revocation, 1150.

GOOD FAITH,
as principle upon which early chancellors based decisions, 50, 56.

GOOD-WILL,
what is, and capability of, of assignment, 1355.
sale of business with, when enforced against vendor, 934, note, 1355, 1405, note.

GOVERNMENT,
officers of, cannot be compelled to discover matters of state, 203.
contracts interfering with functions of, illegal, 935.
for procurement of office, 935.
interfering with legislative proceedings, 935.
with executive and judicial proceedings, 935.

GRACE,
commencement of exercise of, by chancellor, 33.
statute of 22 Edw. III. concerning, 34, 35.

GRANTOR AND GRANTEE,
trust inferred from powers and authority given to grantee, 1011.
liabilities and rights of, in conveyances by mortgagors, 1205–1208. See MORTGAGOR AND MORTGAGEE.
grantee of mortgaged premises when subrogated on payment of mortgage debt, 1212, note.
entitled to redeem from mortgages, 1220, note.
lien of grantor, on conveyance, 167, 1249–1259. See LIENS. See DEEDS.

GUARANTIES,
whether pass by assignment of debt, 1279, note.

GUARDIAN AND WARD,
what rights and duties between, belong to equity, 99, 100.
mistake of law in transactions between, relieved against, 848.
duty to disclose in transactions between, 902–904.

GUARDIAN AND WARD — *Continued.*
reward to guardian for procuring or consenting to marriage with ward, illegal, 931.
conditions or limitations restraining marriage to extent of guardian's consent, valid, 933.
number requisite to give consent where several, 933.
validity of dealings and transactions between, 961.
constructive trust where guardian purchases property with ward's funds, 422, 587, 1049.
where guardian obtains renewal of lease in his own name, 1050.
in wrongful acquisition of trust property by guardian, 1052.
what constitutes charter of power of guardian, 1062.
guardian must not deal with ward's property for own advantage, 961, 1075.
must not mingle his own with ward's funds, 1076.
must not act inconsistent with ward's interests, 961, 1077.
must not sell ward's property to, nor buy from himself, 961, 1078.
of infants and insane are *quasi* trustees, 157, 1088, 1097.
committee of lunatic entitled to redeem from mortgage, 1220, note.
jurisdiction of equity to appoint guardians, 78, 1306.
when exercised; domicile; situation of property, 1306.
over guardians, 157, 1097, 1308-1310. See INFANTS.
how far abridged by jurisdiction given to law courts, 78, 280, 1309.
guardian compelled to account in equity, 78, 280, 1097, 1313, 1421, note.

H

HEIRS,
interest of vendee under executory contract for sale of land descends to, 105.
cannot during life of ancestor compel discovery, 198, note.
right of discovery of title deeds by and against devisee, 198, note.
bound by election of ancestor, 516.
surrender of copyholds against, supplied, 588.
are not *bona fide* purchasers, 747.
held a trustee when devise prevented through fraud, 919, 1054.
agreements between, to share property which may descend, not illegal, 931, note.
transactions with expectant, when relieved against, 953.
post obit contracts made with, when relieved against, 954.
resulting trust enforced against, 1043.
constructive trust enforced against, 1048.
trust devolving on, on death of trustee, 1060.
land descends to, when devise lapses, 1143, 1144.
cannot maintain action to construe will, 1156.
money directed or agreed to be laid out in land descends to, 371, 1165.

HEIRS — *Continued.*
resulting trust to, on total failure of purposes of conversion of land, 1170.
in partial failure, in wills, surplus results to, as money, 1171.
in partial failure of purposes of conversion of money, in deeds, 1174.
mortgagor's interests, in equity, descend to, 73, 162, 1181.
of mortgagor subrogated on payment of mortgage debt, 798, 1212, note.
entitled to redeem from mortgages, 1220, note.
grantor's lien avails against grantee's, 1253.
may be enforced by grantor's, 1254.
vendor's legal title in land descends to, 1261.
vendee's interest descends to, 105, 368, 372, 1261, 1406.
hope of, inheriting is mere expectancy, 1286.

HONESTY,
as a principle upon which chancellor based decisions, 35, 50.

HUSBAND AND WIFE,
what rights and duties between, belong to equity, 99, 100.
wife not compelled to make discovery against husband, 203.
power of, over community property, 503.
legacy by husband to creditor-wife, whether in satisfaction, 539.
portion or advancement to her husband, whether in satisfaction of legacy to female child, 559.
defective execution of powers aided on behalf of wife, 588, 589, 834.
conveyances or settlements in fraud of marital rights set aside, 920, 1113.
agreements for separation between, when valid and enforced, 402, note, 932, 1402, note.
dealings between, when invalid, 963.
trust arising where husband purchases property with wife's money, 422, 587, 1037, note, 1049.
no trust results where husband purchases property in wife's name, 981, 1039, 1041.
nor in conveyance from husband to wife, 981.
covenant to settle by either, created use, 981.
rights of husband on death of wife intestate, 1110.
rights of, in marriage settlements in case of adultery, 1110.
legacies between, whether preferred in abatement, 1141.
executory agreements between, before marriage, enforced in equity after, 1297, 1403, note.
husband's liability for wife's necessaries constitutes equitable debt, 1299.

See MARRIED WOMEN.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

I

IDAHO,
distinction between legal actions and suits in equity abolished in, 40, note.
recording in, 646, note.
assignments of things in action in, 705, note.
[married women's contracts in, 1126, note.]
real party in interest to sue in, 1273, note.
interpleader in legal actions in, 1329, note.
statutory suit to quiet title in, 1396, notes.

IDIOTS,
transactions of, when invalid, 946.
jurisdiction of equity over persons and property of, 1311-1314. See NON COMPOTES MENTIS.

IGNORANCE,
relief from forfeitures occasioned by, 451, 454.
when does not prevent estoppel, 809.
essential prerequisite of mistake is, 839.
mistake of fact may consist of, 854.
delay through, of fraud does not bar remedies, 917.
inadequacy accompanied by, relieved against, 928, 948.
in setting up defense at law, not relieved against, 1361, note.
of facts constituting defense, no excuse for failure to make it, 1361, note.

ILLEGALITY,
jurisdiction of equity in cases of, not abridged by remedy given at law, 278, 280.
maxim, He who seeks equity must do equity, applied where relief sought against, 391, 937.
He who comes into equity must come with clean hands, applied to cases of, 402.
limitations on the application of the maxim, 399, note.
in assignment of things in action, as between assignors and assignees, 709.
illegal contracts and transactions constituting constructive fraud, 929-942.
kinds of relief, affirmative and defensive in, 929.
illegal because contrary to statute, 402, note, 930.
usurious, gaming, and smuggling contracts, 402, note, 930.
illegal because opposed to public policy, 931-935.
to influence a testator in making dispositions, 931.
to share property which may descend, 931, note.
interfering with freedom of marriage, 931.
marriage brokerage contracts, 931.
contracts in restraint of marriage, 931.

ILLEGALITY — *Continued.*
rewards for marriages, 931.
secret contracts in fraud of marriage, 931.
for a separation, when valid, and enforcement of, 402, note, 932, 1402, note.
conditions and limitations in instruments in restraint of marriage, when valid, 933. See MARRIAGE.
in restraint of trade, 934. See TRADE.
interfering with bidding at auctions; puffing, 934.
use of fraudulent trade-marks, 934, 1353.
policy of statute regulating business dealings interfered with, 402, note, 934.
trading with alien enemies, 934.
interfering with governmental functions, 935. See GOVERNMENT.
illegal because opposed to good morals, 936.
for past or future illicit sexual intercourse, 402, 936.
promoting or furnishing opportunities for unlawful cohabitation or prostitution, 402, 936.
constituting champerty or maintenance, 936.
forbearance or abandoning of criminal prosecution, 402, 936.
equitable jurisdiction in case of, 937–942.
usurious contracts relieved against, 391, 403, note, 937. See USURY.
gaming contracts, when relieved against, 402, 938. See GAMING.
ordinary illegal contracts when relieved against, 402, 939.
maxims limiting exercise of jurisdiction, 402, 403, 929, 939–942. See IN PARI DELICTO.
meaning of maxim, *In pari delicto,* etc., 939.
in pari delicto, general rules, 401, 402, 929, 940.
limitations, 403, 941.
when not *in pari delicto,* 403, 942.
illegal contracts cannot be ratified, 964.
trusts illegal or unlawful, not enforced, 987.
resulting trusts in case of, of purposes, 1032.
corporations and directors restrained from committing illegal acts, 1345.
public officers restrained from committing illegal acts, 1345.

ILLICIT INTERCOURSE,
contracts based upon future or past, illegal, 936.
based upon termination of, and providing for children from, valid, 402.

ILLINOIS,
law and equity systems distinct, but administered by same tribunal in, 41, note.
equity jurisdiction co-extensive with English chancery, 285, 342, 345.
statutory provisions concerning, 285, note.

ILLINOIS — *Continued.*
election of widow entitled to dower in, 494, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
[spendthrift trusts in, 989, note.]
deeds of trust in, 995, note.
charitable trusts in, 1028, note, 1029, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's power of disposition of separate property in, 1105, note.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedent's estate in, 349, note, 1154.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance exists in, 1249.
whether assignable, 1254, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
statutory suit to quit title, and remove clouds from title in, 1396, notes, 1397, note.

ILLITERACY,
contracts with illiterate persons may be relieved against, 856, note, 948.

IMPROVEMENTS,
made by joint owner; right of contribution and equitable lien for, 1240.
compensation for, in suits for partition, 1240, note, 1389.
made under mistake as to title, compensation, and equitable lien for, 1241.
made by life tenant; right of reimbursement, and equitable lien for, 1242.
vendee of land from time of conclusion of contract entitled to subsequent, 1406.
making, as constituting part performance of verbal contract, 1409.

INADEQUACY,
of legal remedies as affecting equity jurisdiction, 132, 133, 137-139, 173, 176, 180, 216-222. See REMEDIES.
of price, whether constitutes actual notice, 600.
of consideration as affecting *bona fide* purchaser, 747, note.
as constituting constructive fraud, 925-928. See FRAUD, CONSTRUCTIVE.
in connection with personal incapacity, 943-954. See FRAUD, CONSTRUCTIVE.

INDEMNITY,
requirement of, as ground of exercise of equity jurisdiction on lost sealed instruments, 831.
on lost unsealed instruments, 832.

INDIANA,
distinction between sealed and unsealed instruments abolished in, 70, note.
equity jurisdiction, extent of, in, 287, 342, 345.
statutory provisions concerning, 287, note.
reformed procedure adopted in, 40, note, 287.
[election of widow entitled to dower in, 494, note.]
[notice of *lis pendens* in, 640, note.]
recording in, 646, note, 733, note.
effect of other kind of notice in absence of record in, 664, note.
assignments of things in action in, 705, note.
[spendthrift trusts in, 989, note.]
deeds of trust in, 995, note.
charitable trusts in, 1028, note, 1029, note.
resulting trusts in, where conveyance to one, price paid by another, 1042, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's contracts in, 1126, notes.
equity jurisdiction over administration of decedents' estate in, 1154.
mortgages of land in, 163, note, 1188.
[assignment of note does not carry mortgage in, 1209, note.]
grantor's lien on conveyance exists in, 1249.
whether assignable, 1254, note.
real party in interest to sue in, 1273, note.
personal representatives of deceased joint debtor sued with survivors in, 1301, note.
estate of joint surety whether liable in, 1302, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.
necessity for injunction restraining action at law where new parties required, obviated in, 1372, note.
statutory suit to quiet title in, 1396, notes.

INFANTS,
proceedings in which jurisdiction is exercised over, are exclusively equitable remedies, 171.
discovery will not be granted against, 199.
doctrine of election whether applies in attempted dispositions by wills of, 482.
election by, made by court, 509.
relief against, given to *bona fide* purchaser for fraud, 780.

INFANTS — *Continued.*
equitable estoppel applied to, 815.
contracts of, generally voidable, 945.
disabilities of, no defense to fraud, 945.
may be trustees, 987.
legacies given to; jurisdiction of equity over, exclusive, 1128.
money from land of, sold compulsorily under statute, not converted, 1167.
conversion of property of, under order of court, 1167, note.
cannot elect to have a reconversion; election by the court, 1176, note.
money advanced to pay debts of, constitutes equitable debt, 1300.
jurisdiction of equity over persons and estates of, 78, 1303-1310.
importance of jurisdiction in England, 78, 1303.
statutory changes in America, 78, 1303, 1304.
origin of the jurisdiction, 1304.
whether originated in king's power as *parens patriæ*, 1304.
firmly established and exercised as judicial function, 1304.
how acquired, 1305.
must be made a ward of court by some proceeding, 1305.
existence of property whether necessary to exercise of jurisdiction, 170, note, 1300.
allegation of property formal, 1305.
extent of the jurisdiction, 1306, 1307.
appointment of guardians, 1306.
when appointed; domicile; situation of property, 1306.
controlling the person of, 1307.
removal from custody of guardian or parent, 1307.
jurisdiction when exercised, 1307.
how exercised; supervision of the guardian, 1308-1310.
intellectual, moral, and religious education of ward, 1307, 1308.
management of property; maintenance of ward, 1309.
to what property extends, 1309.
allowance to parent for maintenance, 1309, note.
sale of property for maintenance, 1309.
marriage of ward, 1310.
must be with consent of court, 1310.
when without consent, 1116, note, 1310.
receiver appointed of estates of, during litigation, 1332.
bound by decree in partition, 1387.
See GUARDIAN AND WARD.

INJUNCTIONS.
early chancery jurisdiction increased by use of preventive remedies, 37.
granted in opposition to law, 51.
a well-established equitable remedy, 110, 112.
exclusively equitable, 171.
legal estate protected by exclusively equitable remedy of, 138, 170, 221, 1346.

INJUNCTIONS — *Continued.*
operate *in personam,* 135, note, 170, 1360.
final relief granted on jurisdiction obtained for purpose of, 236, 237.
to prevent multiplicity of suits. See MULTIPLICITY OF SUITS.
[power of United States courts to grant, not abridged by state legislation, 293, note.]
power of courts of New Hampshire to grant, 303, 307.
of courts of Massachusetts, 319.
of Maine, 331, 333.
application of maxim, Equity aids vigilant, not those who slumber on rights, to suits for, 418.
estoppel by acquiescence preventing remedy of, 418, 817, 1359.
remedies in case of fraud accompanied by, 910.
when granted in contracts in restraint of trade, 934.
executory gaming contracts, 938, 940.
when parties are *in pari delicto,* 938, 940.
by beneficiary against trustee to render final relief efficient, 1058, 1340, note.
whether granted to restrain acts, etc., in another state, 1318, note, 1361, note.
origin of; "interdicts," 1337.
may be final, or preliminary and interlocutory, 1337.
general principles, doctrines, and rules the same, 1337.
remedy of, is preventive, prohibitory, or protective, 1337.
statutory provisions concerning granting of, 1337.
effect on equity jurisdiction, 1337.
tendency of American courts is to narrow scope of, 227, note, 1338, note, 1341, note.
fundamental principles governing issue of, 1338.
principle is affirmative and negative, 1338.
violation of rights will be prohibited, unless considerations of policy or expediency forbid, 1338.
inadequacy of legal remedies as determining right to, 1338.
to protect equitable estates or interests, and aid equitable remedies, 1339, 1340.
questions of inadequacy of legal remedies cannot arise, 1339.
where aid of, required, jurisdiction to grant exists and exercised, 1339.
effect of statute authorizing notice of *lis pendens,* 1339, note.
transfer of negotiable instruments restrained for fraud, etc., 221, 1340, 1363, note, 1377, note.
stocks not strictly negotiable, 1340.
chattels and other property, 221, 899, note, 1340, 1363, note.
payment of money in violation of trust restrained, 1340.
breach of trust prevented by, 1340.
violation of confidence restrained, 1340, note.
property in litigation protected by, 1340.
transfer of lands, chattels, or securities restrained in suits to enforce equitable right against property, 1340.

INJUNCTIONS — *Continued.*
to prevent violation of contracts, 1341-1344.
are negative specific enforcements, 1341.
governed by same rules as specific performance, 1341.
may be granted where stipulations are negative or affirmative, 1341.
inadequacy of legal remedies the test, 1341.
[breach of contract affecting numerous parties, 261, note.]
more freely granted in England than America, 227, note, 1341, note.
restrictive covenants creating equitable easements, 689, 1295, 1342.
granted against immediate parties and subsequent purchasers with notice, 689, 1295, 1342.
covenant need not "run" with the land, 689, 1295, 1342.
granted almost as a matter of course, 1342.
contracts for personal acts, 1342.
remedy at law may be wholly inadequate, 1343.
specific performance not decreed, 1343, 1402, note.
when violation restrained by, 1343, 1402, note.
special agreements generally negative in nature, 1344.
granted where specific performance enforced if affirmative, 1344.
inadequacy of legal remedies the criterion, 1344.
agreements not to carry on trade, 934, 1344, note.
not to build, publish rival work, etc., 1344, note.
affirmative contracts implying negative, 1344, note.
corporations and directors restrained from doing illegal or *ultra vires* acts, or violating trust duties, 1345.
from admitting to and expulsion from membership, 1345.
between mortgagors and mortgagees, to restrain waste, improper sales, etc., 1345.
public officers not restrained from acting as such, 1345.
illegal, improper, or unlawful acts when restrained, 1345.
imposition or enforcement of taxes, 258-260, 265, 270, 273, 1345. See TAXES.
cloud on title prevented by, 1345, 1398, note.
married women's property protected by, 1345.
granted in partnership controversies, 1345.
special cases where granted, 1345, note.
to prevent or restrain commission of torts, 1346-1358.
estates and interests generally legal, 1346.
inadequacy of legal remedies the criterion, 221, 1346.
kinds and classes of torts restrained, 1347.
where legal remedy is and is not inadequate, 1347.
title must be clear and injury real, 1347, 1350.
in case of waste, actual or threatened, 1348. See WASTE.
public and private nuisances, 1349-1351. See NUISANCES.

INJUNCTIONS — *Continued.*
violation of easements, 1351.
patent rights and copyrights, 1352.
literary property, as distinct from copyright, 1353.
works of creative art, 1353.
trade-marks, 1354.
good-will, 934, note, 1355, 1405, note.
trespasses, 1347, 1356, 1357. See TRESPASSES.
slander of title; libels; wrongful use of name, 1358.
mandatory, 1359.
term is, in strictness, confined to interlocutory or preliminary, 1359.
final relief of removing obstructions properly abatement, and not, 1359.
may compel defendant to undo wrongful act, 1359.
when granted, 1359.
granted more freely in England than America, 227, note, 1359, note.
acquiescence as defeating right to, 1359.
to restrain actions or judgments at law, 1360–1365.
origin of the jurisdiction, 1360.
equitable jurisdiction built up through instrumentality of, 37, 1360.
addressed to litigant parties, and not to law courts, 1360.
when jurisdiction not exercised; general doctrine, 1361.
court of law able to do as full justice as court of equity, 1361.
where ground of decision equally available at law, 1361.
failure of valid defense, or erroneous decision at law, 1361.
ignorance, mistake, or negligence as regards defense, 856, note, 1361, note.
criminal proceedings not enjoined, 1361, note.
action in foreign country or state, 1361, note.
proceedings in other equitable actions, 1361, note.
when jurisdiction exercised, 1362–1364.
equitable estate, right, or interest involved, 219, 221, 1362.
cause containing distinct legal and equitable questions, 1362.
on sealed obligation after payment of debt, 51, 70, 102.
to prevent multiplicity of suits, 1362, note. See MULTIPLICITY OF SUITS.
when discovery in aid of defense sought, 1362, note.
legal remedies inadequate, 221, 914, note, 1363.
instruments executed through fraud, 221, 914, note, 1363.
equitable affirmative relief necessary, 1363.
fraud, accident, or mistake in trial at law, 221, 836, 871, 899, note, 914, note, 919, 1364.
final relief granted, when restrained, 236.

INJUNCTIONS — *Continued.*
jurisdiction obsolete through power of granting new trials at law, 1365.
remaining in courts of equity, 278, 280, 1365.
equitable defenses in legal actions, as a substitute for, to restrain legal actions or judgments, 1366–1374.
effect of equitable pleas permitted under common-law procedure, 1367.
equitable defenses under the reformed procedure, 1368.
legal and equitable defenses united in what states, 1368, note.
meaning and nature of equitable defenses, 1369.
may entitle defendant to affirmative relief or operate as bar, 1369.
injunctions against actions at law in general unnecessary, 1370.
effect of courts of original jurisdiction having full equity powers, 1370, note.
injunctions when may still be necessary, 1371–1373.
to prevent multiplicity of suits, 1371.
cross-complaint precluding necessity for, 1371.
where new parties required, 1372.
where codes provide for bringing in new parties, 1372.
cross-complaint precluding necessity for, 1372.
where no affirmative relief required, in states requiring affirmative relief on equitable defenses, 1373.
illustrations of equitable defenses, 1374.

IN LOCO PARENTIS,
legacy given by one, to creditor-child, whether in satisfaction, 539.
debt by one, to child whether satisfied by advancement in parent's life-time, 540.
legacies to child whether satisfied by portions and advancements, 553–564. See SATISFACTION.
portions to child whether satisfied by subsequent legacies, 565–568. See SATISFACTION.
defective execution of powers aided on behalf of child, 588, 589, 834.
trust inferred when property given to one with directions for maintenance, 1012.
no resulting trust where title taken in another's name by one in, 1039, 1041.
See PARENT AND CHILD.

IN PARI DELICTO,
no relief, in general, from actual fraud, where plaintiff, 401, 916.
limiting exercise of equitable jurisdiction over illegal contracts, 402, 403, 929, 939–942.
meaning of, 939.
cancellation, or recovery back of money not decreed, when contract executed where plaintiff, 402, 929, 938, 940.

IN PARI DELICTO — *Continued.*
decreed in special cases from motives of public policy, 403, 941.
in usurious contracts, 403, note, 937, 941, note.
in marriage brokerage contracts, 941, note.
in secret bargains in compositions and assignments, 403, note, 967.
corporation, when estopped from setting up illegality, 940, note.
suit by third person for accounting or recovery of proceeds, 940, note.
contract, when executory, not enforced, 402, 929, 938, 940.
specific performance refused where illegality, disclosed by evidence, 940.
nature of evidence to show illegality to constitute defense, 940, note.
contract, when executory canceled, or ancillary remedies granted, 940.
relief, when granted, 937, 938, 940.
when parties not, full relief granted against executed and executory contracts, 403, 929, 937, 942.
cases which may occur, 942.
duress, threats, undue influence, etc., 942.
contracts intrinsically unequal, 942.
knowledge or belief that property or money will be put to illegal use or crime, 942, note.
contracts illegal by statute enforced on implied contract, 942, note.
ultra vires and other corporate contracts, 942, note.

IN PERSONAM,
decrees and remedies of equity operating. See DECREES.

IN REM,
decrees and remedies of equity operating. See DECREES.

INSOLVENCY. See BANKRUPTCY AND INSOLVENCY.

INSURANCE,
duty to disclose to fullest extent in contract of, 902, 907.
specific performance of agreements to insure, 1402, note.
See POLICIES OF INSURANCE.

INTERPLEADER,
is an exclusively equitable remedy, 171.
remedy of, is ancillary and provisional, 171, 1319, 1320.
is not specific, 171, 1319, 1320.
in what cases granted at common law, 1320, note.
general nature and object of, 1320.

INTERPLEADER — *Continued.*
rationale of the remedy; the risk of being vexed by several suits, 1320, note.
effect of double liability, 1320, note.
nature of the risk, 1320, note.
suit may not have been actually commenced, 1320, note.
inadequacy of legal remedies when, granted, 221, 1320.
may be granted whether claims are legal or equitable, 1321.
essential elements requisite for remedy of, 1322–1326.
the same thing, debt, or duty, 1323.
claims of different amounts, 1323, note.
taxes levied in different counties, 1323, note.
identity of claims in choses in action, 1323, note.
privity between opposing claimants, 1324.
no relief of, where titles independent, 1324.
plaintiff a mere stake-holder, without claim or interest, 1325.
interest in legal question at issue not prejudicial, 1325.
charge, lien, or claim admitted by defendants, 1325.
stake-holder must be the plaintiff, 1325, note.
must be in possession or custody of fund, 1325, note.
no independent liability to one claimant, 1326.
liability on contract or for acknowledgment of title, 1326.
fraud or mistake in promise or acknowledgment, 1326.
liability arising from nature of original relation, 1326.
bailee and bailor; principal and agent; tenant and landlord, etc., 1326, 1327.
by bailees, agents, tenants, and parties to contracts, 1326, 1327.
not in general allowed, 1326, 1327.
allowed when opposing claimant's title is derivative, and not antagonistic, 1327.
bill of, what allegations must contain, 1328.
must be accompanied by an affidavit, 1328.
plaintiff in, when entitled to costs, 1328.
in legal actions, 1329.
general scope of the statutes, 1329.
effect on equity jurisdiction, 297, note, 1329.

INTERROGATORIES,
as superseding discovery, 193, 198, note, 209.

INTOXICATION,
transactions with persons intoxicated, whether invalid, 949.

INVESTMENTS,
by trustees, 1071–1074. See TRUSTEE AND CESTUI QUE TRUST.

IN VINCULIS,
inadequacy with persons, may be ground for relief, 928, 948.
illegal contracts made with persons, relieved against, 942.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

IOWA,
distinction between sealed and unsealed instruments abolished in, 70, note.
equity jurisdiction co-extensive with English chancery, in, 285, 342, 345.
statutory provisions concerning, 285, note.
reformed procedure adopted in, 40, note, 287.
time within which widow must elect in, 513, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
assignments of things in action in, 705, note.
deeds of trust in, 995, note.
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts, in, 1099, note.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance exists in, 1249.
real party in interest to sue in, 1273, note.
personal representatives of deceased joint debtor sued with survivors in, 1301, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
interpleader in legal actions in, 1329, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.
necessity for injunction restraining action at law where new parties required obviated in, 1372, note.
statutory suit to quiet title in, 1396, notes.
payment of price in, as part performance, sufficient to enforce verbal contract, 1409, note.

J

JOINT OWNERS,
early equity jurisdiction of controversies between, 51.
joint ownership preferred at common law to ownership in common, 406, 408.
preference given to ownership in common over, by equity, 406, 408.
application of maxim, Equality is equity, 406, 408.
when legal rule in favor of joint ownership operates in equity, 408.
legislation declaring against joint ownership, 408.
trustees are, of trust property, 1060.
entitled to redeem from mortgages, 1220, note.
equitable lien from expenditure by one of several, 1240.
partition of land between, at law, 1386.
in equity, 1386-1390. See PARTITION OF LAND.
accounting between, in equity, 1421, note.
as an incident to partition, 1389, 1421, note.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

JOINT RIGHTS AND LIABILITIES,
maxim, Equity looks to intent rather than to form, applied to, 384.
leaning of the common law in favor of, 406, 409, 1301.
how regarded in equity, 406, 409, 1301.
maxim, Equality is equity, applied to, 406, 409.
contribution among persons jointly or jointly and severally liable, 1418.

JUDEX,
office of, in Roman law, 4, 6.

JUDGMENTS,
nature of reliefs in, under reformed procedure, 87, 116, 183, 357.
rules concerning at common law, 113, 175.
in equity, 114, 115, 175.
[jurisdiction of United States courts to enjoin, not abridged by state legislation, 293, note.]
as constituting notice, 641-643.
priorities between liens of, and those created by trusts or contracts *in rem*, 685, 720-725.
inferiority of judgment liens, generally, 685, 720.
between subsequent docketed, and prior unrecorded mortgages, 719, 721, 722.
[between subsequent docketed, and prior unrecorded deeds, 721, note.]
[between subsequent docketed, and equity to reform for mistakes, 721, note.]
mortgages to secure future advances, 1198, 1199.
defectively executed and equitable mortgages, 685, note, 721, note.
against grantee and grantor's lien, 721, note, 1253.
against grantee and grantor's lien by reservation, 1258, note.
vendee and vendor's lien, 685, note, 720, note, 721, note, 1261, note.
interest of *cestui que trust*, 685, note, 721, note.
notice of prior lien or unrecorded mortgage, 723.
between purchase at sale under subsequent, and prior unrecorded mortgages or liens, 724, 773.
purchase-money mortgages and, against mortgagor, 725.
whether corrected for mistake, 871, 1376.
when canceled for accident, mistake, or fraud, 836, 871, 914, note, 919, 1377.
when fraudulent, a defense, 919.
aided in equity when prevented or hindered by fraud, 919, note.
when enjoined, 1360-1365. See INJUNCTIONS.
in statutory suits to quiet title, effect of, 1397, note.
when removed as constituting cloud, 1399, note.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

JUDGMENTS — *Continued.*
specific performance of agreements to compromise and discharge, 1402, note.
necessity for obtaining, as preliminary to creditors' suits, 1415.
See DECREES.

JURISCONSULTS,
functions and "responses" of, in Roman law, 8, note.

JURISDICTION,
of equity. See JURISDICTION OF EQUITY.
of prætors in Roman law, 6.
definition of, 129.
of American courts, state and national, whence derived, 35, note, 282.

JURISDICTION OF EQUITY,
necessity of historical review of, 1.
commencement and progress of, 12, 30–42.
ancient office of chancellor, 12, 31.
early ordinary jurisdiction of chancellor, 32.
chancellor's extraordinary jurisdiction; grace, 33–35.
commencement of, 33.
rapid growth of; statute of 22 Edw. III., concerning, 34, 35.
principles upon which chancellor based decision, 35, 50.
development of, 36–39.
ill-defined in earliest periods, 36.
over crimes; recovery of land; trespass, 36.
causes tending to extend, 37, 38.
the power of probing consciences, 37.
of prevention, 37.
of awarding damages, by statute, 37.
recognition by Parliament, 37.
introduction of uses, 38.
opposition to, from Parliament and common-law judges, 39.
how far combined with that of law in England and America, 40–42.
early corrective and supplementary, 50–52.
how determined at the present day, 62.
effect on, through changes in legal rules, instances, 69–88.
sealed and lost instruments, penalties, mortgages, trusts, recording, administration, infants, and married women, 70–80.
statutory limitations of, 81.
practical abolition of auxiliary, 82, 83, 143.
reformed procedure as affecting, 84–88, 353–358. See REFORMED PROCEDURE.
as a basis of equity classification, 121–125. See CLASSIFICATION OF EQUITY.
definition of, 129, 130.
requisites, in order that a case may come within the, 130, 424.
want of, effect on judgment, 129, 130.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

JURISDICTION OF EQUITY — *Continued.*
objection to, when to be raised, 129, note, 130.
distinction between existence of, and its proper exercise, 131, 139, note, 218.
depends on existence of equitable rights and interests, and equitable remedies, 133, 424.
how far *in personam,* and how far *in rem,* 134, 135, 170, 428, 1317, 1318.
decrees by statute made to operate *ex proprio vigore,* or executed by officer, 135, 170, 428, 1317, 1318.
effect of legislation on power of equity to act *in personam,* 135, 170, 1317, 1318.
threefold: exclusive, concurrent, and auxiliary, 136.
what embraced in exclusive, 137, 138, 146–172. See EXCLUSIVE JURISDICTION.
what embraced in concurrent, 139, 140, 173–189. See CONCURRENT JURISDICTION.
cases may fall under both exclusive and concurrent, 141.
what embraced in auxiliary, 142–144, 190–215. See AUXILIARY JURISDICTION.
rules concerning government of, 216–281.
inadequacy of legal remedies affecting, 132, 133, 137–139, 173, 176, 180, 216–222. See REMEDIES.
discovery as a source of, 143, 181, 223–226. See DISCOVERY.
when attaches for any purpose extends to whole controversy, 181, 231–242.
as applied to concurrent jurisdiction, 181, 231.
as applied to exclusive jurisdiction, 181, 232.
limitations on doctrine, 233.
illustrations of doctrine, 234–241.
in cases of discovery, 224–230, 234. See DISCOVERY.
of administration, 235, 351, 1154.
of injunction, 236, 237.
[against judgments, executions, etc., 236, note.]
[not, when no ground for equitable jurisdiction, 237, note.]
[against trespass and waste, 237, note.]
[when right to equitable relief fails pending suit, 237, note.]
[not, when only some incidental matter of equitable cognizance, 236, note.]
miscellaneous cases, 238–241.
effect of reformed procedure on doctrine, 242.
exists to prevent a multiplicity of suits, 243–275. See MULTIPLICITY OF SUITS.
once existing, not lost by jurisdiction subsequently acquired by law courts, 276–281.

JURISDICTION OF EQUITY — *Continued.*
doctrine, a source of concurrent jurisdiction, 176, 182, 276.
as applied to exclusive jurisdiction, 182, 276.
where jurisdiction enlarged by law courts, 277, 278.
examples, 278.
where jurisdiction enlarged by statute, 279, 280.
examples, 280.
where statute destroys equity jurisdiction, 281.
as held by the courts of the several states and the United States, 282–358.
unlimited jurisdiction not held by any American tribunal, 282.
common-law jurisdiction, whence derived, 35, note, 282.
equitable, whence derived, 282.
amount of: four classes of states, 283–288.
first class: where expressly co-extensive with English court of chancery, 284.
second class: where impliedly co-extensive, 285.
third class: where limited by statute, 286.
fourth class: no distinction made between law and equity, 287.
summary of conclusions, 288.
as established by judicial interpretation, 289–358.
uniformity does not exist, 288–290.
in the United States courts, 291–298. See UNITED STATES COURTS.
states where special and partial by statute, 299–341. See NEW HAMPSHIRE; MASSACHUSETTS; MAINE; PENNSYLVANIA.
states where jurisdiction complete, 342–352.
what states included, 342.
questions stated, 343.
where limited by inadequacy of legal remedies, 342, notes, 344.
extent of statutory jurisdiction, 342, 345.
over administrations, 346–352, 1152–1154. See ADMINISTRATIONS.
reformed procedure as affecting, 84–88, 353–358. See REFORMED PROCEDURE.
maxim, Equity will not suffer a wrong without a remedy, the source of, 423, 424.

JURY,
relations of Roman judex to, 4.
chancellor could not summon, 32.

JURY TRIAL,
an obstacle to complete amalgamation of law and equity, 116.
as preventing equitable cognizance when law courts have first taken cognizance, 179.
effect of constitutional guaranties of, on equity jurisdiction concerning fraud, 914.

JUS GENTIUM,
definition of, and influence on Roman law, 8.

K

KANSAS,
distinction between sealed and unsealed instruments abolished in, 70, note.
equity jurisdiction, extent of, in, 287, 342, 345.
statutory provisions concerning, 287, note.
reformed procedure adopted in, 40, note, 287.
election of widow entitled to dower in, 494, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note, 733, note.
effect of other kind of notice in absence of record in, 664, note.
assignments of things in action in, 705, note.
deeds of trust in, 995, note.
[charitable trusts in, 1029, note.]
resulting trusts in, where conveyance to one, price paid by another, 1042, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance does not exist in, 1249.
real party in interest to sue in, 1273, note.
personal representatives of deceased joint debtor sued with survivors in, 1301, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
interpleader in legal actions in, 1329, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.
necessity for injunction restraining action at law where new parties required obviated in, 1372, note.
statutory suit to quiet title in, 1396, notes.

KENTUCKY,
distinction between sealed and unsealed instruments abolished in, 70, note.
equity jurisdiction co-extensive with English chancery, 285, 342, 345.
statutory provisions concerning, 285, note.
reformed procedure adopted in, 40, note, 287.
[statutory election of widow entitled to dower in, 494, note.]
time within which widow must elect in, 513, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
assignments of things in action in, 705, note.

KENTUCKY — *Continued.*
[spendthrift trusts in, 989, note.]
deeds of trust in, 995, note.
charitable trusts in, 1029, note.
resulting trusts in, where conveyance to one, price paid by another, 1042, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's power of disposition of separate estates in, 1105, note.
married women's contracts in, 1126, notes.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance exists in, 1249.
whether assignable, 1254, note.
real party in interest to sue in, 1273, note.
personal representatives of deceased joint debtor sued with survivors in, 1301, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
statutory suit to quiet title in, 1396, note.
specific performance of verbal contracts part performed in, 1409, note.

KNOWLEDGE,
distinction between, and notice, 592, 594, 603.
of truth necessary by party estopped, 809.
by person claiming benefit of estoppel, 810.
element of, in fraud. See FRAUD.

L

LACHES,
application of maxim, Equity aids vigilant, not those who slumber on rights, to, 418, 419.
preventing operation of maxim, Equity will not suffer a wrong without a remedy, 424.
constructive notice arising from, 610–613. See NOTICE.
one equity superior to other by reason of, 687.
assignee of thing in action may lose priority through, 698–702. See PRIORITIES.
priorities among equitable estates, mortgages, etc., lost by, 716, 727, 731, 732.
of plaintiff where *bona fide* purchaser has made only part payment, 750.
as defeating defrauded stockholders' rights of remedy, 881, 965, note.
constituting fraud, where *bona fide* statement afterwards discovered to be untrue, 888.

LACHES — *Continued.*
constituting a bar to relief from fraud, 817, 897, 917, 965.
specific performance refused where during, inadequacy occurs, 927, note.
grantee's lien may be waived by grantor, 1252.
injunctions against trespasses, nuisances, etc., not granted where, 817, 1359.
effect of, where judgment at law sought to be restrained for accident, fraud, or mistake, 1364, note.
as defense to specific performance, 1408.
See ESTOPPEL; ACQUIESCENCE.

LAND,
jurisdiction of early chancellors to recover possession of, 36.
jurisdiction of equity over, how increased, 53.
in what states seal required in conveyance or contract concerning, 70.
verbal contracts concerning, enforced in equity in opposition to law, 103.
equity jurisdiction to obtain possession of, does not in general exist, 177, 735.
exists in certain special cases, 140, 174, 180, 185, 735, note. See BOUNDARIES, ESTABLISHMENT OF DISPUTED; DOWER, ASSIGNMENT OF; PARTITION OF LAND.
possession may be decreed as an incident, 177.
when transfer of, restrained in equity, 221, 1340, 1363, note.
whether remedy in equity, where by mistake conveyed or contracted to be conveyed, 869.
conditions or limitations in restraint of marriage annexed to gifts of, when valid, 933.
notice of assignments of equitable interests in, unnecessary as against subsequent assignees, 697.
introduction by equity of double nature of property in, 982.
investment of trustees in, 1074.
devise of, always specific, 1130, note.
conversion of, into money, and *vice versa,* 161, 371, 1159–1178. See CONVERSION.
executory contracts to convey, enforced where owner dies before time arrives, 1297.
receivers, when appointed in suits between conflicting claimants to, 1333.
equitable defenses in actions to recover, 1374, note.
instruments concerning, reformed, 871, 1376.
canceled, 869, 871, 912, note, 914, note, 1377.
partition of, 1386–1390. See PARTITION OF LAND.
instruments concerning, when removed as constituting clouds, 1399, note. See MORTGAGES; LIENS; VENDOR AND VENDEE; DOWER, etc.

LANDLORD AND TENANT. See LEASES.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

LEASES,
stipulations for payment of sums, for violating covenants in, liquidated damages, 442, note.
forfeitures arising from covenants in, when relieved against, 450, 451, note, 453, 454, 826, note.
possession under, whether and of what notice, 614-625. See NOTICE.
notice of, is notice of covenants in, 628.
may be corrected or canceled, 871, 1376, 1377.
of premises for purposes of prostitution, etc., illegal, 936, note.
statutory trusts for purpose of leasing land, 1003-1005.
renewed by partner or other fiduciary person in his own name inures to others' benefit, 1050.
may cover property to be acquired in future, 1236, note.
tenant when may interplead landlord, 1326, 1327.
may be removed as constituting cloud on title, 1399, note.

LEGACIES,
election where, given. See ELECTION.
satisfaction of, and debts by, 520-577. See SATISFACTION.
are not performance of covenants to leave property by will, 586.
accidental prevention of making of bequests whether relieved against, 828.
bequests may be impressed with trust on account of fraud, 919, 1054.
whether fraud in obtaining, is necessary to the raising of such trust, 1054, note.
rewards for procuring bequests are illegal, 931.
conditions or limitations in restraint of marriage annexed to bequests, when valid, 933. See MARRIAGE.
when action would lie to recover, at common law, 156, 1127.
power of ecclesiastical courts concerning claims to, 156, 1127.
concurrent jurisdiction of equity over, 156, 187, 1127.
jurisdiction of equity over, when exclusive, 156, 1127, 1128.
is based upon trust relations, 156, 1127.
as exists under American legislation, 77, 156, 187, 1129.
generally confined to probate courts, 77, 156, 187, 1129.
kinds of, 1130.
specific, what are, 1130.
article must form part of testator's estate at time of death, 1130, 1131.
title to, obtained by virtue of will, 1130.
legatee entitled to income and profits of, 1130.
ademption of, what is, and rules concerning, 1131.
when takes place, 1131.
does not apply to general or demonstrative, 1131, 1133.
distinction between, and satisfaction of, 524, 554, 1131.
depends on testator's intention, 524, 1131, note.
general, what are, 1132.
pecuniary, described, 1132, note.
create obligations on executors to pay, if sufficient assets, 1132.

LEGACIES — *Continued.*
favored by courts, rather than specific, 1132.
demonstrative, what are, 1133.
combine the advantages of general and specific, 1133.
annuities, what are, 1134.
are for life if no time specified, 1134.
are comprised in term "legacies," in construing wills, 1134, note.
may be governed by rules of demonstrative or general, 1134, 1138, note, 1139.
See ANNUITIES.
abatement of, 1135–1143. See ABATEMENT.
lapsed, when occur, and result, 1144, 1145.
to a class: class determined on testator's death, 1144.
lapse, how prevented by testator, 1144, note.
statutory changes, 1145.
interest of mortgagee, in equity, passes under, 1204.
equitable liens arising from charges of, on property, 1244–1248. See LIENS.

LEGISLATURE,
contracts interfering with functions of, illegal, 635.

[LETTERS,
possession of, may be recovered in equity, when, 185, note.]

LETTERS TESTAMENTARY AND OF ADMINISTRATION,
no jurisdiction of equity to grant, 77.

LEX NATURAE,
definition of, and influence on Roman law, 8.

LIABILITIES,
joint rights and. See JOINT RIGHTS AND LIABILITIES; RIGHTS.

LIBELS,
whether restrained in equity, 1358. See SLANDER OF TITLE.

LIENS,
enforcement of, as equitable remedy, 112, 171.
[bill to enforce, maintainable, although statute has provided another remedy, 279, note.]
[enforcement of, by United States courts, where no remedy provided in state courts, 293, note.]
maxim, Equality is equity, applied to apportionment of, 411, 1222.
not created by covenant to purchase and settle or convey lands, 583.
purchaser or mortgagee with notice of, bound, 688, 692.
priorities among, 716–732. See PRIORITIES.
merger of, 789–799. See MERGER.
of beneficiary on whole amount, where trust funds are mingled, 1076.

LIENS — *Continued.*
trustee's, for expenses and outlays, 1085.
of creditor advancing money to trustee, 1085.
mortgages regarded in equity as, 73, 74, 163, 1181, 1182, 1188, 1204.
equitable, 165-167, 1233-1269.
what included within term, 1233.
what are, 165, 1233.
analogous to and derived from Roman law *hypotheca,* 1233, note.
essence of, is possession remaining with debtor, 165, 1233.
difference between, and common law, 1233.
analogous to and not a species of trusts, 166, 1234.
introduced to make equitable relief on executory contracts, efficient, 166, 1234.
theory of, founded in contracts, express or implied, 166, 1234.
arising from express contract, 167, 1235-1237.
executory agreements indicating intent to charge or convey property as security, 167, 1235.
maxim, Equity regards as done what ought to be done, applied, 373, 1235.
maxim, Equity looks at the intent rather than the form, applied to, 380, 383.
property must be identified, and intent to be held or given as security must appear, 167, 1235.
agreement with reference to future-acquired property, 167, 373, 1236, 1288, 1289.
rights in such cases at law; "potential existence," 369, 1236.
form and nature of agreement immaterial if intent appears, 1237.
agreements to give, and defective mortgages, 383, 1237.
illustrations of agreements creating, 1237.
See ASSIGNMENTS.
arising from implied contracts, 167, 1238-1243.
nature of implied contracts in equity, 1238.
principles upon which based, 1239.
expenditure by one joint owner, 1240.
expenditures through mistake for true owner's benefit, 1241.
knowingly suffered by owner to be made, 1241, note.
by life tenant, 1242.
payment of premiums on life insurance policies, 1243.
maritime, 1243.
partners', 1243.
priority of, arising by contract over those of subsequent judgments, 685, 720, 721, note.
arising from charges by will or by deed, 167, 1244-1248.
legal title vests in recipient, but lien created, 1033, note, 1244.
effect of, on common-law rule making personalty primarily liable, 1244, note.

LIENS — *Continued.*
recipient when personally liable, 1244, note.
distinction between property given for, and subject to or charged with, particular purpose, 1033, note, 1244, note.
intent to charge must clearly appear, 1245, 1246.
from express charges, 1246.
from implied charges, 1247, 1248.
rules governing particular dispositions, 1247, 1248.
considerations upon which based, 1247.
ordinary in favor of grantor, on conveyance, 167, 1249–1254.
adopted in England and in what states, 1249.
distinction between, and vendor's lien under contract of sale, 1249, note, 1260.
origin and *rationale* of, 1250.
whether in harmony with American real-property law, 1250, note.
permitted only for unpaid purchase price, 1251.
debt for purchase price must be certain, ascertained, and absolute, 1251.
how discharged or waived, 1252.
against whom avails, 721, note, 1253.
in favor of whom, avails, 1254.
whether personal and not assignable, 1254.
assignment of debt, whether carries lien, 1254, 1279, note.
in favor of grantor, where reserved, 167, 1255–1259.
excepted from statutes abolishing ordinary grantor's lien, 1249, note, 1255, note.
notes described and made liens by deed, 1255, note, 1256, note, 1259.
what a reservation, 1256.
resemble purchase-money mortgages, 1255, 1257, 1258.
recorded with deed, and notice thereby, 1255, 1257, 1258.
priority of, over general encumbrances, 1258.
how, may be discharged or waived, 1259.
assignable and not personal, 1259.
passes by assignment of debt, 1259.
enforced by suit similar to foreclosure, 1257, note, 1259.
in favor of vendor on contract of sale, 167, 1260–1262.
rule of *lis pendens* extends to, 635.
has been treated the same as grantor's, 1249, 1260.
distinction between, and grantor's liens on conveyance, 1249, note, 1260.
[may exist when land tortiously taken under eminent domain power, 1260, note.]
whether defeated by transfer to *bona fide* purchaser, 1260.
is a mode of expressing vendor's interest arising from conversion, 1260, note, 1261.

LIENS — *Continued.*
vendor's and vendee's positions determined by, and operation of, doctrine of conversion, 105, 368, 372, 1161, 1261.
not waived by taking security, 1261, note.
vendee, when entitled to conveyance, though purchase-money unpaid, 1261, note.
priority of, over subsequent judgments against vendee, 721, note, 1261, note.
assignability of, where notes given, 1261, note.
how enforced, 1260, note, 1262.
tender of deed, whether prerequisite to enforcement, 1262.
in favor of vendee on contracts of sale, 167, 1263.
when arise, and rules concerning, 1263.
arising from deposit of title deeds, 167, 1264–1267.
the English doctrine, 1264.
good as against volunteers and persons with notice, 612, 685, 688, 1264.
doctrine upon what rests, 1264, note.
deposit once made may include future advances, 1264, note.
the doctrine in America, 1265, 1266.
how enforced, 1267.
priority of, over subsequent judgments and voluntary transfers, 685, 720, 721, note.
of judgment creditors in property fraudulently transferred, 1057, note.
married women's contracts as creating, 1122, 1413, note.
various statutory, 167, 1268, 1269.
nature and object of; mechanics' liens, 1268.
enforced by purely legal actions, 1269.
by equitable actions, when charged upon real estate, 167, 297, note, 1267.
equitable jurisdiction enlarged thereby, 1268, 1269.
[by equitable actions, when statute itself provides no method of enforcement, 167, note.]
equitable assignments of fund regarded as property, and not as, 1280, note.
receiver when appointed in suits to enforce equitable, 1334, 1335.
transfer of property restrained in suits to enforce equitable, 1340.

LIMITATIONS,
in restraint of marriage, annexed to gifts, when valid, 933. See MARRIAGE.

LIMITATIONS, STATUTE OF. See STATUTE OF LIMITATIONS.

LIQUIDATED DAMAGES,
stipulations for, are not penalties, 440–445.
whether penalties or, on what depends generally, 440, 445.
effect of use of words, "penalty" and, 440.

LIQUIDATED DAMAGES — *Continued.*
tendency of courts towards penalties in doubtful cases, 440.
[disproportion of sum fixed, not conclusive, 440, note.]
rules determining penalties and, 437, 441-445.
alternative stipulations are, 437.
larger sums securing payment of smaller are penalties, 433, 436, 441.
agreements for performance of single act where damages not easily ascertainable are, 442, 445.
[examples, 442, note.]
[covenants not to carry on business, 442, note.]
[agreements between lessor and lessee, 442, note.]
[provisions against delay in building contracts, 442, note.]
[sale of personal property, 442, note.]
sums for violation of agreements for performance of each of several acts when, 442, note, 443, note, 445.
sum to be paid whether partial or complete default, not, 444.
[not necessary to prove any actual damage, 445, note.]
[no recovery for more than stipulated amount, 445, note.]
specific performance not decreed where provision for, 447.
forfeiture not relieved against, where in nature of, 456.
See PENALTIES; FORFEITURES.

LIS PENDENS,
constructive notice by, 632-640. See NOTICE.
effect of statute authorizing notice of, on right to injunction, 1339, note.

LITERARY PRODUCTIONS,
invasion or piracy of unpublished and private, restrained, 1353.

LOST INSTRUMENTS,
power to sue on, in equity, but not at law, 51, 71, 175, note, 831, 832.
changes made in legal rules as to actions on, 71, 280.
jurisdiction of equity over suits on, exists, although law courts have acquired jurisdiction, 280.
when taken away by statute in case of non-negotiable paper, 281.
does not exist to supply lost records, 827.
to decree re-execution of, 1376, note.

LOUISIANA,
equity jurisdiction, extent of, in, 287, 345.
statutory provisions concerning, 287, note, 345, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
charitable trusts in, 1029, note.
mortgages of land in, 163, note, 1188.
equitable remedies and decrees operating *in rem* in, 1317, note.
statutory suit to quiet title in, 1396, note.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

LUNATICS,
proceedings determining persons to be, are remedial, 98, 112.
are exclusively equitable, 171.
discovery will not be granted against, 199.
election by, made by court, 510.
when contracts and conveyances of, invalid, 946.
committees of, are *quasi* trustees, 157, 1088, 1097.
money from land of, sold compulsorily under statute, not converted, 1167.
conversion of property of, under order of court, 1167, note.
cannot elect to have a reconversion, 1176, note.
committees of, entitled to redeem from mortgages, 1220, note.
moneys advanced to pay debts of, constitute equitable debts, 1300.
jurisdiction of equity over persons and property of, 1311-1314. See NON COMPOTES MENTIS.
receiver appointed of estates of, during litigation, 1332.

M

MAINE,
law and equity systems distinct, but administered by same tribunal in, 41, note.
equity jurisdiction limited in, by statute, 286, 322-337, 345.
statutory provisions concerning, 286, note, 322.
general interpretation of, 322, 323, 345.
applied to mortgages, 324.
penalties and forfeitures, 325.
specific performance, 326, 1409, note.
fraud, 327.
creditors' suits, 328.
trusts, 329.
mistake and accident, 330.
nuisance and waste, 331.
partnership and accounting, 332.
injunction, 333.
taxation by municipal corporations, 334.
discovery, 335.
damages, 336.
special cases, 337.
election of widow, concerning dower, in, 494, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
[spendthrift trusts in, 989, note.]
charitable trusts in, 1029, note.
admissibility of parol evidence in, to vary instruments within statute of frauds, 867.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's contracts in, 1126, note.

MAINE — *Continued.*
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance does not exist in, 1249.
equitable remedies and decrees operating *in rem* in, 1317, note.

MAINTENANCE,
contracts constituting or amounting to, illegal, 936.
assignments not permitted in equity when violating policy of law against, 1276.

MANAGERS. See DIRECTORS.

MANDATORY INJUNCTIONS,
when granted, 1359. See INJUNCTIONS.

MARITIME LIENS,
certain kinds of, enforced by equity in England, 1243.

MARRIAGE,
contracts interfering with freedom of, illegal; brokerage; in restraint of; rewards for; contracts in fraud of, etc., 931.
cancellation or recovery back of money on brokerage contracts decreed, 941, note.
agreements for separation, when valid and enforced, 402, note, 932, 1402, note.
conditions and limitations in restraint of, annexed to gifts, when valid, 933.
when absolute, or partial and reasonable, 933.
consent of trustees or guardians, 933.
number requisite, 933.
fraudulent refusal, 933.
when in restraint of second, 933.
distinction between conditions precedent and subsequent, 933.
between real and personal property, 933.
between conditions and limitations, 933, note.
executory trusts arise in agreements and articles of, 1000.
claims arising from breaches of promise of, whether assignable, 1275.
jurisdiction of equity over, of wards, 1310.
must be with consent, 1310.
where without consent, 1310.
settlement directed to be made, 1116, note, 1310.
whether part performance, sufficient to enforce verbal contract, 1409, note.
See HUSBAND AND WIFE; MARRIED WOMEN.

MARRIED WOMEN,
equity jurisdiction to reach separate estate of, not abridged by relief given at law, [279, note], 280.

MARRIED WOMEN — *Continued.*
whether doctrine of election applies in attempted dispositions by wills of, 482.
rights of, in community property, 503–505.
election by, 508.
appearing in instrument, constructive notice of rights, 630.
notice to agent of, is constructive notice to, 667.
relief against, for fraud, given to *bona fide* purchaser, 780.
equitable estoppel, whether applies to, 814.
relief given against, for fraud, 780, 945, 1104, note.
may be trustees, 989.
separate estate of, 159, 160, 1098–1113.
equity doctrines concerning, as illustrating invasion of common-law rules, 52, 53, 159, 1098.
is a particular instance of trusts, 159, 1098.
early origin of, 35, note, 159, 1098.
jurisdiction of equity over, exclusive, 159, 1098, 1099.
with relation to, how far *feme sole,* 1098, 1104.
free from husband's control, creditors and common-law rights, 989, 1098.
alienation of, may be restricted; restraint on anticipation, 989, 1098, 1107.
distinction between, and her ordinary trust estates, 1098.
trusts upon which held; must conform to statutory regulations, 159, 1098.
passive trusts appearing in connection with, 988, note, 1098, note.
legislation creating statutory estates, effect of, 79, 80, 160, 1099, 1105.
actual trustees in creation of, unnecessary, 1100.
husband held a trustee in absence of actual trustees, 1100.
words showing intention to create, sufficient, 1100, 1102.
how, and by what instruments created; ante and post nuptial settlements, gifts, etc., 1101.
gifts and post nuptial settlements subject to rights of husband's creditors, 973, 1101.
what words showing intention to create sufficient, 1102.
what property may be included in, 1098, 1101, 1103.
character of, may be lost by wife's acts, and husband's dealing with, 1103.
liability of, for commission or acquiescence in breach of trust, 1104.
power of disposition of, in England, 1104.
in America, 1105.
where she takes a full legal estate by statute, 160, 1099, 1105.
where given on express statutory trusts, 159, 1003–1005, 1105, 1126.
states divided into two classes in regard to, 1105.
disposition under power of appointment, 1106.

MARRIED WOMEN — *Continued.*
appointed property not liable for debts, generally, 1106, 1123.
when disposition can be made only by power of appointment, 1106.
restraint on anticipation, clauses in, may be inserted in settlement and conveyance, 989, 1098, 1107.
what words sufficient to constitute restraint, 1108.
property on which restraining clause may operate, 1108.
time during which may operate, 1109.
effect of the restraint, 1109.
does not operate except during coverture, 1109.
operates during all covertures, 1109.
power of court of equity to release restraint, 1109.
terminated before or after coverture by wife's dealings, 1108, 1110.
adultery as affecting, 1110.
devolution in intestacy, 1110.
pin-money of, what is, and rules concerning, 1111.
paraphernalia of, what are, and rules concerning, 1112.
settlement or conveyance by, in fraud of marriage set aside, 920, 1113.
when a fraud on marital rights, 920, 1113.
equity to a settlement, 389, 1114–1118.
is an application of, He who seeks equity must do equity, 389, 1114.
general nature of, 389, 1114.
doctrine of, when applied, 389, 1114.
practically obsolete in America, 389, 1114, note.
extends to what property, 1115.
against whom extends, 389, 1114, 1115.
when does not arise, 1116.
may be waived, 1116.
where ward of court married without consent, 1116, note, 1310.
amount of the settlement, 1117.
form of settlement, 1118.
maintenance of, power of equity to compel, 1119.
alimony, what is, 1120.
jurisdiction of equity to award, 1120, 1299.
contracts of, 1121–1126.
enforcement of, by sale of separate estate, a pecuniary remedy, 112, 1413.
equity, doctrines concerning, as illustrating invasion of common-law rules, 52, 53, 104, 159, 1121.
how considered at law and in equity, 945, 1121, 1293.
not personal, but enforced against separate estate, 1121.
liability for, an incident of separate estate, 1122.
whether equitable liens are created by, 1122, 1413, note.

MARRIED WOMEN — *Continued.*
separate property subject to restraint on anticipation, not liable for, 1107, 1109, 1123.
separate property held at time of engagement only liable for, 1123.
life interest with power of appointment liable for, 1106, 1123.
personal decree cannot be obtained on, 1121, 1123.
separate property, how reached on, 1123.
separate property, for what kinds of, liable, 1124-1126.
in England, 1104, 1124.
in America, 1125, 1126.
equitable jurisdiction enlarged by legislation, 79, 80, 160, 1105, 1125.
in case of property given on express statutory trusts, 1003-1005, 1105, 1126.
general doctrine; different types, 1126.
legacies given to, jurisdiction of equity over, exclusive, 1128.
gifts *causa mortis* to, law accepts, 1149, note.
money of, directed to be laid out in land, subject to husband's curtesy, 1165.
whether may elect to have a reconversion, 1176, note.
receivers appointed in suits to enforce contracts of, 1335.
property of, protected by injunction, 1345.
reformation of deeds of, 1376, note.
See HUSBAND AND WIFE; MARRIAGE.

MARSHALING OF ASSETS,
discrepancy between legal and equitable rules concerning, 77.
governed by statutes in America, 77.
suits for, are pecuniary remedies, 112.
general nature and definition of, 410.
maxim, Equality is equity, applied to, 410.

MARSHALING OF SECURITIES,
maxim, He who seeks equity must do equity, the source of doctrine of, 396.
nature of the remedy of, 186, 1413.
general doctrine and rules concerning, 396, 1414.
doctrine of, applied between what persons, 1414.

MARYLAND,
law and equity systems distinct, but administered by same tribunal, in, 41, note.
equity jurisdiction co-extensive with English chancery, 285, 342, 345.
statutory provisions concerning, 285, note.
election of widow concerning dower in, 494, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
[spendthrift trusts in, 989, note.]

MARYLAND — *Continued.*
deeds of trust, 995, note.
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's power of disposition of separate estate in, 1105, notes.
married women's contracts in, 1026, notes.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance exists in, 1249.
whether assignable, 1254, note.
equitable remedies and decrees operating *in rem* in, 1317, note.

MASSACHUSETTS,
law and equity systems distinct, but administered by same tribunal, in, 41, note.
legal actions for partition and admeasurement of dower, retained in, 110, note.
equity jurisdiction limited in, by statute, 178, 283, note, 286, 311-321, 345.
statutory provisions concerning, 286, note, 311.
general interpretation of, 312, 313, 345.
applied to specific performance, 314, 1409, note.
trusts, 315.
mortgages, 316.
creditors' suits, 317.
fraud, 318.
slander of title, 320, note, 1358, note.
special cases, 319, 320.
enlarged by recent statute, 321.
over administration of decedents' estates, 348, note, 1154.
election of widow, concerning dower in, 494, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
admissibility of parol evidence in, to vary contracts within statute of frauds, 867.
[spendthrift trusts in, 989, note.]
deeds of trust in, 995, note.
charitable trusts in, 1028, note, 1029, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's contracts in, 1126, notes.
mortgages of land in, 163, note, 1187.
grantee assuming mortgage liable on principle of subrogation, 1207, note.
compensation of mortgagee in possession, 1217, note.
grantor's lien on conveyance does not exist in, 1249.

MASSACHUSETTS — *Continued.*
equitable remedies and decrees operating *in rem* in, 1317, note.
statutory suit to quiet title in, 1396, note.

MAXIMS OF EQUITY,
as a basis of equity classification, 120.
underlie the whole of equity jurisprudence, 359, 360.
list of, and importance of, 363.
Equity regards as done what ought to be done, 364-377.
importance and general operation, 364.
true meaning and effects, 365-377.
applies whenever an equity exists between parties, 365, 370.
is the source of equitable property and estates, 366, 377.
sources of legal property or titles described, 366.
effect of executory contracts at law, 105, 367.
in equity, 105, 368, 372, 1161, 1260, 1261, 1263. See VENDOR AND VENDEE.
sources of equitable property described, 369.
equitable estates derived from, 370-377.
conversion, 161, 371, 1159. See CONVERSION.
contracts for purchase and sale of lands, 372. See VENDOR AND VENDEE.
assignments of possibilities and property to be acquired in future, 369, 373, 1235.
of things in action, 373, 1270.
of a fund, 373, 1270.
See ASSIGNMENTS.
equitable liens arising from contracts, 373, 1235. See LIENS.
express trusts, 374.
trusts arising by operation of law, 375.
equity of redemption, 376.
conclusion, 377.
Equity looks to the intent rather than to the form, 378-384.
meaning and effect, 378.
legal requirements of form, 379.
is the source of equitable doctrines, 380-384.
of property, 380.
penalties and forfeitures, 381, 433.
equity of redemption, 382.
effect of a seal, 379, 383.
special instances, 384.
of merger, 786.
He who seeks equity must do equity, 385-396.
meaning of, 385.
when applicable, 386, 387.
a general rule regulating administration of reliefs, 388.
applied to wife's equity, 389, 1114.
equitable estoppel, 390, 816.

MAXIMS OF EQUITY — *Continued.*
relief against usury, 391, 937.
contracts illegal by statute, 391.
specific performance, 392, 393, 400, 1404.
fraud, 392, 910.
inadequacy, 953.
relief by expectant heirs and reversioners, 953.
special instances, 392, 393.
is the source of certain equitable doctrines, 394–396.
of election, 395, 461, 465.
marshaling securities, 396.
He who comes into equity must come with clean hands, 397–404.
meaning of, 397.
regulates the administration of reliefs, 397.
is based upon conscience and good faith, 398.
limitations upon, 399.
applied to specific performance, 400, 459, 1404.
fraud; plaintiff's claim tainted with, 401, 916.
illegality; parties *in pari delicto,* 402, 940, 941.
parties not *in pari delicto,* 403, 942.
usury; contract tainted with, sought to be enforced, 391, note, 937.
acquiescence as an estoppel, 816.
parties claiming to be *bona fide* purchasers, 762.
conclusion, 404.
Equality is equity, 405–412.
general meaning of, 405.
effect upon certain equitable contracts, 406–411.
pro rata distribution and contribution, 406, 407.
ownership in common, 408.
joint liability, 409.
settlement of insolvent estates, 410.
marshaling of assets, 410.
abatement of legacies, 411, 1136.
apportionment of liens, 411, 1222.
appointment under trust powers, 411, 1002.
conclusion, 411.
Where there are equal equities the first in time shall prevail, 413–415.
meaning of "equities," 413.
application of, 413, 416, 591, 678, 682, 718.
to doctrines of notice, priorities, and *bona fide* purchasers, 416, 591, 678, 718.
true meaning of, 414, 678.
effect of, 415.
Where there is equal equity the law must prevail, 416, 417.
application of, 416, 591, 678, 682, 741.
the source of doctrines concerning notice, priorities, and *bona fide* purchasers, 416, 591, 678, 682, 741.
meaning and effects of, 417, 678.

MAXIMS OF EQUITY — *Continued.*
Equity aids the vigilant, not those who slumber on their rights, 418, 419.
meaning of, 418.
controls the administration of remedies, 418.
application and effects of, 419.
Equity imputes an intention to fulfill an obligation, 420-422.
meaning and application of, 420.
is the source of certain equitable doctrines, 421.
performance of covenants, 421, 578, 579.
trust resulting from acts of trustee, 422, 587, 1049.
Equity will not suffer a wrong without a remedy, 423, 424.
meaning of, 423.
is the source of entire remedial jurisdiction, 423.
limitations on, 63-67, 130, 424.
Equity follows the law, 425-427.
twofold meaning of, 425, 426.
first, in obeying the law, 425.
secondly, in applying legal rules to equitable estates, 426.
as applied to uses, 426, 982.
narrow operation of, 425, 427.
Equity acts *in personam,* and not *in rem,* 135, 170, 428-431, 1317, 1318. See DECREES.
origin and original meaning of, 135, 170, 428.
in what sense equitable remedies operate *in rem,* 135, 170, 429, 1317.
operation of equity on conscience of party, 430, 431.

MECHANICS' LIENS,
statutory suits to enforce; branch of exclusive jurisdiction, 138.
belong to what class of equitable remedies, 171.
inferior to purchase-money mortgages, 725, note.
nature and object of, 167, 1268, 1269.
how enforced, and effect on equity jurisdiction, 171, 1269.

MENTAL WEAKNESS,
mistake of law containing element of, relieved against, 847.
transactions of persons of weak mind, when invalid, 947, 948.
jurisdiction of equity over persons afflicted with, 1311-1314. See NON COMPOTES MENTIS.

MERGER,
originates in maxim, Equity looks at intent and not at form, 786.
of estates, 787, 788.
legal doctrine and rules of, of lesser in greater estate, 787.
equitable doctrines and rules, 147, 788.
of charges, 789-800.
owner of property becomes entitled to charge, 790-795.
general doctrine at law and in equity, 790.

MERGER — *Continued.*
presumption in favor of, when arises, 790, 792, 793.
against, when arises, 791–793, 798, 799.
intention prevents, 791.
time and mode of intention, 792.
parol evidence to show intention, 792.
when mortgagee takes conveyance of land, 734, 790, 793.
when mortgage assigned, 790, 793.
never prevented when fraud or wrong would result, 794.
when life tenant becomes entitled to charge, 795.
tenants in common and lessees, 793, 795.
owner of land pays off charge, 796-799.
owner in fee personally liable pays off charge, 791, note, 797, 1205, 1206, note, 1213.
grantee assuming, or liable for, mortgage debt, 791, note, 797, 1205, 1206, note, 1213.
mortgagor continuing to be principal debtor, 797, 1213.
conveyances with warranty against encumbrances, 797, note.
owner not personally liable pays off charge, 798, 1211.
life tenant pays off charge, 799.
widows entitled to dower, 799.
tenants for years and in common, 799.
priorities affected by, 800.

MICHIGAN,
law and equity systems distinct, but administered by same tribunal in, 41, note.
seal presumptive evidence of consideration in, 70, note.
equity jurisdiction co-extensive with English chancery, 284, 342, 345.
statutory provisions concerning, 284, note.
election of widow concerning dower, in, 494, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note, 733, note.
effect of other kind of notice in absence of record in, 664, note.
deeds of trust in, 995, note.
express trusts in, 1003, note.
charitable trusts in, 1029, note.
resulting trusts in, where conveyance to one, price paid by another, 1042, note.
passive trusts for married women abolished in, 1098, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance exists in, 1249.
equitable remedies and decrees operating *in rem* in, 1317, note.
statutory suit to quiet title in, 1306, notes.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

MINNESOTA,
equity jurisdiction, extent of, in, 287, 342, 345.
statutory provisions concerning, 287, note.
reformed procedure adopted in, 40, note, 287.
election of widow concerning dower in, 494, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note, 733, note.
effect of other kind of notice in absence of record in, 664, note.
assignments of things in action in, 705, note.
deeds of trust in, 995, note.
express trusts in, 1003, note.
charitable trusts in, 1029, note.
resulting trusts in, where conveyance to one, price paid by another, 1042, note.
passive trusts for married women abolished in, 1098, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, note.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance exists in, 1249.
[lien not assignable, 1254, note.]
real party in interest to sue in, 1273, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
interpleader in legal actions in, 1329, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.
counterclaims required to be interposed by defendant in, 1371, note.
statutory suit to quiet title in, 1396, notes.

MISSISSIPPI,
law and equity systems distinct, and administered by separate tribunals in, 41, note.
equity jurisdiction co-extensive with English chancery in, 285, 342, 345.
statutory provisions concerning, 285, note.
election of widow concerning dower in, 494, note.
[notice of *lis pendens* in, 640, note.]
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
[spendthrift trusts in, 989, note.]
deeds of trust in, 995, note.
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's power of disposition of separate property in, 1105.
married women's contracts in, 1126, notes.

MISSISSIPPI — *Continued.*
jurisdiction of equity over administrations in, 348, note, 350, note, 1154.
mortgages of land in, 163, note, 1187, 1188, note.
[absolute deed cannot be declared mortgage on evidence of grantor alone, 1196, note.]
grantor's lien on conveyance exists in, 1249.
whether assignable, 1254, note.
jurisdiction over persons of unsound mind expressly given to equity in, 1313, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
interpleader in legal actions in, 1329, note.
statutory suit to quiet title and remove clouds from title in, 1396, notes, 1397, note.

MISSOURI,
equity jurisdiction, extent of, in, 287, 342, 345.
statutory provisions concerning, 287, note.
reformed procedure adopted in, 40, note, 287.
election of widow concerning dower in, 494, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
[spendthrift trusts in, 989, note.]
deeds of trust in, 995, note.
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, notes.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1187, 1188, note.
grantor's lien on conveyance exists in, 1249.
whether assignable, 1254, note.
real party in interest to sue in, 1273, note.
personal representatives of deceased joint debtor sued with survivors in, 1301, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.
statutory suit to quiet title in, 1396, note.

MISTAKE,
fraud, accident, and, as basis of equity classification, 119.
not embraced entirely in concurrent jurisdiction, 138, 140, note, 175, note, 188, 822.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.
MISTAKE — *Continued.*
inadequacy of legal remedies in, as occasion of exclusive jurisdiction, 140, note, 188, 221.
fraud, accident, and, as occasion of concurrent jurisdiction, 140, 174, 188.
a ground for enlarging equity jurisdiction, where discovery asked, 224-226, 234.
equity jurisdiction in cases involving, not abridged by jurisdiction subsequently acquired at law, 278.
equity jurisdiction of courts of New Hampshire over cases involving, 304.
of courts of Massachusetts, 319.
of Maine, 330.
accelerating time of payment relieved against where, involved, 439.
relief from forfeitures occasioned by, 451, 454.
effect of election made under, 512.
effect of, in recording instruments, 654.
when does not prevent an estoppel, 809.
indorsement of negotiable paper omitted by, compelled, 837, note.
early origin of equity jurisdiction concerning, 838.
possible modes in which remedial jurisdiction occasioned by, can be exercised, 838.
definition of, 839.
distinction between accident and, 823, 839, 873.
between fraud and negligence and, 839, 873.
may be of law or of fact, 840.
of law, 841-851.
various conditions included in the term, 841.
ignorance or error with respect to general rule of municipal law, 841.
with respect to existing legal rights or interests, 841.
with respect to legal import of transaction, 841.
maxim, *Ignorantia juris non excusat,* when applies, 841, 842.
general rule and limitations, 842.
when relief will or will not be granted, 843-851.
no relief when, as to general rule of municipal law, 841, 842, 849.
nor when, as to legal import and effect of a transaction, 843.
relief from, of law may be granted, 842, 844.
relief not granted unless, material, and has determined parties' conduct, 844.
no relief if agreement was as intended to be, 843, 845.
when written instrument does not express intention, 845, 870.
when common to all parties, 846.
attempted distinction between, of plain and doubtful rules of law, 846.
relief in family compromises where, of plain rule of law, 846, note.

MISTAKE — *Continued.*
when accompanied with inequitable conduct of other party, 842, 847, 877, note.
when occurs in transaction between parties in trust relations, 848.
relief when, as to existing legal rights, interests, or relations, 849.
reasons for relief are that, are really those of fact, 849.
compromises and voluntary settlements made under, as to legal rights, when relieved against, 850, 871.
money paid under, cannot be recovered back, 851.
when accompanied by inequitable conduct, 851.
parol evidence, whether admissible, 857.
of fact, 852-856.
general rule, 852.
how may occur: subject-matter; terms, 853.
in what may consist, 854.
ignorance, forgetfulness, unconsciousness or belief, 854.
error or ignorance of law of foreign country, 854.
intentional act cannot be treated as, 854.
omission of provisions from written agreements, 854, note.
in compromises of doubtful claims, 850, 855, 871.
in speculative contracts, 855.
requisites to relief from, 856.
must be material, 856, 860.
must be free from culpable negligence, 856.
what negligence will be relieved against, 856.
negligence in failure to set up defense, 856, note, 1361, note.
in overlooking defect in title, 856, note.
causing forfeiture, 852, 856, note.
careless execution of instrument without reading, 856, note.
as to matters of which party had means of knowledge, 856, note.
facts capable of being ascertained by reasonable diligence, 856.
means of information open to both parties; confidence reposed, 856.
how shown, when by parol evidence, 857-867. See EVIDENCE.
instances of equitable jurisdiction occasioned by, 868-871.
jurisdiction may be exercised defensively or affirmatively, 868.
by way of defense, 860, 868.
by defendants in legal actions under reformed procedure, 862, 868.
by way of affirmative relief, 869-871.
when jurisdiction only exercised, 869.
money paid or chattels delivered by, 869-871.

MISTAKE — *Continued.*
land conveyed or contracted to be conveyed by, 869, 871.
cancellation and reformation when appropriate for, 870, 1376, 1377.
conditions of fact which are occasions of affirmative relief, 871.
defective execution of powers, 589, 590, 834, 871. See POWERS.
judgments and records set aside, corrected, or enjoined, 871, 1364, 1376, 1377.
settlements and compromises, 850, 855, 871, 1376, 1377.
in wills, whether corrected, 871.
instruments operating *inter vivos,* 871, 1376, 1377.
awards, 871, 1376, 1377.
surrender or discharge of instruments by, 871.
bona fide purchaser not relieved against for, 776, 871.
legal title acquired by, impressed with use, 981.
equitable lien arising from expenditures under, for true owner's benefit, 1241.
right to relief from acknowledgment or promise obtained by, not determined in interpleader suit, 1322.

MONEY,
no equity jurisdiction for mere recovery of, 178.
relief may be pecuniary in certain cases, 184, 186–188.
[where jurisdiction is invoked to prevent multiplicity of suits, 251½, 261, note.]
paid under mistake of law, whether can be recovered back, 851.
parol evidence in case of, 857.
equity jurisdiction to recover, paid under mistake, 869, 871.
relief in equity of recovery of, obtained by or due through fraud, 910, 912, note, 914.
under the reformed procedure, 914.
legacies of, when specific, 1130, note.
as the subject of donations *causa mortis,* 1148.
conversion of land into, and *vice versa,* 161, 371, 1159–1178. See CONVERSION.
equitable assignments of a fund, 1280–1284. See ASSIGNMENTS.
See COMPENSATION; DAMAGES; FORFEITURES; PENALTIES.

MONOMANIACS,
contracts and conveyances of, whether invalid, 946.
See NON COMPOTES MENTIS.

MONTANA,
distinction between legal actions and suits in equity abolished in, 40, note, 287.
statutory provisions concerning equity jurisdiction in, 287, note.
[notice of *lis pendens* in, 640, note.]

MONTANA — *Continued.*
recording in, 646, note.
assignments of things in action in, 705, note.
real party in interest to sue in, 1273, note.
statutory suit to quiet title in, 1396, notes.

MORAL LAW.
as such not an element of the human law, 63, 424.
large portion of, not jural in its nature, 64.
effect of, on equity and law, 49, 55, 65–67.

MORTGAGES OF LAND,
difference between legal and equitable primary rights illustrated by, 107.
interests created by, are permanent equitable estates, 148.
estate of mortgagor, in equity, belongs to exclusive jurisdiction, 162.
jurisdiction of equity concerning, in New Hampshire, 301.
in Massachusetts, 316.
in Maine, 324.
recording of, as constituting constructive notice, 644–655. See NOTICE.
priorities among, 716–732. See PRIORITIES.
bona fide purchase no defense in foreclosure by prior legal against subsequent equitable, 740, 741, 765.
doctrine of *bona fide* purchaser of legal estate protected applies to, 767.
tacking of, whether allowed by *bona fide* mortgagee, 768.
when merges, 789–799. See MERGER.
may be corrected or canceled in equity, 871, 1376, 1377.
whether relief against for usury, where payment of, assumed, 937.
by subsequent, against prior, 937.
relation between deeds of trust to secure debts and, 995.
statutory trusts to mortgage lands, 1003–1005.
statute of frauds does not apply to trusts in money secured by, 1008.
investment by trustees in first, favored, 1074.
legacies of, when specific, 1130, note.
as subjects of donations *causa mortis*, 1148.
jurisdiction of equity to foreclose, on decedents' lands, 1154.
under the English doctrine, 73, 162, 1179–1185.
at the common law, 73, 162, 1179, 1182.
changes in doctrine of, by statute 7 Geo. II., 1179.
present legal theory concerning, 1179.
conveyance or devolution on death of interests of parties in, 73, 162, 1182.
origin and development of equity jurisdiction over, 162, 1180.
founded on maxim, Equity looks at intent rather than form, 162, 382, 1180.
principle that equity relieves against penalties and forfeitures, 162, 382, 433, 1180.

MORTGAGES OF LAND — *Continued.*
mortgagor when first relieved in chancery, 162, 1180.
"equity of redemption," what is, and development of, 162, 376, 382, 1180. See EQUITY OF REDEMPTION.
equitable theory of, 73, 162, 1180–1182.
mortgagees' interests regarded as liens, 73, 1181, 1182, 1204.
conveyance or devolution of interests of parties to, 73, 162, 1180–1182, 1204.
double system of, at law and in equity, 73, 162, 1182.
legal and equitable remedies of parties, 1183.
the two theories kept distinct, 1184.
deed to mortgagor necessary on redemption, 1184.
subsequent equitable, 1185.
under the American doctrine, 73, 74, 163, 1186–1191.
in general: two methods prevailing, 73, 163, 1186.
where both legal and equitable theories adopted, 163, 1187.
mortgagee, how far legal owner, 163, 1186, 1187.
when entitled to possession, 1187.
equitable theory chiefly prevails, 1187.
remedies of mortgagor and mortgagee, 1187.
where equitable theory alone adopted, 74, 163, 1188–1190.
revolution in equity jurisprudence, 74, 163, 1186, 1188, 1190.
interest of the two parties, 74, 163, 376, 1188, 1204.
lien only, created, 74, 163, 376, 1188, 1204.
conveyance or devolution of interests of parties in, 74, 1188, 1204.
"equity of redemption" as used in connection with, 74, 1188.
consequences of mortgagee's obtaining possession, 1189, 1190, 1215.
equitable remedies of the parties, 1188, 1190.
definition of, 1191.
in equity, are securities for debts, 1192.
once a mortgage always a mortgage, 1193.
mortgagor cannot, in instrument, deprive himself of rights of redemption, 382, 1193, 1219.
stipulations in, giving mortgagees advantage, invalid, 1193, note.
conveyances with agreements to repurchase distinguished from, 1194, 1195.
continued existence of debt the criterion, 1192, 1195.
construction favorable to, in cases of doubt, 1195.
parol evidence to show character of transaction, 1195.
facts evidencing intent, nature of, 1195.
when mortgages, rights, and liabilities of parties the same as in ordinary, 1194.
conveyances absolute in form as, 1196.
may be shown to be by extrinsic and parol evidence, 866, note, 1196.

MORTGAGES OF LAND — *Continued.*
between what parties, 1196.
nature of evidence to overcome presumption, 1196.
continued existence of debt the criterion, 1192, 1196.
rights and liabilities of parties the same as in ordinary mortgages, 1196.
to secure future advances, 1197–1199.
validity of, as between the parties, 1197.
enforced for all advances made within scope of, 1197.
fact that, are given to secure future advances need not be stated, 1197.
validity of, as against subsequent encumbrancers or purchasers, 1198, 1199.
advances before and after encumbrances and conveyances, 1198.
want of notice, independent of recording acts, 1198.
recording acts as affecting, 1199.
optional and obligatory advances, 1197, 1199.
to secure several different notes or bonds, 1200–1203.
order of priority among assignees of notes, 1201.
notes payable at the same and different times, 1201.
mortgagee changing order by agreement, 1201.
assignment of note is assignment *pro tanto* of mortgage, 1202.
foreclosure and redemption in case of, 1202.
priority where mortgagee retains part of notes, 1203.
conveyance by mortgagor subject to, effect of, 1205–1208. See MORTGAGOR AND MORTGAGEE.
assignment of, by mortgagee, 1209, 1210.
manner and effect at law and in equity, 1209.
operation of recording acts on, 655, note, 733, 734, 767, 1209, note.
assignment of debt carries, with it, 1210.
of mortgage without debt, effect of, 1210.
subject to equities, 704, 733, 734, 753, note, 1210. note.
when, given to secure negotiable notes, 704, note, 1210, note.
equitable assignment by subrogation on payment of mortgage debt, 798, 1211–1214, 1221.
prevented when merger occurs, 793, 797, 798, 1211, 1213.
in whose favor exists, 798, 1211–1213.
See MERGER.
actual assignment when compelled by equitable assignee, 1214.
rights and liabilities of mortgagee in possession, 1215–1218. See MORTGAGOR AND MORTGAGEE.
redemption of, 1219–1226. See REDEMPTION.
foreclosure of, 1227, 1228. See FORECLOSURE.
equitable liens created by agreements to give, 1237.
by informal and defective, 383, 1237.
grantor's lien waived by, of grantee, 1252.

MORTGAGES OF LAND — *Continued.*
grantor's liens by reservation resemble, 1255, 1257–1259.
receivers when appointed in suits to enforce, 1334.
when removed as being cloud on title, 1399, note.
specific performance of agreement to pay or discharge, 1402, note.
See MORTGAGOR AND MORTGAGEE.

MORTGAGES OF PERSONAL PROPERTY,
equitable estates arising from, belong to exclusive jurisdiction of equity, 150.
subsequent, superior to lien arising from contract, 726.
at law are conditional sales, 164, 1229.
delivery not essential, 1229.
distinction between, and pledges, 1229.
legal title vests in mortgagee on breach of condition, 1229.
interests of mortgagor how extinguished, 1229.
jurisdiction and remedies of equity concerning, 164, 1230.
mortgagor retains equity of redemption, 164, 1230.
may maintain suit to redeem before sale, 164, 1230.
for accounting after sale where inequitable conduct, 164, 1230.
mortgagee may sue to foreclose, 164, 1230.
foreclosure when preferable to public sale, 1230, note.
statutory charges concerning, 164, 1232.
equitable liens created by agreements to give, 1237.
embracing future-acquired property are equitable liens, 1236, note, 1291.
operate as equitable assignments, 1288–1291. See ASSIGNMENTS.

MORTGAGOR AND MORTGAGEE,
whether election where gift made by testator to mortgagee, 491.
defective execution of powers aided on behalf of mortgagee, 834.
mortgagee with power of sale is a trustee for the sale, 958, note.
estates and interests of, at common law, 73, 162, 1179, 1182.
mortgagee, but not mortgagor, may maintain ejectment, 1182, 1187.
conveyance, or devolution on death of, 73, 162, 1182.
estates and interests of, in equity, in England, 73, 162, 1180–1182, 1204.
mortgagor's "equity of redemption," what is, and development of, 162, 1180.
mortgagee's interest regarded as mere lien, 73, 1181, 1182, 1204.
conveyance, or devolution on death of, 73, 162, 1180–1182, 1204.
mortgagor, when first relieved in equity, 162, 1180.
legal and equitable remedies of, in England, 1183.
of mortgagee: suit for debt; appropriation of rents and profits; foreclosure, 1183.
of mortgagor: redemption, 1182, 1183.
estates and interests of, in America, 73, 74, 163, 1186–1190.

MORTGAGOR AND MORTGAGEE — *Continued.*
where both legal and equitable theories adopted, 73, 163, 1186, 1187, 1204.
mortgagee, how far legal owner, 163, 1186, 1187.
whether entitled to possession, 1187, 1204, 1215.
whether can maintain ejectment, 1187.
remedies of mortgagor and mortgagee, 1187.
equity deals chiefly with mortgagor's interests, 1190.
where equitable theory alone adopted, 74, 163, 376, 1186, 1188, 1204.
mortgagee has but a lien, 74, 163, 376, 1188, 1204.
conveyance or devolution on death of, 74, 1188, 1204.
consequences of mortgagee's obtaining possession, 1189, 1190, 1215.
mortgagor may maintain ejectment, 1188-1190.
remedies of mortgagor and mortgagee, 1188, 1190.
equity deals chiefly with mortgagee's interests, 1190.
mortgagor cannot in instrument deprive himself of right to redeem, 382, 1193, 1219.
may deprive himself by separate instrument, 1193, note.
conveyances with separate agreement when mortgages, rights and liabilities of, in, 1194.
deeds absolute in form when mortgages, rights and liabilities of, in, 1196.
interest of mortgagee, in equity, liable to be sold on execution, 1204.
of mortgagee liable to be reached by creditors, 1204.
fiduciary relation does not exist between, 1204.
conveyance by mortgagor, effect of, 1205-1208.
grantee with notice takes subject to mortgage, 1205, 1225.
operation of recording acts, 1205, note.
liabilities of grantee and mortgagor, 1205.
liabilities of grantee assuming mortgage, in whole or in part, 1206, 1207, 1225.
form of words creating liability, 1206.
mortgagor a surety; rules concerning, 797, note, 1206.
whether mortgagor can release grantee from liability, 1206, note.
liability of subsequent grantees, 1206.
grantee cannot contest validity of mortgage, 937, note, 1206.
whether results from contract or subrogation, 1206, 1207.
mortgage when merges on payment, 793, 797, 798, 1205, 1206, 1211, 1213. See MERGER.
liability of second mortgagee assuming mortgage, 1208.
rights and liabilities of, in assignment of mortgage, 1209-1214. See MORTGAGES.
rights and liabilities of mortgagee in possession, 1215-1218.
are virtually the same in all states, 1215.
duty as ordinary prudent owner, negligence, waste, etc., 1216.
chargeable with rents and profits or occupation value, 1216.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

MORTGAGOR AND MORTGAGEE — *Continued.*
repairs and disbursements, for what allowed and credited, 1217.
compensation not allowed, 1217.
liability to account; rules concerning, 1190, 1218.
where deeds absolute in form are, 1196.
trustee for mortgagor after debt has been paid, 1218.
redemption by mortgagor, and rights and liabilities arising from. See REDEMPTION.
grantor's lien does not prevail against *bona fide* mortgagee, 1253.
injunctions granted between, to restrain waste, improper sales under power, etc., 1345, 1348, note.
when parties in suit for partition, 1387, note.
marshaling of securities between, 396, 1413, 1414. See MARSHALING OF SECURITIES.
See MORTGAGES OF LAND.

MORTMAIN,
charitable trusts defeated by statutes of, 1020, note.
conversion not permitted so as to defeat statutes of, 1166.

MULTIPLICITY OF SUITS,
jurisdiction of equity to prevent, 243–275.
a foundation of concurrent jurisdiction, 139, 181, 243.
an occasion of exercise of exclusive jurisdiction, 243.
inadequacy of legal remedies, the theory of doctrine of, 243.
difficulties involved in the doctrine of, 244.
cases to which doctrine of, may apply, classified, 245.
"bills of peace," *rationale* and examples of, 246–248. See BILLS OF PEACE.
bills "to quiet title," explained, 248.
examples of early use of, 247.
rationale of doctrine of, on principle, 249–251.
not an independent source of equity jurisdiction, 250.
[party invoking must have prior right to some relief, legal or equitable, 250, and note.]
legal relief obtainable need not be of same kind as equitable, 250.
[parties not necessarily those litigative with whom it ought to be avoided, 250, note, 274, note.]
what multiplicity prevented; public rights and injuries, 251.
[jurisdiction not exercised when that would be ineffectual; simplifying of the issues essential, 251½.]
[there must be a practical necessity for the exercise of the jurisdiction, 251¾.]
[when the numerous parties may be joined at law, 251¾.]
[danger of vexatious suits must be a real danger, 251¾.]
examination of doctrine on authority, 252–261.
first class: where plaintiff at law obliged to bring number of similar actions against same wrong-doer, 252, 263, 267, 1394.

MULTIPLICITY OF SUITS — *Continued.*
second class: where one defendant brings successive or simultaneous similar actions against a plaintiff, 253, 254, 263, 267, 1394.
[injunction against numerous prosecutions for violations of a municipal ordinance, 254, note.]
third and fourth classes: numerous plaintiffs and defendants, 255–261, 264–266, 268–270, 1394.
privity or common interest between parties whether necessary, 251, 255–261, 264–270, 1394.
distinct proprietors injured by one wrong, 257, 264, 268, 269, 1394.
distinct proprietors relieved from illegal taxes, assessments, and public burdens, 258–260, 261, note, 265, 266, 270, 273, 1345. See TAXES.
miscellaneous instances, 261.
[third class: cases where the multiplicity of suits conferred jurisdiction or warranted its exercise, 261, note.]
[(a) actions at law against numerous parties enjoined, 261, note.]
[(b) injunction against the enforcement of an invalid municipal ordinance, 261, note.]
[(c) injunction against trespass, or other wrongful act of the defendant, affecting numerous plaintiffs, 261, note.]
[(d) injunction against breach of contract affecting numerous parties, 261, note.]
[(e) cancellation in favor of numerous plaintiffs, 261, note.]
[(f) pecuniary relief to numerous plaintiffs, 261, note.]
[as to suits by numerous plaintiffs to share ratably in fund, 261, note.]
[third class: joinder, where each of the numerous plaintiffs has an equitable cause of action, 257, 261, note.]
[fourth class: cases where the avoidance of a multiplicity of suits conferred jurisdiction or warranted its exercise, 261, note.]
[(a) injunction against numerous defendants prosecuting suits at law, 261, note.]
[(b) injunction against tax proceedings which involve the single plaintiff in litigation with numerous parties, 261, note.]
[(c) injunction against numerous attachments or executions on property claimed by complainant, 261, note.]

MULTIPLICITY OF SUITS — *Continued.*
[(d) injunction against numerous trespassers, 261, note.]
[(e) cancellation, 261, note.]
[(f) quieting title, etc., against numerous defendants, 261, note.]
[(g) recovery of specific chattels, 261, note.
[(h) pecuniary relief against numerous defendants, 251½, 261, note.]
[fourth class: joinder of numerous defendants against each of whom the plaintiff has a similar cause of action for equitable relief, 261, note.]
title, whether and how to be established at law, 252, 253, 256, 263, 267, 1394.
who may be plaintiffs and who defendants, 251, 267, 269.
summary of conclusions, 267–270.
cases in which jurisdiction exercised, 271–274.
based upon statute, 275.
[jurisdiction of United States courts to prevent, not abridged by state legislation, 293, note.]
prevented by injunction, 1345, 1362, note.
when actions at law restrained to prevent, in states adopting reformed procedure, 1371, 1372.
equitable jurisdiction for assignment of dower to prevent, 1382.
to establish disputed boundaries, 1384, 1385.

MUNICIPAL CORPORATIONS,
relief from illegal acts and taxes of, 258–260, 265, 266, 270, 273, 1345. See TAXES.
[injunction against numerous prosecutions for violation of ordinance of, 254, note, 261, note.]
investment by trustees in bonds of, 1074.

N

NAMES,
when equity will correct mistakes in, in wills, 871, note.
wrongful use of, when restrained, 1358.

NEBRASKA,
distinction between sealed and unsealed instruments abolished in, 70, note.
equity jurisdiction co-extensive with English chancery in, 285, 342, 345.
statutory provisions concerning, 285, note.
reformed procedure adopted in, 40, note, 287.
election of widow concerning dower in, 494, note.
recording in, 646, note, 733, note.
effect of other kind of notice in absence of record in, 664, note.
assignments of things in action in, 705, note.

NEBRASKA — *Continued.*
[charitable trusts in, 1029, note.]
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance does not exist in, 1249.
real party in interest to sue in, 1273, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
interpleader in legal actions in, 1329, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, notes.
necessity for injunction restraining action at law where new parties required obviated in, 1372, note.
statutory suit to quiet title in, 1396, notes.

NEGLIGENCE,
no relief from forfeiture occasioned by, 452, 856, note.
one equity superior to other by reason of, 687.
effect of, on priorities, 716, 727, 731, 732.
when ignorance caused by, does not prevent an estoppel, 809.
when owner cannot be divested of legal title through mere, 811.
relief where accident is result of, 828.
distinction between, and mistake, 839.
no relief from erroneous acts or omissions resulting from, 839, 856. See MISTAKE.
where legal defense not set up through, 856, note, 1361, note.
theory that trustee is liable only for gross, 1070, note.

NEGOTIABLE INSTRUMENTS,
lost, could only be sued on in equity, 71.
jurisdiction to restrain transfer of, when exercised in equity, 221, 1340, 1363, note, 1377, note.
rule of *lis pendens* does not embrace suits concerning, 636.
assignment of non, subject to equities, 703–715. See PRIORITIES.
rule of antecedent debts being valuable consideration in transferring, whether applies to *bona fide* purchasers generally, 748.
whether sufficient actual payment, in doctrine of *bona fide* purchaser, 751.
jurisdiction of equity of suits on lost or destroyed, 832.
indorsement of, omitted by accident or mistake, compelled, 837, note.
mistake in, may be corrected, 837, note, 871, 1376.
may be cancelled, 914, note, 1377.
void when executed in belief that they were other instruments, 915, note, 918.
negotiation restrained when given in gaming, 938.
married women liable on, 1124, 1126.
legacies of, when specific, 1130, note.
as the subjects of donations *causa mortis,* 1148, 1151.

NEGOTIABLE INSTRUMENTS — *Continued.*
several notes secured by same mortgage; assignment of, 1200–1203. See MORTGAGES.
assignment of mortgage whether subject to equities when securing, 704, note, 1210, note.
foreclosure necessary where, pledged, 1231.
equitable liens created by or upon bills of exchange, 1237.
acceptance of, when waiver of grantor's lien, 1252.
notes secured by deeds reserving liens; rules concerning, 1255, note, 1256, note, 1259.
vendor's lien passes by assignment of notes given for price, 1261, note, 1262, note.
when transferred without indorsements are equitable assignments, 1274, note.
bills of exchange and checks not in general equitable assignments, 1284.

NEVADA,
equity jurisdiction co-extensive with English chancery in, 285, 342, 345.
statutory provisions concerning, 285, note.
reformed procedure adopted in, 40, note, 287.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
assignments of things in action in, 705, note.
deeds of trust in, 995, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedent's estates in, 1154.
mortgages of land in, 163, note, 1188.
real party in interest to sue in, 1273, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
statutory suit to quiet title in, 1396, notes.

NEW HAMPSHIRE,
law and equity systems distinct, but administered by same tribunal in, 41, note.
equity jurisdiction in, limited by statute, 286, 299–310, 345.
statutory provisions concerning, 286, note, 299.
general interpretation of, 299, 345.
applied to specific performance, 300.
foreclosure; redemption of mortgages and pledges, 301.
discovery, 302.
fraud; cancellation and rescission, 303.
mistake, reformation, 304.
trusts, 305.

NEW HAMPSHIRE—*Continued.*
accounting, 306.
injunction, 307.
nuisance, waste, and trespass, 308.
creditors' suits, 309.
special cases, 310.
time within which widow must elect in, 513, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1187.
to secure future advances, not allowed in, 1197, note.
grantor's lien on conveyance does not exist in, 1249.
equitable decrees and remedies operating *in rem* in, 1317, note.

NEW JERSEY,
law and equity systems distinct, and administered by separate tribunals in, 42, note.
[jurisdiction, once attached, not retained for full relief, as matter of right, 233, note.]
equity jurisdiction co-extensive with English chancery in, 285, 342, 345.
statutory provisions concerning, 285, note.
election of widow concerning dower, in, 494, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
[spendthrift trusts in, 989, note.]
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, notes.
equity jurisdiction over administration of decedents' estates in, 349, note, 350, note, 351, note, 1154.
statute 7 George II., concerning mortgages of land, re-enacted in, 1179, note.
mortgages of land in, 163, note, 1187.
power of mortgagor to release grantee assuming mortgage without mortgagee's consent, 1206, note.

NEW JERSEY — *Continued.*
grantee assuming mortgage liable on principle of subrogation in, 1207, note.
grantor's lien on conveyance exists in, 1249.
equitable remedies and decrees operating *in rem* in, 1317, note.
statutory suit to quiet title and remove clouds from title in, 1396, notes, 1397, note.

NEW MEXICO,
[notice of *lis pendens* in, 640, note.]
recording in, 646, note.
[jurisdiction of equity over administration of decedents' estates in, 1154, note.]

NEW YORK,
seal presumptive evidence of consideration in, 70, note.
lost negotiable instruments, how sued on in, 71, note.
equity jurisdiction co-extensive with English chancery in, 284, 342, 345.
statutory provisions concerning, 284, note.
reformed procedure adopted in, 40, note, 287.
time within which widow must elect in, 513, note.
actual notice in, 596, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note, 733, note.
effect of other kind of notice in absence of record in, 664, note.
assignments of things in action in, 705, note.
definition of mistake in proposed code of, 839.
of fraud, 873, note.
of duress and menace, 950, note.
[spendthrift trusts in, 989, note.]
deeds of trust in, 995, note.
express trusts in, 153, note, 1003, note, 1004.
powers in trust in, 1002, 1004.
charitable trusts in, 154, note, 1029, note.
"voluntary and involuntary" trusts in proposed code of, 1030.
resulting trusts abolished where price paid by one and title taken by another in, 1042, note.
trust arises in favor of creditors, 1042, note.
powers, duties, and liabilities of express trustees in proposed code of, 1061, note, 1086, note.
passive trusts for married women abolished in, 1098, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, notes.
lapsed legacies and devises in, 1145, note.

NEW YORK — *Continued.*
equity jurisdiction over administration of decedents' estates in, 349, note, 1154.
mortgages of land in, 74, 163, note, 1188.
grantor's lien on conveyance exists in, 1249.
whether assignable, 1254, note.
real party in interest to sue in, 1273, note.
assignments of possibilities and expectancies in, 1285, note.
suing of representatives of deceased joint debtor in, 1301, note.
where deceased joint debtor is surety, 1302, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
interpleader in legal actions in, 1329, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.
statutory suit to quiet title in, 1396, notes.

NON COMPOTES MENTIS,
proceedings determining persons to be, are remedial, 98, 112.
are exclusively equitable, 171.
inadequacy in transactions of persons, relieved against, 928.
transactions of persons, when invalid, 946.
may be beneficiaries, 987.
jurisdiction of equity over persons and property of persons, 1311-1314.
origin of the jurisdiction, 1311.
delegated by the crown, 1311.
of the control of committees, 1311.
mode of exercising jurisdiction in England, 1312.
jurisdiction in the United States, 1313.
conferred by statute; extent of legislation, 1313.
to compel accounting of committees, 1097, 1313.
in cases of weak and unsound mind, 1314.
See LUNATICS; IDIOTS; DRUNKARDS, etc.

NORTH CAROLINA,
equity jurisdiction in, co-extensive with English chancery, 285, 342, 345.
statutory provisions concerning, 285, note.
reformed procedure adopted in, 40, note, 287.
election of widow concerning dower in, 494, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
assignments of things in action in, 705, note.
effect of other kinds of notice in absence of record in, [664, note], 759.
[spendthrift trusts in, 989, note.]
[parol trusts in, 1006, note.]
charitable trusts in, 1029, note.

NORTH CAROLINA — *Continued.*
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's power of disposition of separate estate in, 1105, notes.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance does not exist in, 1249.
real party in interest to sue in, 1273, note.
equitable decrees and remedies operating *in rem* in, 1317, note.
interpleader in legal actions in, 1329, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.
specific performance of verbal contracts part performed in, 1409, note.

NORTH DAKOTA,
reformed procedure adopted in, 287.
statutory provisions concerning equity jurisdiction in, 287, note.
[recording in, 646, note.]
[effect of other kind of notice in absence of record, 664, note.]
[mortgages of land in, 1188, note.]

NOTICE,
recording as affecting equitable rules concerning, 76.
maxim, When there are equal equities the first in time shall prevail, applied to, 416, 591.
When there is equal equity the law must prevail, applied to, 416, 591.
importance of doctrine of, in determining when equities are equal. 591.
general rule as regards one purchasing with, 591.
whether entire doctrine of, based upon fraud, 591, 660, 665.
objects of, 592.
to affect priority of right, 592.
as a badge or ingredient of fraud, 592.
knowledge and, distinguished, 592, 594, 603.
effects produced are the same, 592, 603.
kinds of, actual and constructive, 593.
legal effect of each, the same, 594, 690.
definition of, 594.
distinction between, and evidence to prove, 594.
actual, 595–603.
what is, 593, 595.
distinction between, and constructive, depends on manner of information, 595, 596, 604.

NOTICE — *Continued.*
not inferred by presumption, but conclusion of fact, 595, 596, 610.
when shown by indirect evidence, 596.
illustrations of the operation of, 596, notes.
interpretation of statutes requiring "actual," 596, note.
vague rumors, hearsay statements, whether constitute, 597, 602.
information sufficient to put prudent man on inquiry constitutes, 597.
how far should be prosecuted, 596, 597, 601.
[must be of such nature as to lead to discovery of conflicting claim, 597, note.]
kind and amount of information necessary to constitute, 599.
information concerning conflicting claim or encumbrance, 599.
given by a relative or friend, 599.
what circumstances sufficient to constitute; relationship, intimacy, inadequacy, defective recording, etc., 600.
[knowledge that purchase money was unpaid, sufficient to charge with notice of vendor's lien, 600, note.]
by extraneous facts, 600, 610.
effect of explaining or contradicting information given, 599, 601.
information by whom may be given, 599, 602.
when must be given and received, 602, 671, note.
effect of knowledge, 592, 603.
[need not be acquired in same transaction, 603, note.]
[may come from any source, 603, note.]
constructive, 604-676.
what is, 593, 604, 605.
inferred by legal presumptions, 596, 604.
arises where facts would put prudent man on inquiry, 597, 606.
what is due inquiry, 607, note.
presumption when rebuttable, 596, note, 606, 607.
when due inquiry has been made, 607, 624, note.
classes of cases where rebuttable, 607, note, 610, 624, 625.
presumption, when conclusive, 596, note, 606, 608.
classes of cases when conclusive, 607, note, 627, 669, 673.
by extraneous facts, generally acts of fraud, negligence, or mistake, 610-613.
criterion is that matters would put man on inquiry, 610.
presumption is rebuttable, 607, note, 610.
narrow operation of extraneous facts constituting, in America, 610, note.
visible objects and structures, constituting, 611.
absence or non-production of title deeds, constituting, 606, 612.
information of other facts, although perfect record title, 613, 659-665.

NOTICE — *Continued.*
by possession or tenancy, 614-625.
general rules as to, to purchasers and encumbrancers, 614, 615.
by grantee or vendee whether, to subsequent grantee with record title, 615, 664.
[by tenant in common, 616, note.]
by lessee whether, of subsequent and collateral agreement, 616, 625.
possession whether, of different title, where a title recorded, 616.
grantor remaining in possession whether, 616, note, 617.
tenant's possession whether, of lessor's title, 618, 625.
[where grantor's tenant becomes grantee's tenant, 618, note.]
[not notice of title of one claiming adversely to possessor, 618, note.]
[not notice of rights of which possessor was ignorant, 618, note.]
when actual, open, exclusive occupancy, 615, 620.
[possession of wife not, of her rights, 620, note.]
[sufficiency of acts of occupation; examples, 620, note.]
when premises vacant not, of last occupant's title, 621.
when are premises vacant, 621.
constructive possession, whether constitutes, 621.
third person receiving rents and profits as constituting, 621.
time of possession, 622.
presumption is rebuttable, 607, note, 623, 624.
decisions in various states as to possession constituting, 664, note.
by recital or reference in instruments of title, 626-631.
general rule as to recitals or references, 626.
presumption conclusive, 607, note, 627.
rules apply to unrecorded instruments, 627.
extent of, 628-631.
separate instruments in chain and provisions contained, 626, 628.
collateral instruments referred to, 628.
matters purely collateral, 629.
instrument executed and others referred to thereby, 630.
description and character of parties to instrument, 630.
instrument in contemplation of execution, 631.
erroneous or vague information, 631.
between whom operates, 631.
grantee by quitclaim deed, whether charged with, 631, note, 753.
by *lis pendens,* 632-640.
rationale of doctrine, 632.

NOTICE — *Continued.*
general rule, 633.
doctrine of, essential incident of equitable suits, 633.
whether principle of, applies to actions at law, 633.
begins with service of subpœna or other process, 634.
[in some states, from filing of bill, 634, note.]
how long continues and when ends, 634.
[ended by abandonment or dismissal of suit, 634, note.]
[effect of appeal or writ of error, 634, note.]
suit must be prosecuted in good faith and with diligence, 634.
what allegations in pleadings necessary, 634.
[effect of amending bill, 634, note.]
rules should apply to counterclaims and cross-complaints under reformed procedure, 634.
rule extends to suits concerning land, 635.
[extends to timber growing on land in suit, 634, note.]
[examples of suits concerning land, 635, note.]
how far extends to suits concerning personal property, 636.
negotiable instruments, 636.
who are affected by, 637, 638.
purchaser from one not a party, 637.
[purchaser at foreclosure sale, 637, note.]
prior right acquired before commencement of suit, 637.
[right of mortgagee purchasing at his own sale, 637, note.]
[right of holder of prior unrecorded deed or mortgage, 637, note.]
purchaser from either litigant party, 638.
[creditors' bill not notice of claims of other creditors than plaintiff, 638, note.]
not favored by courts of equity, 639.
statutory notice of *lis pendens,* 639, 640.
by judgments, 641-643.
original equity doctrines, 641.
legislation concerning docketing, 641, 642.
rules concerning, 643.
by registration or recording of instruments, 644-665.
statutory system in England, 645.
in the United States, 646.
theory, scope, and object of legislation, 647-649.
equitable estates are embraced within legislation, 649.
requisites of record in order to be notice, 650-654.
instrument must be of kind of which recording authorized, 651.
recording of deed transferring chattels, 651, note.
unauthorized recording of assignment of mortgage, 651, note.

NOTICE — *Continued.*
must be duly executed and acknowledged, 652.
[acknowledgment regular on face, irregular in fact, 652, note.]
record must be made in proper form and manner, 653.
recording in wrong book, 653, note.
[where record is notice from time of filing for record, 653, note.]
[index not essential, in general, 653, note.]
[effect of destruction of records, 653, note.]
record must be made in county where land situated, 653.
record must be true copy, 654.
[error in name, 654, note.]
[failure to copy acknowledgment, 654, note.]
[omission of copy of seal, 654, note.]
only notice of what is contained in itself, 654.
deed and defeasance constituting mortgage must be recorded together, 654, note, 658.
premises how must be described, 654.
[where record shows mistake, whether purchaser put on inquiry, 654, note.]
[description of debt, in mortgage, necessity of, 654, note.]
recording of copy instead of original, 654.
extent to which record is notice, 655.
[of breach of trust or constructive fraud, 655, note.]
to whom record is notice, 656–658.
not to prior parties, 657.
[not to prior mortgagee, 657, note.]
to subsequent purchasers under same grantor, 656, 658, 761.
who constitute the same grantors, 658, note.
effect of perfect record, 658, 761.
record of instruments made by vendor prior to vendor's record, 658.
estoppel, where record, on assignee of title subsequently acquired, 658, note.
effect of other kind of notice in absence of record, 613, 659–665.
will postpone a subsequent and recorded instrument, 430, 613, 659, 692, 730, 759.
defective deeds and mortgages, 659, note.
whether fraud the foundation of rule, 660, 665.
kinds of notice sufficient to produce effect, 661–665.
whether actual or constructive, 661–664.
facts giving rise to, 664.
rationale of notice in place of record, 665.
constituting notice preventing *bona fide* purchase, 757–761.
See BONA FIDE PURCHASER.

NOTICE — *Continued.*
between principal and agent, 666-676.
general rule that notice to agent is constructive notice to principal, 666.
rule embraces all who act for others in business relations, 667.
applies where same agent acts for both parties, 667.
[does not apply to notice to stockholders of a corporation, 667, note.]
[applies to sub-agents, when, 667, note.]
does not apply where agency for ministerial act, 668.
whether applies to attorney at law, 666, note, 668.
notice must be within scope of agent's authority, 668.
agent must be attorney in fact, 668.
notice to agent may be actual or constructive, 669.
to principal is constructive, 669, 673.
notice must be given agent during actual employment, 670.
must be given in same transaction sought to be affected, 671, 672.
when may be given in prior transaction, 672.
information must be material and such as agent is bound to communicate, 673.
presumption of communication to principal, 669, 673.
is generally conclusive, 607, note, 669, 673.
when not conclusive; agent's fraud, 674, 675.
rule is based upon policy and expediency, 666, 676.
effect of, on equities, 688-692. See PRIORITIES.
by assignee of thing in action to debtor, holder, or trustee, to establish rights of priority, 694-697. See PRIORITIES.
diligence in giving, to prevent his subsequent acts, 702.
when should be given to cut off equities in assignments of things in action, 704-706.
priorities between unrecorded mortgages and liens and subsequent judgments where, 723.
where purchase with, at execution sale, 724.
whether equity protected by legal estate obtained after, of prior equity, 729, 756.
of existing equities, as affecting priorities among estates, interests, etc., 727, 730.
of assignments of mortgages, priorities depending upon, 733, 734.
resulting trust enforced against all persons taking with, 1043.
rights and liabilities of transferee of trust property with, of trust, 688, 988, note, 1048.
of subsequent encumbrance or conveyance, as affecting mortgages to secure future advances, 1198, 1199.
as affecting mortgagee's right to release, in contribution or exoneration on redemption, 1226.
to creditor-assignee of fund necessary to absolute assignment, 1281.
equitable assignments and liens available against subsequent purchasers with, 1291.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

NUISANCES,
legal estate may be protected against, by exclusive equitable remedy of injunction, 138, 170, 221, 1346.
remedy at law must be inadequate, 221, 1346.
final relief granted on injunction in cases of, 237.
[where nuisance abated pending suit, 237, note.]
relief against private, in equity, to prevent multiplicity of suits, 252, 257, 271, 273.
equity jurisdiction over, when abolished by statute, 281.
of courts of New Hampshire over, 307, 308.
of courts of Massachusetts, 319.
of courts of Maine, 331.
not restrained where estoppel by acquiesence, 817.
suit in equity to abate, where must be brought, 1318, note.
public, when restrained, 1349.
private, when restrained, 1350.
violating easements, restrained: ancient lights; excavations; polluting and diverting streams, etc., 1351, 1357, note.
mandatory injunctions, when granted, in case of, 1359.

O

OFFICE,
contracts for procurement of, illegal, 935.

OFFICERS,
removal and appointment of, of corporations, as an equitable remedy, 112, 138, 171.
decrees of equity carried into effect by statute by, 135, 170, 428, 1317.
contracts interfering with election of, illegal, 935.
made with, interfering with governmental functions, illegal, 935.
persons not restrained from acting as public, 1345.
illegal, unlawful, or improper acts of public, restrained, 1345.
imposition or enforcement of taxes, 258–260, 265, 270, 273, 1345, note.
See TAXES.

OHIO,
equity jurisdiction, extent of, in, 287, 342, 345.
statutory provisions concerning, 287, note.
reformed procedure adopted in, 40, note, 287.
election of widow concerning dower in, 494, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note, 759.
assignments of things in action in, 705, note.
statute of uses in, 986, note.
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.

OHIO — *Continued.*
married women's power of disposition of separate property in, 1105, note.
married women's contracts in, 1126, notes.
equity jurisdiction over administration of decedents' estates in, 349, note, 1154.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance exists in, 1249.
whether assignable, 1254, note.
real party in interest to sue in, 1273, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
interpleader in legal actions in, 1329, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.
necessity for injunction restraining action at law where new parties required obviated in, 1372, note.
statutory suit to quiet title in, 1396, notes.

[OKLAHOMA,]
[mortgages of land in, 1188, note.]

OREGON,
seal presumptive evidence of consideration in, 70, note.
equity jurisdiction, extent of, generally, in, 285, 345.
statutory provisions concerning, 285, note.
inadequacy of legal remedies as affecting, 342, 344, 345.
reformed procedure adopted in, 40, note, 287.
election of widow concerning dower in, 494, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note, 733, note.
effect of other kind of notice in absence of record in, 664, note.
[charitable trusts in, 1029, note.]
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance exists in, 1249.
[whether assignable, 1254, note.]
real party in interest to sue in, 1273, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
interpleader in legal actions in, 1329, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.
statutory suit to quiet title in, 1396, notes.

P

PARAPHERNALIA,
what are, and rules concerning, 1112.

PARENT AND CHILD,
what rights and duties between, belong to equity, 99, 100.
legacy given by parent to creditor-child, whether in satisfaction, 539.
debt to child, whether satisfied by advancement in parent's lifetime, 540.
legacies to child, whether satisfied by portions and advancements, 553-564. See SATISFACTION.
portions, whether satisfied by subsequent legacies, or other similar provisions, 565-568. See SATISFACTION.
defective execution of powers aided on behalf of child, 588, 589, 834.
inadequacy in contract between, constituting constructive fraud, 928, note.
rewards to parents for procuring or consenting to marriage with child illegal, 931.
dealings between, when invalid, 962.
covenant by parent to settle on child created use, 981.
trust inferred in property conveyed to parent for maintenance of family or children, 1012.
trust arising where parent purchases property with child's money, 1037, note, 1049.
no trust results where parent purchases property in child's name, 981, 1039, 1041.
nor in conveyances from parent to child, 981.
legacy to child, whether preferred in abatement, 1141.
child when removed from custody of parent, 1307.
parent when allowed for maintenance of child, 1309, note.
See IN LOCO PARENTIS; ADVANCEMENTS; PORTIONS.

PARTIES,
rules as to joinder of, at common law, 113.
in equity, 114.
where rules as to, prevented action at law, equity has concurrent jurisdiction, 189.
relation and situation of, to each other, in order that discovery may be granted, 198-200. See DISCOVERY.
in actions to prevent multiplicity of suits, 251, 267, 269. See MULTIPLICITY OF SUITS.
where breach of trust committed among co-trustees, 1081.
real party in interest to sue under reformed procedure, 1273.
effect of, on assignments of things in action, 1274.
in suits against directors of corporations, 1091-1095. See DIRECTORS.
where one joint debtor has died, 409, 1301, 1302.
injunctions restraining actions at law under reformed procedure, where new, required, 1372.
in establishing disputed boundaries, 1385, note.
in suits for partition of land, 1387, note.
in suits to quiet title, 1397, note.

PARTITION OF LAND,
remedy of, belongs to concurrent jurisdiction, 140, 174, 185, 735, note, 1379.
substantially the same at law and equity; estate or right directly established or recovered, 110, 140, 174, 180, 1378.
based upon inadequacy of legal remedies, 174, 180, 1379, 1387.
has almost displaced legal remedy of, 1379.
legal remedy, where retained in modified form, 110, note.
"ejectment" used for purpose of, under reformed procedure, 110, note.
maxim, He who seeks equity must do equity, applied in suits for, 393, note.
receivers appointed in suits for, 1333.
common-law remedy; extent and insufficiency, 1386.
early origin and extent of equitable jurisdiction, 1387.
who may be bound by decree in, 1387.
parties in suits for, 1387, note.
title of defendant to be shown by complainant at law; discovery in equity, 1386, 1388.
complainant must show title in himself, 1386, 1388.
where disputed; legal and equitable titles, [177, note], 1388.
[retention for determination of legal title, 241, note.]
of equitable estates and incorporeal hereditaments, 1388.
accounting in, where joint owner or owner in common receives more than share of profits, 1389, 1421, note.
reimbursement in, for expenditures by one of parties, 393, note, 1240, note, 1389.
inconvenience or difficulty in, no ground for refusing relief, 1389.
effected by mutual conveyances; "owelty" or partition, 1389.
by means of sale; consent, 1390.
land not converted when sold by court, 1167, note.

PARTITION OF PERSONAL PROPERTY,
remedy of, belongs to concurrent jurisdiction, 185.
estate or interest is directly recovered or established, 1378.
remedies at common law, 1391.
jurisdiction of equity to decree, or sale, 1391.
title tried by equity where disputed in, 1392.

PARTNERS,
dealings between, are fiduciary, 963.
surviving, whether trustees for estates of deceased, 1044, note, 1046.
resulting or constructive trust in property purchased by, with partnership funds, 422, 587, 1049.
constructive trust where one of several, obtains renewal of lease in his own name, 1050.
must not act inconsistently with partnership's interests, 1077.
are *quasi* trustees, 157, 1088.

PARTNERS — *Continued.*
lien of, enforced by equity, 1243.
receivers, when appointed in suits between, 1333.
injunctions granted in controversies between, 1345.
accounting between, in equity, and rules arising from, 1421.

PARTNERSHIPS,
suits to wind up and distribute assets of, are pecuniary remedies, 112, 186.
what questions growing out of, belong to concurrent jurisdiction, 186, 1416.
suits between, having common member belong to concurrent jurisdiction, 175, note, 189.
rule that jurisdiction attaching for any purpose extends to whole controversy applied to, 239.
[not, when no right to equitable relief is made out, 237, note.]
jurisdiction of equity in affairs of, not lost by relief given at law, 280, 1154.
maxim, Equality is equity, applied in settling up affairs of, 410.
property of, after insolvency or dissolution, a trust fund for benefit of firm creditors, 1046.
conversion of lands of, when and for what purposes takes place, 1166, note.
affairs of, settled up in equity, although probate courts afford relief, 1154.
agreements not specifically enforced, 1405, note.
dependence of equity jurisdiction over, on accounting, 1421.
See PARTNERS.

PART PERFORMANCE,
specific performance of verbal contracts decreed when, 1409. See SPECIFIC PERFORMANCE.

[PASSWAYS,
equity will determine location of, 185, note.]

PATENTS,
[conveyance of, equity will compel, when, 186, note.]
injunction when granted to restrain infringement of, 1352.

[PECUNIARY RELIEF. See MONEY.]

PENALTIES,
equitable doctrines concerning, adopted by courts of law, 72, 434.
equitable relief against, as applied to mortgages, 162, 382, 433, 1180.
discovery subjecting to, not compelled, 202.
jurisdiction of courts of Maine to relieve from, 325.
exacted by the common law, 72, 379, 381.

PENALTIES — *Continued.*
maxim, Equity looks at the intent rather than the form, applied to, 381, 433.
equitable jurisdiction over, whether embraced in that of accident, 433, note.
when relieved against; general doctrine, 381, 433.
original extent and growth of, 381, 433.
test is whether compensation can be adequately made, 381, 433.
damages how ascertained when relief against, given, 433.
form of relief against, 434.
what are, 435, 436, 441.
stipulations to secure payment of money alone, 433, 436, 441.
stipulations not, 437-445.
when in the alternative, 437.
for reduction of existing debt upon prompt payment, 438.
for acceleration of payment of existing debt, 439.
may be waived by creditor, 439.
relieved against when accident, mistake, or fraud involved, 439, 826, 833.
for liquidated damages, 440-445.
whether penalty or liquidated damages, on what depends generally, 440, 445.
effect of use of words "penalty" and "liquidated damages," 440.
tendency towards, in doubtful cases, 440.
mere largeness of sum, whether reason for holding to be, 440.
rules determining liquidated damages and, 441-445.
larger sums securing payment of smaller are, 433, 436, 441.
how regarded at law, 441, note.
agreements for performance of single act, where damages not easily ascertainable, 442, 445.
whether rule applies to sale of goods, chattels, and securities, 442, note.
agreements for performance of several acts each, 443, 445.
party liable in same amount, whether partial or complete default, 444.
agreements for performance of one of several acts, where damages not easily ascertainable, 445.
specific performance cannot be resisted by payment of, 446.
not decreed where party recovered judgment at law for damages, 446.
not decreed where sum to be paid is liquidated damages, 447.
forfeitures, whether governed by same rules as, 449, 456.
statutory, not relieved against, 458.
See FORFEITURES; LIQUIDATED DAMAGES.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

PENNSYLVANIA,
law and equity systems distinct, but administered by same tribunal in, 41, note.
legal actions for partition and admeasurement of dower retained in, 110, note.
equity jurisdiction in, limited by statute, 286, 338-341.
statutory provisions concerning, 286, note, 340.
equitable powers of common-law courts in, 116, note, 339, 340.
originally not given to courts, 116, note, 339, 340.
finally given by statute, 340.
election of widow concerning dower in, 494, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
fraud the essence of estoppel by conduct in, 805, note.
peculiarity of trusts in, 986, note.
for married woman not valid unless married or contemplating marriage, 986, note, 1009, note, 1109, note.
property given on passive trusts may not be liable for beneficiary's debts in, 989, note.
[spendthrift trusts in, 989, note.]
doctrine of precatory trusts restricted in, 1015.
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
restraint on anticipation operates only during single marriage in, 1109.
married women's power of contracting in, 1126, note.
jurisdiction of equity over administrations in, 348, note, 1154
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance does not exist in, 1249.
jurisdiction of equity over persons of unsound mind expressly given in, 1313, note.

PERFORMANCE,
distinction between, and satisfaction, 578, 586.
doctrine of, rests on refusal to admit double benefits, 578.
right of election does not exist when, 578.
application of maxim, Equity imputes intent to fulfill an obligation to, 421, 578, 579.
definition of, 579.
two classes of cases involving doctrine of, 579.
covenant to purchase and settle or convey lands, 580-583.
purchase and suffering lands to descend presumed to be with intention of, 580.
covenant may be of various forms, 581.
purchase of less value than specified *pro tanto*, 582.

PERFORMANCE — *Continued.*
lands owned when covenant made and suffered to descend, not in, 582.
property purchased of different nature or estate presumed not to be in, 582.
effect of provision that purchase to be made with consent of trustees, 582.
covenant generally creates no lien on lands afterwards purchased, 583.
presumption may arise of, 583.
presumption destroyed by conveyance, 583.
covenant to leave property by will, 584-586.
share obtained by succession deemed in, 584.
covenant must be broken when, 584.
covenant must not create debt in covenantor's lifetime, 585.
a legacy not a, 586.
presumption of, by trustees purchasing with trust funds, 422, 587, 1049.
enforcing agreements partly performed, founded on meritorious or imperfect consideration, 588-590.
what is meritorious or imperfect consideration, 588.
agreements against and in favor of whom enforceable, 588.
surrender of copyholds against heir supplied, 588.
defective execution of powers when aided, 589, 590, 834, 835.
See POWERS.

PERPETUATION OF TESTIMONY,
suits for, branch of auxiliary jurisdiction of equity, 82, 142, 190.
nature and object of, 82, 210, 211.
practical abolition of, 83, 142, 210, 212.
when and by whom maintainable, 211, 213.
[statutory proceedings, apply to witnesses only, 212, note.]
mode of examining witnesses, 211.
defense of *bona fide* purchase defeats, 764.

PERPETUITIES,
trust void if conflicting with statute concerning, 987.
trust for accumulation limited by statute of, 992, note.
trusts permitted in certain states, subject to rules concerning, 1003, 1004.
charitable trusts, whether subject to doctrines concerning, 154, 1018.

PERSONAL ACTS,
specific performance of, not in general decreed, 1343, 1402, note, 1405, note.
may be negatively enforced by injunction, 1343, 1402, note.

PHYSICIAN AND PATIENT,
dealings between, when invalid, 963.

PIN-MONEY,
what is, and rules concerning, 1111.

PLEADING,
in suits for discovery, 198.
in suits against directors when corporation refuses to sue, 1095.
where infant is sought to be made a ward of court, 1305.
by plaintiff in interpleader, 1328.
in suit to establish disputed boundaries, 1385.
where possession required in statutory suit to quiet title, 1396, note.
See BILL; CROSS-BILL; REFORMED PROCEDURE; COUNTERCLAIM; CROSS-COMPLAINT.

PLEDGES,
equitable estates arising from; branch of exclusive jurisdiction, 150.
at law, what are, 1229.
property of pledgee in, 1229.
distinction between, and mortgages of personal property, 1229.
remedy of pledgor at law, by tender and suit, generally adequate, 1231.
jurisdiction and remedies of equity concerning, 164, 1231.
when pledgor may sue to redeem, 164, 1231.
pledgee may sue to foreclose, 164, 1231.
foreclosure, when must be resorted to, 1231.
executory agreements pledging property, equitable liens, 1237.

PLEDGOR AND PLEDGEE,
owner of stock estopped where pledgee makes wrongful transfer, 710, 711.
pledgee of stock may sue wrong-doing directors to protect his interests, 1096.
property of pledgee in pledge at law, 1229.
remedies of, at law and in equity, 1229, 1231.
See PLEDGES.

POLICIES OF INSURANCE,
forfeiture of, for non-payment of premiums at stipulated time, not relieved against, [450, note], 486, note.
notice to company of assignment of, necessary to determine assignee's priority, 695.
should be given to managing officer of company, 696.
may be corrected or canceled in equity, 856, note, 871, 912, note, 914, note, 1376, 1377.
reformed and enforced after loss in same suit, 238.
as subjects of donations *causa mortis*, 1148.
equitable lien on proceeds of, for payment of premiums, 1243.
companies may interplead claimants of insurance money, 1327, note.
See INSURANCE.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

PORTIONS,
meaning of, 553.
satisfaction of legacies by, 553-564. See SATISFACTION.
satisfaction of, by subsequent legacies or other similar provisions, 565-568. See SATISFACTION.
See ADVANCEMENTS.

POSSESSION,
by third person, of land, notice to purchaser, 606, 614-625, 664. See NOTICE.
[one out of, cannot maintain bill to recover, 177, note.]
[lessee out of, cannot try right of one in, 177, note.]
[receiver, out of, cannot recover, from stranger in, in equity, 177, note.]
[decree for, as incidental to other relief, 177, note.]
[not when right to other relief does not arise until legal title established, 177, note.]
as giving precedence among assignees of things in action, 698, note, 774, note.
when required by plaintiff in statutory suit to quiet title, 1396, 1397. See QUIETING TITLE.
in suits to remove cloud from title, 1399, note.
whether part performance sufficient to enforce verbal contract, 1409.

POSSIBILITIES,
not sufficient interests to maintain suits to perpetuate testimony, 211.
assignments of, 168, 1285-1291. See ASSIGNMENTS.

POST OBIT CONTRACTS,
relief against, 954.

POWERS,
maxim, Equality is equity, applied to appointments under trust, 411, 1002.
cases of election arising under appointments in pursuance of, 478-480.
accidental entire non-execution of, not supplied, 590, 828, note, 834, 1002.
supplied where accompanied with a trust, 828, note, 835, 1002.
defective execution of, through accident or mistake, aided, 589, 590, 834, 871.
agreements to execute, aided, 590, 834.
in favor of and against whom jurisdiction exercised, 589, 590, 834.
what defects aided, 589, 834.
where statutory, not aided, 590, 834.
fraudulent appointments under, when relieved against, 920.
what are, and control of equity over, 1002.
in trust: what are, and control of equity over, 920, 1002.

POWERS — *Continued.*
appointment and non-appointment by donee in trust powers, 411, 1002.
in trust, dispositions valid as, though not as trusts, 1002, 1004.
in trust inferred, when necessary to carry out terms of a will, 1013.
appointment under, by married women; disposition when to be made by; liabilities of property for debts, 1106, 1123.
doctrine of married women's contracts as execution of power of appointment, 1122.

POWERS IN TRUST. See POWERS.

PRÆTORS,
in the Roman law, 5-7.
comparison of, with English courts, 5.
legislative work of, by edicts, 5, 7.
jurisdiction of, ordinary and extraordinary, 6.
ordinary finally abolished, 6.
new actions introduced by, 5, 7.
material for improving *jus civile,* from whence obtained by, 8.

PRECATORY WORDS,
what are, 1014.
trust inferred from use of, 155, note, 1014-1017. See TRUSTS.

PRECEDENTS,
early growing and controlling effect of equity, 49, 58.
equity finally established on a basis of, 59-61.
expansive and flexible nature of equity, 59-61, 67.

PRESUMPTION,
where gift made to widow entitled to dower, against obligation to elect, 493.
of satisfaction of debts and legacies. See SATISFACTION.
actual notice not inferred by, 595, 596.
in favor of and against merger, when arises, 790-793, 798, 799. See MERGER.
of fraudulent representations to induce action, 880.
knowledge of untruth of statement when conclusively presumed, 886.
when does not arise of knowledge of party to whom misrepresentation made, 891, 895.
fraud not inferred by, 927, note.
of fraud resulting from condition or relation of parties to transaction, 943.
in transactions with persons of weak mind, 947.
of undue influence where antecedent fiduciary relation, 951.
of invalidity in transactions with expectants, heirs, and reversioners, 953.
in transactions between persons in fiduciary relations, 955-965. See FRAUD, CONSTRUCTIVE.

PRESUMPTION — *Continued.*
intent to defraud creditors by conveyance, when inferred by conclusive and rebuttable, 970, 971.
of intention in resulting trusts, 1031, 1036, 1040, 1041.
of fraud against creditors, where price paid by debtor and title taken by another, 1042.
against trustee for failure to keep full or accurate accounts, 1063, note.
of *donatio causa mortis,* when gift made in last sickness, 1146.
of acceptance by donee of gift *causa mortis,* 1149.
of reconversion, where money to be laid out in land comes into hands of owner, 1177, note.
in favor of mortgages as against conveyances with agreements to repurchase, 1195.
against deed absolute in form being a mortgage, 1196.
See EVIDENCE.

PRICE. See CONSIDERATION.

PRINCIPAL AND AGENT,
agent cannot be joined as party for purpose of discovery, 199.
notice to agent constructive notice to principal, 666-676. See NOTICE.
principal bound by wrongful transfer of stock by agent, 710, 711.
estoppel from acquiescence in settlement of accounts between, 820.
duty to disclose in transactions between, 902-904.
liability of principal for frauds of agent, 908, 909.
validity of dealings between, 959.
constructive trust where agent purchases property with principal's funds, 422, 587, 1049.
agent obtaining renewal of lease in own name, 1050.
agent's wrongful appropriation or conversion of principal's property, 1051.
wrongful acquisition of principal's property, 1052.
trustees may act through agents, 1068.
agent must not deal with principal's property for own advantage, 959, 1075.
must not mingle his own with principal's funds, 1076.
must not act inconsistently with principal's interests, 959, 1077.
must not sell principal's property to nor buy from himself, 959, 1078.
agents may be *quasi* trustees, 157, 1088, 1097.
corporation directors in what respect agents, 1089, 1090.
liability of directors as agents to stockholders, 1091.
mere mandate to agent directing payment of fund not equitable assignment, 1282.
agent, when may interplead principal, 1326, 1327.
principal when may sue agent for accounting, 186, 1421, note.
agent when may sue principal, 1421, note.

PRINCIPLES OF EQUITY, 360, 363-431. See MAXIMS OF EQUITY.

PRIORITIES,
dependence of doctrine of, on maxim, Where there are equal equities the first in time shall prevail, 416, 591, 678, 682, 718.
on maxim, Where there is equal equity the law must prevail, 416, 591, 678, 682, 741.
estates and interests to which doctrine of, applies, 679-681.
does not apply to legal estates, 679, 735.
order of time controls, 679.
modification by statutes concerning fraudulent conveyances and recording, 680.
applies to equitable estates and interests alone, 681, 735.
principles embodying doctrine of, in general, 682.
superior and equal equities, 683-692.
when equities are equal, 683.
superior equities defined and described, 684-692.
inequality based on form and mode of creation, not recognized, 684.
element of valuable consideration important, 684, 685, 691.
nature of the equities, 685.
interest created by trust, or contract *in rem*, superior to that by gift or judgment, 685, 720.
superior equities by reason of fraud, 686, 716, 731, 732.
of negligence, 687, 716, 731, 732.
effects of notice on equities, 688-692.
notice of trust, contract, or lien, 688.
of a prior covenant, 689, 692, 1295, 1342. See COVENANTS.
what is notice, 591-676, 690. See NOTICE.
time of the notice, 691.
notice binding when received before valuable consideration parted with, 691, 750, 755.
whether must be received before conveyance, 691, 755.
of what notice must consist, 692.
in assignments of things in action, 693-715.
order of time does not generally prevail, 693, 695.
prevails in certain American states, 695, 1279.
peculiar position occupied by assignments of things in action, 693.
notice by assignee to debtor, holder, or trustee to establish, 694-697.
unnecessary as against assignor, his volunteers or judgment creditors, 694, 700.
[unnecessary as against attaching or garnishing creditors, 694, note.]
necessary in England and certain states as against subsequent assignees, 695, 713, 989, 1279.

PRIORITIES — *Continued.*
classes of cases to which rule applies, 695.
[notice before assignment is made is ineffectual, 695, note.]
time when notice should be given, 695, note.
person giving notice must be assignee for value and in good faith, 695.
to whom and how should be given, 695, 696.
to assignor of debtor's failure to pay unnecessary, 696.
extent of rule; does not apply to assignments of equitable interests in land, 697, 713.
diligence of assignee in perfecting title and enforcing rights necessary, 698–702.
laches as cutting off rights of, 698.
steps to be taken by assignee where no notice given, 698.
possession as giving precedence, 698, note, 774, note.
questions in connection with assignment of shares of stock, 699–701.
as between assignee and assignor, or the company, 699.
between assignee's and assignor's judgment creditors, 700.
between prior and subsequent assignees, 698, note, 701, 712, 713, 774.
prompt notice to debtor necessary to prevent subsequent acts by him, 702.
payment to or release from assignor before notice, 702.
preventing set-off, by statute, against assignor, 702.
assignments of things in action subject to equities, 703–715.
equities in favor of debtor party, 704–706.
contracts and defenses to which rule applies, 704.
mortgages secured by negotiable notes, 704, note, 1210, note.
equity must exist at time of, or before notice of, assignment, 704.
debtor may be estopped from setting up equities, 704, 820.
code provisions relating to, 705, 706.
equities between successive assignors and assignees, 707–713.
circumstances giving rise to equities, 707.
conflicting decisions; mode of reconciling, 707.
assignment subject to latent equities, 708, 709.
illustrations, 709.
effect of estoppel on application of rule, 710, 711.
whether rule of estoppel extends beyond assignments of stock, 710, 711.
subsequent assignee obtaining legal title protected, 698, note, 701, 712, 713, 774.
successive assignments by same assignor to different assignees, 713.

PRIORITIES — *Continued.*
equities in favor of third person, 714, 715.
general rule of assignments subject to such equities, 714.
contrary rule, 715.
among equitable estates, mortgages, liens, and other interests, 716–732.
doctrine of, greatly modified by recording acts, 683, note, 717.
priority of time among equal equities, 718, 719.
general rule that the order of time controls, 413, 591, 678, 682, 718.
simultaneous mortgages; substituted liens, etc., 719.
one equity intrinsically the superior, 720–726.
subsequent specific superior to prior general lien, 685, 720.
prior unrecorded mortgage or lien superior to subsequent docketed judgment, 719, 721, 722. See JUDGMENTS.
where judgment creditor had notice, 723.
prior unrecorded mortgage and purchase at execution under subsequent judgment, 724, 774.
purchase-money mortgages and judgments against mortgagor, 725.
subsequent liens against premises, 725.
[superior to mortgage made and recorded prior to passing of title, 725, note.]
[inferior to subsequent deed, first recorded, 725, note.]
subsequent lien superior by reason of fraud in prior, 726.
subsequent perfected chattel mortgage superior to prior lien by contract, 726.
assignee having priority where fixed by agreement, 726.
subsequent equity protected by legal title, 727–729.
general rule that priority is gained, 698, note, 727.
where legal estate is obtained from trustee, 728, 729, 769, 770.
where equitable mortgages, mortgagor cannot give priority by conveying legal title, 728.
legal estate obtained after notice of prior equity, 729.
with regard to *bona fide* purchaser, 729, 756, 768.
notice of existing equities, 727, 730.
effect of fraud or negligence upon, 716, 727, 731, 732.
assignments of mortgages; rights of, depending upon, 733, 734.
subject to equities, 704, 733, 753, note, 1210, note.
operation of recording acts, 655, note, 733, 734, 1209, note.
rights of assignee on unrecorded assignment, 734.
effected by merger, 800.

PRIVATE PAPERS,
disclosure of, may be restrained, 1340, note, 1353.

PRIVILEGED COMMUNICATIONS,
discovery of, will not be compelled, 203.
disclosure of, restrained, 1340, note.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

PRIVY COUNCIL,
origin, functions, and composition of, 31.

PROBATE COURTS,
jurisdiction of, generally exclusive, over administration of decedents' estates, 77, 156, 187, 235, 347–350, 1152–1154. See ADMINISTRATIONS.
over election, 518, 519.
legacies, 77, 156, 1129.
construction and enforcement of wills, 77, 156, 1155.
admitting wills to probate, effect of, 913.
infants, 78, 1303–1310. See INFANTS.
guardians, 1097.
donations *causa mortis*, 1151.

PROCEDURE,
at common law as influencing establishment of court of chancery, 21–23.
writs, nature and issuing of, 21. See WRITS.
ancient actions, real and personal, 22. See ACTIONS.
meager system of remedies, 23.
retarding development of law, 66.
in suits for discovery, 198.
in subjecting married women's separate property to contracts, 1123.
in foreclosure of mortgages, 1227, 1228.
in interpleader suits, 1328.
in suits for assignment of dower, 1383.
See REFORMED PROCEDURE; PLEADING; PARTIES.

PROFERT,
as ground of equity jurisdiction of suits on lost sealed instruments, 831.

PROMISSORY NOTES. See NEGOTIABLE INSTRUMENTS.

PROMOTERS. See CORPORATIONS, DIRECTORS.

PROPERTY,
sources of legal and equitable, 366–369.

PROSPECTUSES,
statements in, constituting estoppel, 819.
when fraudulent, 879, 881.
kinds of relief given, 881, 1092.

PROSTITUTION,
contracts promoting or furnishing opportunities for, illegal, 936.

PUBLICATION,
of rival work restrained, when agreement not to publish, 1344, note.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

PUBLIC BURDENS,
relieved against in equity, to prevent multiplicity of suits, 258-260, 265, 266, 270, 273, 1345. See TAXES.

PUBLIC OFFICERS. See OFFICERS.

PUFFERS,
effect of employment of, at law and in equity, 934.
when sale to be without reserve, 934.

PUFFING,
by vendor allowed, if not misrepresentation or warranty, 878.

Q

QUIETING TITLE,
[suit for, retention for full relief, 241, note.]
bills of peace, 246, 1393, 1394. See BILLS OF PEACE.
[jurisdiction when defendants are numerous, 261, note.]
application of maxim, He who seeks equity must do equity, to suit for, 393, note.
suit for, when proper where title-deeds or records lost, 832, note.
suit by devisee to establish will, in nature of suit, 1158.
statutory suit for, 1396, 1397.
exclusive jurisdiction of equity enlarged by, 138, 1395, note.
[jurisdiction of United States courts of, 293, note.]
as taking place of ejectment, 1395, note, 1397.
estate or interest directly established by, 1378, note, 1395.
distinction between, and original equitable suit for, 1396, 1397.
action when equitable in nature, 1396, note.
types of legislation; possession by plaintiff, 1396.
title of plaintiff; legal or equitable, 1396.
nature of claims determined in, 1397.
possession by plaintiff when required, 297, note, 1396, 1397.
nature of possession, 1396, note, 1397, note.
when must be alleged, 1396, note.
when plaintiff out of possession cannot maintain, 296, note, 1397, note.
effect of judgment in, 1397, note.
parties in suits for, 1397, note.

R

RATIFICATION,
of fraudulent transaction, 916, 964.
cannot be of part only, 916.
when may be imputed from conduct or acts, 897, 916.
cannot be of illegal contract, 964.
requisites of, 964.

REAL PARTY IN INTEREST,
to sue in states adopting reformed procedure, 1278.
effect of provision authorizing, 1274.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

REAL PROPERTY. See LAND.

RECEIVERS,
equitable remedy of, exclusive, 171.
is ancillary and provisional, 171, 1319.
final remedies in case of fraud may be aided by appointment of, 990.
who are, 1330.
appointment of, discretionary, 1331.
character of the discretion, 1331.
circumstance of probability that plaintiff will ultimately succeed, 1331.
cases in which, may be appointed, 1330, 1332-1335.
where no person competent to hold property during litigation, 1330, 1332.
infants', lunatics', and decedents' estates, 1332.
litigants equally entitled to property, but unjust that either should retain control, 1330, 1333.
suits between partners, 1333.
partition between co-owners, 1333.
suits between conflicting claimants to land, 1333.
suits against persons in position of trust or *quasi* trust, misusing property, 1330, 1334.
instances, 1334.
after judgment to carry decree into effect, 1330, 1335.
creditors' suits; enforcing liens and contracts of married women; winding up corporations, 1335.
statutory provisions concerning appointment of, 1335.
appointment during litigation does not determine any right or title of parties, 1336.
are *quasi* trustees, 157, 1336.
powers, rights, duties, and liabilities of, 1336.
who may be appointed, and effect of appointment, 1336, note.

RECITALS,
in instruments of title as constituting notice, 626-631. See NOTICE.

RECONVERSION, 1175-1178. See CONVERSION.

RECORDING,
as affecting equitable rules concerning notice, 76.
defective or improper, as constituting actual notice, 600.
possession constructive notice to subsequent grantee with record title, 615, 664.
when actual, open, and visible, is equivalent in effect to, 615, 664.
whether notice of different title where *a* title recorded, 616.
rules concerning recitals or references to instruments as constituting notice apply to recorded and unrecorded instruments, 627.
constructive notice arising from, of judgments, 641-643.
arising from, of instruments, 644-665. See NOTICE.

RECORDING — *Continued.*
rule of order of time governing priority among legal estates affected by, 680.
doctrine of priorities greatly modified by, acts, 683, note, 717.
prior unrecorded mortgage superior to subsequent docketed judgment, 719, 721, 722.
where judgment creditor had notice, 723.
whether superior where sale under subsequent judgment, 724, 773.
effect on priorities of laches in connection with, 731.
operation of acts of, on assignments of mortgages, 655, note, 733, 734, 767, 1209, note.
effect of, acts on doctrine of *bona fide* purchaser, 736, 744, 772.
second purchaser without, from first purchaser with notice of unrecorded instrument protected, 754, note, 760.
second purchaser with, from first purchaser without, 754, note.
what necessary to make holder of subsequent conveyance or mortgage obtaining first record, a *bona fide* purchaser, 757–761. See BONA FIDE PURCHASER.
record as furnishing means of ascertaining truth by party claiming benefit of estoppel, 810.
ditto, by party charging vendor or vendee with fraudulent representations, 895, note.
effect of, on mortgages to secure future advances, 1199.
equities in contribution and exoneration among grantees on redemption disturbed by want of, 1225.
notice arising from, of deeds reserving lien to grantor, 1255, 1257, 1258.
of chattel mortgages, as changing doctrines concerning assignments and liens on future-acquired property, 1291, note.

RECORDS,
lost or destroyed judicial, whether supplied in equity, 827.
of title where lost; remedy of equity, 832, note.
whether mistakes in, corrected in equity, 871, 1376.

RECOUPMENT OF DAMAGES,
used only defensively, 113.
of recent invention by common-law courts, 113, 175.

REDEMPTION,
nature of, as an equitable remedy, 71, 1378, note, 1395.
[suit for, retention for full relief, 241, note.]
of mortgages and pledges in New Hampshire, 301.
in Massachusetts, 316.
in Maine, 324.
maxim, He who seeks equity must do equity, applied in suits for, 392.
provisions for, in mortgage, unnecessary, 1192, note.

REDEMPTION — *Continued.*
mortgagor cannot, in instrument, deprive himself of rights of, 1193, 1219.
may sell or release rights of, by separate instrument, 1193, note.
in conveyances with separate agreements when mortgages, 1194.
in conveyances absolute in form when mortgages, 1196.
by assignees of several notes secured by same mortgage, 1202.
meaning of, 1219.
in England, when suit for, by mortgagor, maintainable, 1219.
remedy of mortgagor out of possession, 1182, 1183, 1219.
nature and result of suit for, 1183, 1219, note.
reconveyance by mortgagee to mortgagor on, 1183, 1184, 1219, note.
in America, when suit for, by mortgagor, maintainable, 1219.
where legal theory adopted, 1219.
uncommon by mortgagor in possession where equitable theory adopted, 1188, 1190, 1219.
where mortgagee obtains possession, 1189, 1190, 1218, 1219.
as applied to suit to compel acceptance of payment and discharge encumbrance, 1190, note, 1219.
statutory right of, not a part of equity, 1219.
requisites of maintaining suit for, 1219.
suit for, when maintainable by persons other than mortgagor, 1220.
where person redeeming has partial interest only, 1220, 1223.
entire mortgage debt must be redeemed, 1220, 1221, 1223.
cannot be complete until whole of debt is due, 1220, 1223.
mortgagee not bound to accept installments not due in, 1220, note.
contribution and exoneration, rights of, on, 1221-1226.
occur when redemption operates as equitable assignment, 1221.
contribution arises after redemption, and depends on equities between parties, 1221.
mortgagee's rights to enforce mortgage are independent of, 1221, note, 1226.
where equities are equal, contribution *pro rata,* 1222.
application of maxim, Equality is equity, 411, 1222.
when equities are equal, 1222, note.
equality of equities how disturbed, 1221, note, 1222, note.
where equities are unequal, 1223-1225.
between tenants for life or years, and remaindermen or reversioners, 1223.
mortgagor and grantee by warranty deed of parcel, 1224.
successive grantees by warranty deeds; inverse order of alienation, 1224.
circumstances disturbing equities and defeating rule, 1225.
mortgagee, after notice, cannot disturb equities by release or agreement, 1226.
may release if no notice of subsequent rights given, 1221, note, 1226.

REDEMPTION — *Continued.*
record not a notice, 1226.
effect of partial release where equities are equal and unequal, 1226.
of pledges and mortgages of personal property, 164, 1230, 1231. See MORTGAGES.

RE-EXECUTION,
of instruments, when discharged or surrendered by mistake, 871.
lost or accidentally destroyed, 1376, note.
remedy of, included in reformation, 1375, note, 1376, note. See REFORMATION.

REFORMATION,
remedy of, well established, 110, 112.
is exclusively equitable, 171, 188.
operates indirectly to establish or protect primary rights, 171, 1375.
often used as preliminary to final relief, 171, 1375.
obtained on behalf of legal or equitable interest, by legal or equitable owner, 221, 1375.
when depends upon inadequacy of legal remedies, 221.
jurisdiction attaching for purpose of, extending to whole controversy, 238.
power of courts of New Hampshire to grant remedy of, 304.
of courts of Massachusetts, 319.
of Maine, 330.
final relief given under reformed procedure where, prayed for, 357, note.
application of the maxim, He who seeks equity must do equity, to suits for, 393, note.
re-execution of instruments virtually included in, 1375, note, 1376, note.
when granted, 845–871, 1376. See MISTAKE.
where by mistake agreement in written form fails to express intention, 845, 870, 1376.
mistake of one party, accompanied by fraud or inequitable conduct of other, 847, 870, 872, 1376.
where provisions intentionally omitted, 854, note.
whether possible by defendants in suits for specific performance, 860, 862.
by plaintiffs, 861, 862.
obtained by defendants in legal actions in suits under reformed procedure, 862, 868.
when delay, laches, etc., 817, 856, 1376, note.
not granted against *bona fide* purchaser, 776, 871.
whether granted when instrument improperly drawn through fraud, 910.
may be had of usurious contracts, on what conditions, 391, 937, note.

REFORMATION — *Continued.*
parol evidence admissible in suits for, 859.
must be clear and convincing, 859.
when contract within statute of frauds, 864-867. See EVIDENCE.
extent of the remedy, 1376.
instances of instruments reformed, 871, 1376.
deeds, mortgages, leases, and other instruments affecting land, 871, 1376.
policies of insurance, 871, 1376.
bonds, 871, 1376.
negotiable instruments, 837, note, 871, 1376.
settlements and compromises, 871, 1001, note, 1376.
mistakes in wills, 871.
awards, 871.
judgments and other records, 871, 1376.
miscellaneous cases, 1376, note.

REFORMED PROCEDURE,
should do away with contest between law and equity courts, 39, note.
as changing the relations of equity to law, 84-88, 353-357.
distinction between actions at law and suits in equity abolished by, 40, 84, 183, 354.
in what states, 40, note.
deals with the procedure alone, 84, 354.
distinction between equitable and legal primary rights and remedies exists under, 84, 354.
jurisdiction of equity in granting remedies, how affected by, 84-88, 183, 355, 357.
by equitable defense or counterclaim to legal action, 85, 86, 183, 357.
equitable and legal remedies granted in one action, 87, 116, 183, 357.
equitable remedy assumed and legal simply granted, 87, 183, 357.
what equitable interests affected by, 356.
nature of action to recover land under, 109, note.
usual method of equity classification is in conflict with, 124.
rule that equity will not interfere where law can do complete justice applies under, 176, note.
effect of, on suits for discovery, 83, 191.
on suits to perpetuate testimony, 83, 212.
on doctrine that jurisdiction once attaching extends to whole controversy, 242.
principle of inadequacy of legal remedies, as affected by, 358.
relief against penalties and forfeitures, how obtained under, 434.
rules concerning *lis pendens* should apply to counterclaims and cross-complaints under, 634.
assignments of things in action without prejudice to set-off, or defense under, 705, 706.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

REFORMED PROCEDURE — *Continued.*
defense of *bona fide* purchase under, 784.
equitable estoppel affecting legal title to lands, enforced at law under, 807.
suits under, on lost instruments, 832.
relief from accidental forfeitures, how obtained under, 833.
relief against judgments, how obtained under, when defense prevented by accident, 836.
contract, how varied under, by defendant in specific performance, 860.
union of reformation and specific performance or pecuniary relief by plaintiff or defendant by, 862, 868.
defendants in legal actions invoking equitable remedies for mistake, 868.
as affecting equity jurisdiction over suits for recovery of money for fraud, etc., 914.
fraud in obtaining judgment, set up under, as equitable defense, 919.
real party in interest to sue under, 356, 1273.
effect of, on assignments of things in action, 1274.
whether representatives of deceased joint debtor can be sued with survivors under, 1301.
equitable defenses under, to legal actions as substitute for injunctions against actions and judgments, 1366–1374. See INJUNCTIONS.
See COUNTERCLAIMS; CROSS-COMPLAINT.

RELIGION,
support and propagation of, charitable uses, 1021.

REMAINDERS,
whether election, where donors dispose of whole of property, but have only, 490.
uses created and conveyed in violation of rules on contingent, 982, note.
vested, not included in contingencies, expectancies, and possibilities, 1286.
contingent, are interests, and not mere hopes or expectancies, 1286.

REMAINDERMEN,
not bound by election by holder of precedent estate, 516.
conversion as between life tenants and, 1168.
reconversion not permitted when, injured, 1176.
need not advance proportionate share in redemption by partial owner, 1220.
entitled to redeem from mortgages, 1220, note.
contribution on redemption between, and tenants for life or years, 1223.
receivers appointed in suits for protection of, 1334.
bound by decree in partition, 1387.
as parties in suits for partition, 1387, note.
See REMAINDERS.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

REMEDIES,
Roman edicts conferred in certain cases, 5, 7.
meager system of, furnished by early English law, 23.
as increasing jurisdiction of chancery, 37.
denied, refused, or prohibited by common law, granted by equity, 48-54. See EQUITY.
union of legal and equitable, under reformed procedure, 40, 84, 87.
equity jurisdiction in granting of, affected by reformed procedure, 84-88, 183, 355, 357. See REFORMED PROCEDURE.
definition of, 90.
remedial rights and duties, definitions of, 90.
nature and extent of, on what depend, 91.
equity contains rules creating primary duties and rights, and conferring remedial rights and, 96-116.
equitable primary rights, 98-107. See RIGHTS.
equitable, generally; kinds and classes of, 108-117.
different from legal, although some legal in their nature, 101, 108.
derivation of many from primary rights, 108, 111.
character and number of legal and, 109, 170, 175.
flexible and expansive nature of, 109, 170.
general classes of: illustrations, 110-112.
mode of administering, 113-116.
common-law rules as to parties and judgments, 113.
equitable rules, 114, 115.
how far legal and equitable, can be combined, 116.
equitable remedial rights and, should be recognized in classification of equity, 126, 127.
equity jurisdiction depends on equitable rights and interests, and equitable, 133, 135, 424.
argument that equity acting *in personam* and not *in rem* is wholly remedial, 134, 135.
destroyed by statutes, 135.
equitable and legal, obtained in concurrent jurisdiction, 136.
exclusive jurisdiction embraces cases where, are purely equitable, 138, 146, 170, 218, 219, 222.
no, asked and granted in suits belonging to auxiliary, 142.
in concurrent jurisdiction like the legal, 139, 173, 175, 222.
are recoveries of specific chattels, land, or pecuniary recovery, 175.
need not be of same external form, or accompanied by same incidents, 175.
exclusively equitable, 170-172.
may be granted to protect and enforce legal, as well as equitable rights, estates, and interests, 170.
acting *in personam* and not *in rem*, meaning of, 135, 170, 428, 1317, 1318. See DECREES.
deal with property, rather than with personal rights and estates, 170, 429.

REMEDIES — *Continued.*
specific character of, 170, 429.
unlimited variety of, 111, 170.
classes of, 171, 1316.
when given, 172.
inadequacy of legal, how far a test of equity jurisdiction, 132, 133, 216, 424.
is the ground of concurrent jurisdiction, 139, 173, 176, 180, 217.
is the occasion only of exclusive jurisdiction, 137, 138, 139, note, 173, 218.
on what branch of exclusive jurisdiction principle of, operates, 219–221.
illustrations, 221.
summary of equity jurisdiction as affected by, 222.
in regard to preventing a multiplicity of suits, 243.
as affecting jurisdiction of United States courts, 295–297, 914.
courts of New Hampshire, 299, 914, note.
of Massachusetts, 313, 914.
of Maine, 323, 914, note.
of other states, 342, 345.
doctrine of, as affected by reformed procedure, 358.
maxims regulating administration of, 385, 388, 397, 418, 423, 424, 428. See MAXIMS.
See INTERPLEADER; RECEIVERS; INJUNCTIONS; SPECIFIC PERFORMANCE; CANCELLATION; ACCOUNTING, etc.

RENT-CHARGE,
whether election between, and dower where, charged on lands devised to others, 500.

RENTS,
suits to recover, under special circumstances, belong to concurrent jurisdiction, 189.
constructive notice of title by third person receiving, 621.
mortgagee in possession chargeable with, 1216.

REPLEVIN,
action of, at common law, 22.
title only incidentally adjudged in common-law action of, 109.
equity will not entertain suit where remedy by, sufficient, 177, 185.
[where no remedy by, equity may take jurisdiction, 185, note.]

REPORTS,
of corporations, when fraudulent, 879, 881.
kinds of relief given, 881, 1092.

REPRESENTATIONS,
fraudulent, 876–899. See FRAUD.
equitable contracts arising from, 1294. See CONTRACTS.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

RESCISSION,
remedy of, well established, 110, 112.
effects may be indirectly obtained in legal actions, 110.
belongs to exclusive jurisdiction, 171, 188.
preliminary to final relief, 171, 1375.
damages granted when jurisdiction obtained for, 237.
power of courts of New Hampshire to grant remedy of, 303, 304.
remedy of, by stockholders purchasing shares through fraud, 881, 1092.
receiver when appointed in suit for, of land contract, 1334.
relations of remedy of, to that of cancellation, 1375, note.
See CANCELLATION.

RESTRAINT OF MARRIAGE. See MARRIAGE.

RESTRAINT OF TRADE. See TRADE.

RESTRAINT OF ANTICIPATION,
clauses in, may be inserted in settlements and conveyances to married women, 989, 1098, 1107.
what words sufficient to constitute restraint, 1108.
property on which restraining clause may operate, 1108.
time during which may operate, 1109.
effect of restraint, 1109.
does not operate except during coverture, 1109.
operates during all covertures, 1109.
power of court of equity to release restraint, 1109.
on power to contract, 1107, 1109, 1123.

REVERSIONERS,
whether election, where donors dispose of whole of property, but are only, 490.
transactions with, when relieved against, 953.
reconversion not permitted when, injured, 1176.
need not advance proportionate share in redemption by partial owner, 1220.
entitled to redeem from mortgages, 1220, note.
contribution on redemption between, and tenants for life or years, 1223.
bound by decree in partition, 1387.
parties in suits for partition, 1387, note.

REWARDS,
for procuring or consenting to marriage, illegal, 931.

RHODE ISLAND,
law and equity systems distinct, but administered by same tribunal in, 41, note.
equity jurisdiction co-extensive with English chancery in, 285, 342.
statutory provisions concerning, 285, note.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

RHODE ISLAND — *Continued.*
time within which widow must elect in, 513, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
[spendthrift trusts in, 989, note.]
deeds of trust in, 995, note.
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, notes.
equity jurisdiction over administration of decedents' estates in, 349, note, 350, note, 1154.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance does not exist in, 1249.

RIGHTS,
effect of reformed procedure on primary, 84, 354.
primary duties and, what are, 90.
remedial duties and, what are, 90.
relations of primary duties and, to remedial, 91.
divisions of primary: 1. Those concerning personal *status;* 2. Those concerning things, 92.
classes of, concerned with things; real and personal; descriptions, 93.
real; *genera* embraced in, 94.
personal; *genera* embraced, 95.
equity contains rules creating primary duties and, and conferring remedies and remedial, 96–117.
cases arising in administration of equity jurisdiction, 97.
equitable primary, kinds and classes of, 98–107.
with what primary, equity deals, 98–100.
are different from or additional to those existing at law, 48, 50, 51, 101.
illustrations, 102–107.
equitable remedial, kinds and classes of, 108–117. See REMEDIES.
equitable primary and remedial duties and, should be recognized in classification of equity, 126, 127.
equity jurisdiction depends on equitable, and equitable remedies, 133, 434.
exclusive jurisdiction embraces cases where primary and remedial, are purely equitable, 137, 138, 146, 218, 219, 222.
concurrent jurisdiction embraces cases where primary and remedial, are legal, 139, 173, 222.
equitable primary, in what and to what extent may exist, 146.
no equity jurisdiction where legal, created by statute, and legal remedies given, 281.
See JOINT RIGHTS AND LIABILITIES; REMEDIES.

ROMAN LAW,
aequitas in, 2-9.
early actions (*legis actiones*) of, 3.
formula, definition and nature of, in, 4.
judex, office of, in, 4, 6.
prætors, office and jurisdiction of, 5-7. See PRÆTORS.
invention of new forms of actions in, 7.
material for improving *jus civile,* from whence obtained, 8.
jus gentium, definition of, and influence on, 8.
lex naturæ, definition of and influence on, 8, 55.
finally developed, 8.
analogies between growth of equity in English and in, 9.
influence of, on English law and equity, 14, 15, 55.
causes tending to retard this influence, 16-21. See COMMON LAW.
discovery, general notions of, borrowed from, 192.
election, doctrine of, in, 463.
principle embodied in maxim, *Ignorantia juris non excusat,* derived from, 841.
standard in, to determine inadequacy of consideration, 927, note.
testament in, 976.
fidei-commissa in, 977.
general notion of uses borrowed from, 151, 977.
equitable liens borrowed from *hypotheca* of, 1233, note.
injunctions borrowed from interdicts of, 1337, 1359.

S

SAILORS,
control of equity over transactions with, 952.

SALES,
of personal property to be acquired in future, 1288-1291. See ASSIGNMENTS.

SATISFACTION,
circumstances under which, arises, 520, 522.
principle underlying, the same as that governing election, 395, 461, 520.
donee when required to elect, generally, 520.
definition of, 521.
rationale of doctrine of, 523.
presumption of, in certain cases where instrument is silent, 523.
occurs in other cases from language of donor, 523.
distinction between ademption and, 524, 554, 1131.
of debts by legacies, 527-543.
legacy by debtor to creditor, 527-540.
presumption arises of, 527.

SATISFACTION — *Continued.*
leaning against presumption, 527.
what prevents presumption, 528–538.
legacy less than debt, whether, 529.
payable at different time from debt, 530.
contingent or uncertain, 531.
of different nature, or for different interest, 532.
motive for gift stated, 533.
debt contingent or uncertain, 534.
subsequently contracted to will, 535.
different interests in debt and legacy, 536.
where direction in will to pay debts and legacies, 537.
presumption only arises in absence of express language, 538.
legacy in pursuance of agreement or express payment, 538.
debt owing to a child or wife, 539.
debt to child whether satisfied by advancement during parent's lifetime, 540.
advancement presumed to be in, 540.
legacy by creditor to debtor, 541, 542.
no presumption of release or discharge of debt, 541.
a right of equitable set-off created, 541.
when released, or enforcement restrained, for testator's declarations, 542.
how enforced, 543.
affirmative or defensive relief to be obtained in equity, 543.
of legacies by subsequent legacies, 544–552.
presumption of, on what depends or affected by, 544.
doctrine whence derived, 544.
same specific thing given by same or different instruments, 545.
legacies of quantity given by different instruments, 546–548.
second legacy regarded as cumulative, 546.
presumption, how strengthened, 546, note.
when motives expressed are the same, second is in, 547.
presumption overcome by language of testator, 548.
legacies of quantity by same instrument, of equal amount, 549.
presumption of substitution overcome by language, 551.
by same instrument of unequal amounts, 550, 551.
presumption that cumulative overcome by language, 551.
extrinsic evidence whether admissible, 525, 552, 573, 574.
of legacies by portions and advancements, 553–564.
how the cases arise, 553.
[doctrine not applicable to devises, 553, note.]
legacy to child is regarded as portion, 554.
presumption of, where legacy given and afterwards portion or advancement, 554.

SATISFACTION — *Continued.*
legacy said to be "adeemed," 524, 554.
subsequent payment less than legacy, whether complete, 555.
where advancement in form of loan or covenant to pay, 555, note.
presumption applies to persons *in loco parentis,* 554, 556.
what persons stand *in loco parentis,* 556.
character of standing *in loco parentis* shown by parol, 556.
when and between whom presumption applies, 556.
leaning of equity in favor of presumption, 557.
circumstances which do or do not prevent presumption, 557-560.
whether two gifts should be *ejusdem generis,* 557, 560.
time of payment, inequality of sums, etc., 557.
where the legacy is of uncertain amount, 558.
where payment is made to husband of female legatee, 559.
payment made to child before execution of will, 560.
where small sums have been paid, 560.
effect of a codicil after portion or advancement made, 561.
when parties are strangers, 562.
presumption whether arises, 562.
parol evidence to show, 562.
when not presumed but expressed, 563, 564.
rationale of rule in such cases, 564.
of portions by subsequent legacies or other similar provisions, 565-568.
presumption of, arises, 539, 565.
when by subsequent settlement, 565.
nature of presumption, 567.
what circumstances do not defeat presumption, 539, 566.
circumstances which do defeat presumption, 567.
beneficiary has an election, 568.
admissibility and effect of extrinsic evidence to show, 525, 569-577.
same rules apply in all instances of, 570.
evidence must refer alone to second gift, 570.
subsequent benefit may be conferred either verbally or in writing, 570.
rules of evidence arising where, 570.
subsequent benefit given by a writing, 571-575.
writing expressly states donor's intention, 572.
writing silent and no presumption of, arising from it, 525, 552, 573-575.
where presumption of, arises, 525, 552, 562, 574, 575.
cases where rules apply, 575.
subsequent benefit given verbally, 576.
can only be given verbally in certain cases, 570, 576.
amount of evidence required, 577.
distinction between, and performance, 578.
of gifts *causa mortis* by legacies, 1150.

SEALED INSTRUMENTS,
early use of injunction to prevent action on, where debt paid, 51, 70, 102.
how could only be discharged, at common law, 51, 70, 379, 383.
how discharged in equity, 70, 379, 383.
seal presumptive evidence of consideration in certain states, 70, note.
equitable rules concerning, adopted by the law; distinction between, and unsealed, abolished, 70.
effect of, at law, as regards consideration, 379, 383.
in equity, want of consideration may be shown, 370, note, 379, 383, 1293.
do not import consideration in suits for specific performance, 1293, 1405, note.
maxim, Equity looks at intent rather than form, applied to, 379, 383.
jurisdiction of equity on lost, 831.
on consideration of past illicit intercourse, valid at law, 936, note.
See BONDS.

SEALS,
rules at law and in equity concerning surety's discharge where contract under, 383.
instruments wanting, inoperative at law, create equitable interests or liens, 383.
See SEALED INSTRUMENTS.

SECRET,
injunction to prevent use or disclosure of, of trade or manufacture, 934, note, 1340, note.
sale of, of trade or manufacture, with contract not to use, whether enforced against vendor, 1405, note.

SEPARATION,
agreements for, when valid, and enforced, 402, note, 932, 1402, note.

SEQUESTRATION,
equitable, not abridged by jurisdiction subsequently acquired at law, 280.
of rents and profits of married woman's estate, for contracts, 1123.
of rents and profits by mortgagee in England, 1183.

SERVITUDES. See EASEMENTS.

SET-OFF,
doctrine of, is of statutory origin, 113, 175.
suits to procure, when not admissible in law, branch of concurrent jurisdiction, 189.
[state statutes for, do not deprive federal equity courts of jurisdiction, 279, note.]
[equitable, to legal actions, not permitted in United States courts; state statutes not followed, 292, note.]

SET-OFF — *Continued.*
legacy by creditor to debtor giving rise to right of, 541.
assignment of thing in action, when without prejudice to, under code, 702, 705, 706.
notice to debtor necessary, 702, 705.
interpretation of provisions, 706.
when good defense to suit on thing in action assigned, 704, note.

SETTLEMENTS,
doctrine of election applies to, 470. See ELECTION.
satisfaction by, or of, portions or advancements in, 553-577. See SATISFACTION.
persons acquiring property under post-nuptial, not *bona fide* purchasers, 747.
voluntary, made under mistake as to legal rights, whether relieved against, 850.
marriage and family, may be corrected or set aside for mistake or fraud, 871, 1376, 1377.
when intention not carried out, 1001, note.
set aside when in fraud of marital rights, 920, 1113.
inadequacy in marriage, not relieved against, 928.
conditions and limitations in, in restraint of marriage, when valid, 933. See MARRIAGE.
antenuptial, when valid as against creditors, 972, notes.
post-nuptial, when fraudulent as against creditors, 973, 1101.
free from husband's creditors, 989, 1098.
trusts to convey, frequently found in English marriage, 992, note.
in pursuance to executory trusts, 1000, 1001.
wife's separate estate may be created by ante and post nuptial, 1101.
rights of husband or wife in, in case of adultery, 1110.
wife's equity to, 389, 1114-1118. See MARRIED WOMEN.
land subject to, not converted when sold compulsorily under statute, 1167.
made on consideration of marriage enforced when part performed, 1409.

SHELLEY'S CASE, RULE IN,
merger not permitted, owing to unfavorable regard for, 788, note.
operation of, in case of executed and executory trusts, 1000, 1001.
abolition of, effect of, on, distinction between executed and executory trusts, 1001.

SHERIFF,
when may interplead claimants of property taken under process, 1327, note.

SLANDER OF TITLE,
jurisdiction of equity to restrain, 320, note, 1358.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

SMUGGLING,
contracts are illegal, 930.

SOUTH CAROLINA,
equity jurisdiction, extent of, generally, in, 287, 345.
statutory provisions concerning, 287, note.
inadequacy of legal remedies as affecting, 342, 344, 345.
reformed procedure adopted in, 40, note, 287.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
assignments of things in action in, 705, note.
[spendthrift trusts in, 989, note.]
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, notes.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance does not exist in, 1249.
real party in interest to sue in, 1273, note.
interpleader in legal actions in, 1329, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.

SOUTH DAKOTA,
reformed procedure adopted in, 287.
statutory provisions concerning equity jurisdiction in, 287, note.
[recording in, 646, note.]

SPECIFIC PERFORMANCE,
when first granted, 35, note, 52.
remedy of, well established, 110, 112.
is exclusively equitable, 138, 171, 221, 1400.
object of, 171, 1400.
jurisdiction taken for purpose of, extends over whole controversy, 237.
[when retained, although specific performance denied, 237, note.]
[jurisdiction of United States courts to grant, not abridged by state legislation, 293, note.]
[by and against municipal corporations, 293, note.]
jurisdiction of courts of New Hampshire to decree, 300, 304.
of courts of Massachusetts, 314, 1409, note.
of Maine, 326, 1409, note.

SPECIFIC PERFORMANCE — *Continued.*
maxim, He who seeks equity must do equity, applied where, asked, 392, 393, 400, 1404.
He who comes into equity must come with clean hands, 400, 459, 1404.
cannot be resisted by payment of penalty, 446.
not decreed where sum to be paid for violation is liquidated damages, 447.
not decreed of forfeitures, 459, 460.
not defeated when vendee charged with notice of easement in suit for, 611, note.
when charged with notice of covenants in lease, 628, note.
receiver appointed in suit for, by vendor against vendee in possession, 1334.
transfer of property restrained in suits for, 1340.
indirectly decreed by injunctions, 1341–1344. See INJUNCTIONS.
ground of jurisdiction to grant remedy of; inadequacy and impracticability of legal remedies, 221, 1401.
award of damages not as beneficial as, 1401, note.
extent of jurisdiction, 1402, 1403.
inadequacy of damages, 221, 1402.
in contracts concerning land, 221, 1402.
concerning chattels and things in action, 1402.
rare chattels, and those of peculiar value, 1402.
delivery of chattels, muniments of title, etc., 1402, note.
trusts or fiduciary relations concerning chattels, 1402, note.
assignments of debts, 1402, note.
stocks, 1402, note.
awards when specifically enforced, 1402.
special contracts where legal remedy inadequate, 1402.
for personal acts, 1402, note, 1405, note.
agreements for separation, 402, note, 932, 1402, note.
for building and construction, 1402, note, 1405, note.
miscellaneous instances, 1402, note.
impracticability of legal remedies, 1403.
action at law not maintainable for legal informality, 1403.
measure of damages cannot be arrived at at all, or with certainty, 1403.
where plaintiff has not, or cannot, perform contract, 1297, 1403.
contracts invalid at law, but binding in equity, 1403, 1409.
contracts incomplete in terms, 1403.
jurisdiction to grant, discretionary, 1404.
meaning and criticism of term "discretionary," 1404.
essential elements and incidents for, 1405.
valuable consideration, 1293, 1405.
effect of seal, 1293, 1405, note.

SPECIFIC PERFORMANCE — *Continued.*
certainty as to subject-matter, stipulations, parties, etc., 1405.
mutuality in obligation and remedy, 1405.
meaning and universality of rule, 1405, note.
free from mistake, misrepresentations, fraud, or illegality, 1405.
parol evidence to show mistake, fraud, or surprise, 860–867. See EVIDENCE.
mistake a defense to suit for, 860, 868.
misrepresentations a defense to suit for, 889, 899.
requisites of misrepresentation, 889.
scienter, knowledge, or belief unnecessary, 889.
plaintiff bound to know truth of representation, 889, 899.
part, may be decreed, 889, 899, note.
made good by suit in nature of, 899, 910, 912, note.
fraudulent concealments a defense, 905.
failure to disclose material fact may defeat, 900, 905, 1405, note.
mere inadequacy not ground for refusing, 926.
gross inadequacy may defeat, 927, note, 1405, note.
must exist at time of making contract, 927, note.
inadequacy occurring in delay a defense, 927, note.
of contracts in restraint of trade, 934.
usury a defense, 937.
not decreed of gaming contracts, 938, 940.
not decreed where parties *in pari delicto,* 402, 929, 940.
decreed of illegal contract, but parties not *in pari delicto,* 403, 942.
persons *non compotes mentis,* weak minded, intoxicated, etc., 946–949.
fairness, equality, and justness in terms and circumstances, 1405.
may be defeated by less strong case than necessary to grant, 1405, note.
refused where, would work breach of trust, 1405, note.
harshness and oppressiveness resulting from, 1405.
vendor's title must be free from reasonable doubt, 1405.
remedy of, must not be nugatory, 1405.
partnership agreements and agreements to submit to arbitration, 1405, note.
capacity and ability of defendant to obey decree, 1405.
total and partial incapacity, 1405, note.
failure of title; conveyance of land; inability to pay price, 1405, note.
granted with compensation where partial deficiency, 1405, note.
court must be able to make efficient and enforce decree, 1405.
manufacturing contracts, 1405, note.
sales of good-will, 934, note, 1355, 1405, note.

SPECIFIC PERFORMANCE — *Continued.*
continuing covenants, 1405, note.
personal services, 1402, note, 1405, note.
building contracts, 1402, note, 1405, note.
rights under the contract; purchaser entitled to benefits and assumes risks of ownership, 1406.
performance by plaintiff a condition precedent, 1407.
failure of title, 1407.
granted with compensation on partial failure, 1403, note, 1407, note.
necessity of tender and demand of performance, 1407.
time as affecting right to, 1408.
stipulations concerning time generally treated as formal, 1408.
effect of willful and intentional delay, 1408, note.
time may be essential; intention, 1408.
fluctuating values, 1408, note.
express stipulation and notice, 1408, note.
time generally material, delay as defeating, 1408.
of verbal contracts part performed, 103, 430, 1297, 1409.
ground of remedy is equitable fraud, 1297, note, 1409.
nature of acts of part performance, 1409, note.
acts which do and do not constitute part performance, 1409.
damages in place of, 237, 1410.
when awarded, 181, note, 237, 1410.
of obligations arising from trusts and fiduciary relations, 1411, 1412.
nature and object of suits, 1411. See TRUSTS; GUARDIAN AND WARD, etc.
suits against corporations to compel transfer or issue of stock, 1412. See CORPORATIONS.

["SPENDTHRIFT" TRUSTS. See TRUSTS.]

STATUTES,
"equitable interpretation of," 44.
equity jurisdiction how affected by, enlarging jurisdiction at law, 279, 280.
may be destroyed by, 281.
[strictly construed, when abrogate or abridge equity jurisdiction, 279, note.]
not allowed to be instruments of fraud, 431.
forfeitures imposed by, not relieved against, 458.
illegal contracts because opposed to, 402, 930.
when policy of, interfered with, 402, note, 934.
procured through fraud, whether relieved against, 935, note.
statutory liens, 167, 1268, 1269. See LIENS.

STATUTE OF FRAUDS,
verbal contracts for sale of land void by, enforced in equity, 103, 430, 1297, 1409.

STATUTE OF FRAUDS — *Continued.*
owner of land may be estopped from setting up title notwithstanding, 807.
cannot shut out parol evidence to do fraud or wrong, 858, 859.
not allowed to be an instrument of fraud, 431, 858, 859, 921, 1293.
effect of, upon use of parol evidence, 864-867. See EVIDENCE.
trusts of land required to be in writing by, 1006, 1007.
except in certain states, 1006, note.
does not extend to trusts of personalty, 1008.
resulting and constructive trusts excepted from, 1008, 1030.
trust enforced where legal title obtained upon fraudulent verbal promise, notwithstanding, 430, 431, 1055, 1056.
construed and applied in equity as at law, 1293.

STATUTE OF LIMITATIONS,
effect of, on distinction between sealed and unsealed instruments, 70.
equity courts apply, 419.
runs from discovery of fraud, 917, note.
as applied by courts of equity, 418, 419, 917, note.
no defense in suit against trustee's estate for breach of trust, 418, 419, 1080.

STOCKHOLDERS,
corporation estopped as against, by statements in prospectuses, etc., 819.
may be estopped from setting up *ultra vires* acts against third persons, 819.
remedies of, for false statements in prospectuses, circulars, and reports, 881, 1092.
promptness in applying for, 881, 965, note.
dealings between, and directors or promoters, 963.
rights of, in corporate property, 1090.
directors are *quasi* trustees for, with respect to stock, 1090.
liability of directors to, as corporate agents, 1091.
suits against directors, when to be brought by, 1091-1093, 1095.
corporation when a defendant in suits by, against directors, 1093, 1095.
See CORPORATIONS; DIRECTORS; STOCKS.

STOCKS,
forfeiture of, when equity will not relieve against, 457.
notice of assignment of, necessary to determine assignee's priorities, 695.
should be given to managing officer of company, 696.
diligence of assignee of, in perfecting title and enforcing rights necessary, 699-701.
as between assignee and assignor, or the company, 699.
between assignee and assignor's judgment creditors, 700.
between prior and subsequent assignees, 698, note, 701, 712-715, 774.

STOCKS — *Continued.*
assignment of, subject to equities, 704, note, 709, notes.
when owner of, estopped from setting up equities, 710, 811, note.
assignee of, obtaining legal title, protected as *bona fide* purchaser, 698, note, 712, 714, 715, 774.
when *bona fide* purchaser not protected, 918.
owner of, divested of title by estoppel, but not by negligence, 811, note.
speculative contracts for purchase of, whether invalid, 930, note.
investments in, when required of trustees, 1073.
when no directions are given trustees, 1074.
shares of, how regarded at law and in equity, 1090.
pledgee of, may sue wrong-doing directors, 1096.
legacies of, when specific, 1130, note.
as subject of donations *causa mortis,* 1148, note.
claimants of, may be interpleaded by companies, 1327, note.
when transfer of, restrained, 1340.
specific performance of contracts concerning, when decreed, 1402, note.
suits against corporations to compel transfer or issue of, 1412. See CORPORATIONS.
See STOCKHOLDERS.

SUBROGATION,
nature of remedy of, 186, 1416.
liability of grantee assuming mortgage, whether results from, 1207.
equitable assignment of mortgages by, 798, 1211–1213. See MORTGAGOR AND MORTGAGEE.
of grantor's lien by, 1254.
principle of, applied in equitable debts, 1300.
extent of doctrine of, 1419, note.
operation of doctrine of, controlled by equitable principles, 1419, note.
as between surety and creditor and co-sureties, 1419.
where surety pays contract or judgment, 1419, note.
effect of surrender or discharge of securities by creditor, 1419, note.

SUI JURIS,
jurisdiction of equity over persons and property of persons not, 1311–1314. See NON COMPOTES MENTIS.

SURETIES,
[cannot maintain bill to compel owner of note to sue, when adequate remedy by statute, 281, note.]
rules at law and in equity concerning discharge where contracts of, were under seal, 383.
mortgagors conveying land, when, of grantees, 797, note, 1205, note, 1206, note.
decease of joint; liability of, as regards principal debtor and co-sureties, 409, 1302.
See EXONERATION; CONTRIBUTION; SUBROGATION.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

SURETYSHIP,
questions growing out of, belong to concurrent jurisdiction, 186.
equity jurisdiction in suits growing out of, not abridged by jurisdiction subsequently acquired at law, 278, 980.
fullest disclosure necessary in contract of, 907, 963.
See EXONERATION; CONTRIBUTION; SUBROGATION.

SURPRISE,
relief from forfeiture occasioned by, 451, 454.
mistake of law containing element of, relieved against, 847.
parol evidence in case of, 858-867. See EVIDENCE.

SURRENDERING OF INSTRUMENTS,
through mistake, whether relieved against, 871.
See DELIVERY-UP.

SURVIVORSHIP,
rules of equity concerning, antagonistic to common law, 104, note, 1301, note.
on death of trustee, 1060.
on death of one joint debtor at law, 406, 409, 1301.
in equity, 104, note, 406, 409, 1301.
application of maxim, Equality is equity, 406, 409.
on death of surety, 409, 1302.

T

TACKING,
allowed in England by *bona fide* mortgagee, 768.
doctrine rejected in America, 768.
foundation of doctrine of, is in subsequent mortgages being legal, 1185, note.

TAXES,
distinct proprietors relieved from illegal assessments and, to prevent multiplicity of suits, 258-260, 265, 266, 270, 273, 1345.
extent of jurisdiction not defined by certain cases, 259.
relief against illegal assessments and, where made a lien, 260, 273.
broad rule in certain states, 260, 273.
suits by or on behalf of tax-payers, 260, note.
[relief against tax proceedings which involve the single plaintiff in litigation with numerous parties, 261, note.]
decisions opposed to granting relief, 259, 265, 266.
result of judicial opinion, 270.
[jurisdiction of United States courts to enjoin illegal, not abridged by state legislation, 293, note.]
whether relieved against in New Hampshire, 310.
in Massachusetts, 320.
in Maine, 334.
plaintiff must first pay what is justly due, 393.
interpleader in case of, levied in different counties, 1323, note.
assessments for, when removed as constituting cloud, 259, 265, 1399, note.

TENANTS FOR LIFE,
merger whether occurs where, entitled to charge, 795.
where, pay off charges, 799.
conversion as between, and remaindermen, 1168.
reconversion not permitted when, injured, 1176.
need not advance proportionate share in redemption by partial owner, 1220.
entitled to redeem from mortgages, 1220, note.
contribution on redemption between, and remaindermen or reversioners, 1223.
what expenditures by, create equitable liens, 1242.
receivers appointed in suits against, by remaindermen, 1334.
decree for partition between, whether binding on future interests, 1387, note.

TENANTS FOR YEARS,
whether merger occurs where, entitled to charge, 795.
where, pay off charge, 799.
contribution on redemption between, and remaindermen or reversioners, 1223.
when may interplead landlords, 1326, 1327.
See LEASES.

TENANTS IN COMMON,
joint ownership preferred to ownership in common at common law, 406, 408.
ownership in common preferred in equity, 406, 408.
application of maxim, Equality is equity, 406, 408.
when legal rule in favor of joint ownership operates in equity, 408.
legislation declaring in favor of ownership in common, 408.
merger whether occurs when one of two or more, entitled to charge, 793, 795.
where, pay off charges, 799.
entitled to redeem from mortgages, 1220, note.
partition of land among, at common law, 1386.
in equity, 1386-1390. See PARTITION OF LAND.
accounting between, in equity, 1421, note.
as an incident to partition, 1389, 1421, note.

TENDER,
of a deed whether prerequisite to enforcement of vendor's lien, 1262.
of performance, as prerequisite for specific performance, 1407.

TENNESSEE,
law and equity systems distinct, and administered by separate tribunals in, 42, note.
distinction between sealed and unsealed instruments abolished in, 70, note.
equity jurisdiction co-extensive with English chancery in, 285, 342, 345.
statutory provisions concerning, 285, note.

TENNESSEE — *Continued.*
election of widow concerning dower in, 494, note.
recording in, 646, note.
effect of other kinds of notice in absence of record in, 664, note.
statute of uses in, 986, note.
[spendthrift trusts in, 989, note.]
deeds of trust in, 995, note.
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's power of disposition of separate property in, 1105, note.
married women's contracts in, 1126, notes.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance exists in, 1249.
whether assignable, 1254, note.
jurisdiction over persons of unsound mind expressly given to equity in, 1313, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
specific performance of verbal contracts part performed in, 1409, note.

TENURE,
rules resulting from, do not apply to beneficiaries' estates, 990.

TESTIMONY DE BENE ESSE,
suits for taking, branch of auxiliary jurisdiction of equity, 82, 142, 190.
nature and object of, 82, 210.
practical abolition of, 83, 142, 210, 215.
when and by whom maintainable, 211, note, 213.
[statutory proceedings, reach testimony of witnesses only, 212, note.]
mode of using depositions, 213.
examination of witnesses in foreign countries branch of, 214.

TESTIMONY, PERPETUATION OF. See PERPETUATION OF TESTIMONY.

TEXAS,
law and equity systems distinct, but administered by same tribunal in, 41, note.
seal presumptive evidence of consideration in, when, 70, note.
equity jurisdiction, extent of, in, 287, 345.
statutory provisions concerning, 287, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
[spendthrift trusts in, 989, note.]

TEXAS — *Continued.*
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance exists in, 1249.
whether waived by mortgage of grantee, 1252, note.
whether assignable, 1254, note.
equitable remedies and decrees operating *in rem* in, 1317, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.

THINGS IN ACTION,
estates and interests arising from assignments of, 168, 1270-1279. See ASSIGNMENTS.
owner of, may be estopped from setting up title to, 811.
cannot be divested of title to, through mere negligence, 811.
may be estopped although intention was that acts should not be relied upon, 811.
as subjects of donations *causa mortis,* 1148.
identity of, as subject for interpleader suit, how determined, 1323, note.
transfer of, when restrained, 221, 1340, 1363, note.
specific performance of contracts concerning, when decreed, 1402.
reached by creditors' suits, 1415.

TIME,
of election, 513.
forfeitures where, of essence of contract, not relieved against, 455.
as affecting right to specific performance, 1408. See SPECIFIC PERFORMANCE.

TITHES,
bills of peace by parson to establish, 247, note, 274, note.
bona fide purchase whether defense in suits to establish, 765.

TITLE,
jurisdiction of early chancellors to establish, 36.
decrees of equity do not operate themselves as, 135, 170, 428, 1317.
operate as, by statute, 135, 170, 428, 1317.
See DECREES.
one legal, not established against another, in equity, 177, 735.
plaintiff whether entitled to discovery of defendant's, 201.
to be established, where multiplicity of suits sought to be prevented, 248, note, 252, 253, 263, 267, 272, 1394.
sources of legal, 366.

TITLE — *Continued.*
diligence of assignee of thing in action in perfecting, necessary, 698-702. See PRIORITIES.
doctrine of *bona fide* purchaser not a rule of, 739.
subsequent equity protected by legal, 727-729. See PRIORITIES.
owner when estopped from asserting, to land, 821.
negligent overlooking of defect in, not relieved against, 856, note.
suit determining, where must be brought, 1318, note.
no interpleader where, of different claimants, independent, 1324.
must be clear before injunction granted to restrain tort, 1347, 1350.
slander of, whether restrained, 320, note, 1358.
to be established at law in suit for admeasurement of dower, 1381.
in partition of land to be shown and established, 1386, 1388.
of personal property, tried by court of equity, 1392.
suits to quiet, 246, 1393, 1394, 1396, 1397. See QUIETING TITLE.
removing clouds from, 1398, 1399. See CLOUDS ON TITLE.
of vendor must be free from reasonable doubt in suits for specific performance, 1405.
specific performance of contracts where failure of, not decreed, 1405, 1407, note.
damages awarded, 237, 1410, note.

TITLE DEEDS,
rules concerning production and inspection of, 205-207.
when held by a third person, constructive notice of claim or interest, 606, 612.
when *bona fide* purchaser not compelled to deliver up, 742, note, 764.
equitable liens arising from deposit of, 167, 1264-1267. See LIENS.
equitable relief, where lost, 832, note.
jurisdiction of equity to order, delivered up, 185, 1377, note, 1402, note.

TORTS,
what claims arising from, are assignable, 1275.
injunctions to restrain commission of, 1346-1358. See INJUNCTIONS.

TORT-FEASORS,
no contribution among, 1418, note.

TRADE,
sum to be paid on breach of covenant not to carry on, is liquidated damages, 442, note.
contracts in restraint of, when illegal, 934.
criterion is the unreasonableness of the restraint, 934.
combinations among employers and employees, 934, note.
by persons carrying on the same business, 934, note.
sale of good-will, or secret of, 934, notes.
remedies granted in case of, 934.
of trading with enemies, illegal, 934.

TRADE — *Continued.*
disclosure of secret of, may be restrained, 934, note, 1340, note.
agreements not to carry on, may be enforced by injunction, 934, 1344, note.
concerning manufacture and sale of secret of, not specifically enforced, 1405, note.

TRADE-MARKS,
when fraudulent, 934.
injunction may be granted to restrain use of, 1354.
fraud the ground for granting, 1354.
[application of maxim, "He who comes into equity must come with clean hands," to, 402, note.]

TRESPASS,
action of, at common law, 22, 23, 29.
action of, entertained by early chancellors, 36.

TRESPASSES,
legal estate may be protected against, by exclusively equitable remedy of injunction, 138, 170, 221, 1346.
remedy at law must be inadequate, 221, 1346, 1357.
final relief granted on injunctions obtained in cases of, 237.
relief against, in equity, to prevent multiplicity of suits, 252, 257, [261, note], 271.
[jurisdiction of United States courts to enjoin, not abridged by state statutes, 293, note.]
equity jurisdiction of courts of New Hampshire over, 307, 308.
not restrained where estoppel by acquiescence, 817.
refusal of equity to restrain, at an early day, 1346.
equity jurisdiction to restrain, firmly established, 1347, 1356.
where single act and temporary, not enjoined, 1357.
enjoined where destructive and irreparable, 1357.
where continuous, enjoined, 1357.

TROVER,
action of; origin and development of, 25, 29.
equity will not entertain suit when remedy by, sufficient, 177, 185.

TRUSTS,
when purchaser under record title takes free from secret, 658.
interests created by, superior to those by gifts or judgments, 685, 720, 721, note.
notice to trustees of assignments of funds subject to, to determine rights of priority, 694-697, 989. See PRIORITIES.
mistakes of law in transactions between parties in relations of, relieved against, 848.
all wrongful acts by persons in relations of, are not fraudulent, 885.

TRUSTS — *Continued.*
duty to disclose facts in transactions by persons in relations of, 902-904.
presumption of undue influence in transactions between parties in relations of, 951, 955.
transactions presumptively invalid between parties in relations of, 955-965. See FRAUD, CONSTRUCTIVE.
doctrine of, as illustrating evasion and contradiction of legal rules, 52.
for married women, effect of, on legislation on married women's property, 80, note.
difference between legal and equitable rights arising from implied, 106, 107.
from express passive, 107.
express, are permanent equitable estates, 148, 1030.
implied, are temporary equitable estates, 148, 1030.
connection of all equitable estates and interests with, 149, 151.
are embraced within exclusive jurisdiction of equity, 150, 153, 171, 219, 986.
theory of, borrowed from Roman law, *fidei-commissum,* 151, 976, 977.
description of *fidei-commissum,* 151, 976, 977.
uses, origin, growth, and general description of, 151, 978-985. See USES.
are based on statute of uses, 151, 984, 986.
jurisdiction of equity over administrations, legacies, etc., based on ground of, 156, 348, 1127, 1152.
remains where, are created, 156, 1128.
in fiduciary relations based on ground of, 157, 1088.
variety of remedies given in case of, 158.
separate estates of married women are instances of, 159, 1098.
money held on, not recovered in equity where action at law will lie, 178.
equity jurisdiction over, not abridged by relief given at law, 278, 280, note.
when taken away by statute, 281.
in the United States courts, as affected by statute, 297, note, 298.
jurisdiction of courts of New Hampshire over, 305.
of courts of Massachusetts, 315.
of courts of Maine, 329.
are result of maxim, Equity regards as done what ought to be done, 374, 375.
enforcing express, not within maxim, Equity aids vigilant, not those who slumber on rights, 418, 419.
whether election between gift and dower in lands devised in trust to sell, 499.
between gift and dower in lands devised to trustees to manage, lease, etc., 501.
rule of *lis pendens* extends to suits to enforce, 635, 636.
effect of statute of uses on creation of, in the United States, 986, note.

TRUSTS — *Continued.*
effect of attempt to create passive, in states abolishing passive, 986, note, 1004.
attempt to create active, not allowed by statute, 986, note, 1004, note.
what property may be the subject of, 151, 987.
who may impress property with, 987.
what trusts equity will enforce, 987.
trustors not relieved where, illegal or fraudulent, 987.
void, if forbidden by statute, or law of perpetuities, 987.
divided into express, and arising by operation of law, 152, 987.
definitions of, 152, 987.
express, divided into private and public, 152, 987.
definitions of, 152, 987.
private, divided into passive and active, 153, 988.
passive, 153, 988-990.
when exist, and general nature of, 75, 153, 988.
cannot be held by a person for himself, 988.
existence of, in America, 75, 153, 986, note, 988, 1003.
appearing in connection with married women's separate property, 988, note, 1098, note.
in personal property common in America, 988.
estates of trustee and *cestui que trust* in, 153, 988, 989.
["spendthrift trusts," 989, note.]
[English cases, 989, note.]
[American cases, arranged by states, 989, note.]
rules of descent and succession generally applied to, 990.
rules resulting from tenure do not apply, 990.
active, 153, 991-995.
what are, 153, 991.
extent to which, may exist, 153, 991.
becoming passive, and effect of change, 991, note.
[right of *cestui* to have trust terminated, 991, note.]
common classes of, 992.
assignments for benefit of creditors, as a class of, 992, note, 993, 994. See ASSIGNMENTS.
deeds of trust to secure debts, 995.
classes of, only allowed in certain American states, 75, note, 153, 1003.
voluntary, when binding and enforceable, 996-999.
valuable consideration unnecessary in creation of, 996.
perfect and complete, enforceable, 996, 997.
executory and incomplete, not enforceable, 997, 1009.
[bank deposits, 997, note, 1009, note.]
modes in which, may be created, 997-999.
imperfect voluntary assignments not, 997, 998, note.
application of doctrine of; donor the legal owner, 998.
donor the equitable owner, 999.
the term as used in certain states, 1030.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

TRUSTS — *Continued.*

executed and executory, 1000, 1001.
distinction between, with what concerned, 1000.
executory, generally arise in marriage articles and agreements and wills, 1000.
definitions and descriptions of, 1001.
abolition of rule in Shelley's Case, effect of, upon, 1001.
powers in trust; what are, and control of equity over, 835, 920, 1002. See POWERS.
dispositions valid as powers in trust, though not as, 986, note, 1002.
express, regulated and limited by legislation in various states, 75, 153, 1003-1005.
what classes of, allowed, 75, note, 153, 1003.
judicial interpretation, validity of, 986, note, 1004.
interests, rights, and liabilities of various parties in, 75, 1003, 1005.
express, how created, 1006-1017.
in real property; writing necessary by statute of frauds, 1006.
character of the writing requisite, 1006, 1007.
when and by whom writing executed, 1006, 1007.
acceptance by trustee unnecessary to validity of, 1007, 1060.
not allowed to fail for want of trustee, 988, 1007, 1026.
in personal property, may be created verbally, 998, note, 1008.
words and dispositions sufficient to create, 997-999, 1009.
[collections by banks; deposits, 1009, note.]
intention to create must be clear, 997-999, 1009.
may be inferred by construction, 155, note, 1009, 1010-1017.
improperly called "implied," 155, note, 1010.
inferred from powers given trustees, 1009, note, 1011.
from provisions for maintenance, 1012.
when necessary to carry out purposes of wills, 1013.
from precatory words, 155, note, 1014-1017.
tendency against doctrine, 1015, 1016, note, 1017.
what intention necessary, 1014, 1016.
the true criterion, 1016, 1017.
presumption from use of precatory words, 1016.
objections to doctrine of, 1016, note, 1017.
public or charitable, 154, 1018-1029.
general description of, 154, 987, 1018.
property capable of being subject of, 154, 1018.
not subject to doctrines of perpetuities, 154, 1018.
public, not private, benefaction requisite, 154, note, 1019.
certainty of intention requisite in creation of, 1019.
what are charitable uses, 1019, note, 1020-1024.
distinction between, and gifts to corporations, 154, 1020, note.
"statute of charitable uses," 1020.
effect of statutes of mortmain on, 1020, note.
religious purposes; "superstitious" uses, 1019, note, 1021.
benevolent purposes, 1022.

TRUSTS — *Continued.*
educational purposes, 1019, note, 1023.
[promotion of ethical and political reforms, 1023, note.]
miscellaneous public purposes, 1019, note, 1024.
certainty or uncertainty of object and beneficiaries, 154, 987, 1009, note, 1018, 1019, 1025, 1027.
[validity of gift, where discretion to apply to indefinite purpose not strictly charitable, 1025, note.]
of the trustee, 1026.
cy-pres, meaning and extent of doctrine of, 1026, note, 1027, 1029. See CY-PRES.
origin and extent of equity jurisdiction over, statute of Elizabeth, 154, 1020, 1028.
in the United States, 154, 1029.
suits by attorney-general against wrong-doing officers of, 1096.
implied, or arising by operation of law, 155, 1030–1058.
general nature and kinds of, 155, 1030.
to be distinguished from certain express, termed "implied," 155, note, 1010, 1030, note.
idea of antagonism between trustee and beneficiary in, 148, 1030.
are excepted from statute of frauds, 1008, 1030.
termed "involuntary" in certain states, 1030, note.
resulting, 155, 1031–1043. See USES.
what are, and types of, 155, 1031.
intention, the essential element of, 155, 1031, 1033, note.
consideration, the underlying principle of, 981, 1031, 1033, 1035, 1037.
trust resulting to donor, 1032–1036.
in failure of purposes; uncertainty; illegality, 1009, note, 1032, 1033.
distinction between gifts *for,* and *subject to* particular purposes, 1033, 1244.
when part only of estate, or equitable title only conveyed, 981, 1034.
in conveyances without consideration, 981, 1035.
where conveyance recites consideration, 1035, 1036.
parol evidence to show, 1036.
in conveyance to one, price paid by another, 1037–1042.
consideration how and when paid, 1037.
where title is taken in names of some of grantees only, 1038.
part of consideration only paid, 1038.
doctrine applies to personal and real property, 1038.
purchase made in name of wife or child, 1039.
parol evidence to show, 1040, 1041.
legislation abolishing; extent of, 1042.
in favor of creditors of person paying price, 1042.
interest and rights of beneficiary in, 369, 375, 1030, 1043.

TRUSTS — *Continued.*
constructive, 155, 1044-1058. See USES.
what are, and when arise, 155, 1044.
may be referred to fraud, 155, 981, 1044.
distinction between actual, and *sub modo,* 1044, 1046.
number of instances of, 1045.
arising from contract express or implied, 1046.
money received equitably belonging to another, 1047.
property subject to, acquired by volunteers or purchasers with notice, 630, 688, 692, 770, 920, 1048.
followed as long as can be identified, 1048, 1051, 1058, 1080.
[right of trustee, in default, to recover property, 1048, note.]
bona fide purchasers only protected, 767, note, 770, 988, note, 1048, 1051, 1058, 1080.
proceeds in hands of trustees subject to, 1048, 1051, 1058.
money as the subject of, 1048, 1051.
[right to follow funds that have been mingled, 1048, note.]
fiduciary persons purchasing property with trust funds, 422, 587, 912, note, 914, note, 920, 958, 1049, 1058.
maxim, Equity regards as done what ought to be done, applied to, 422, 587, 1049.
renewal of leases by partners and other fiduciary persons, 1050.
wrongful appropriation or conversion of another's property, 1051.
trust property wrongfully acquired by trustee or other fiduciary person, 958, 1052.
ex maleficio, what are, and varieties of, 1030, 1053.
where devise or bequest procured by fraud, 430, 919, 1054.
whether fraud in procuring bequest or devise is essential to raising such trust, 1054, note.
legal title procured on fraudulent verbal promise, 910, 912, note, 914, note, 919, 1055.
[what constitutes fraud in such case, 1055, note.]
no trust from verbal promise to purchase and convey, 1056.
except where conveyance thereby obtaining by person in confidential relation, 1056, note.
in favor of judgment creditors where property fraudulently transferred, 1057.
rights and remedies of *cestui que trust* in, 369, 375, 1058, 1080.
jurisdiction of equity exclusive in, of donations *causa mortis,* 1151.
unabridged by that of probate courts, in testamentary, 235, 351, 1154.
to construe and enforce wills incident to that over, 351, 352, note, 1064, note, 1154-1157. See WILLS.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

TRUSTS — *Continued.*
resulting, on failure of purposes of conversion, 1169–1174. See CONVERSION.
equitable liens analogous to, 166, 1234.
grantor's lien, whether referable to doctrine of, 1250, note.
breaches or violations of, restrained, 1340.
concerning chattels, specific performance of contract creating, 1402, note.
specific performance refused where breach of, would result, 1405, note.

TRUSTEE AND CESTUI QUE TRUST,
rights growing out of relation of, concerned with property, belong to equity domain, 100.
removal and appointment of trustees as equitable remedy, 112.
rights of beneficiary under *fidei-commissum,* 151, 976, 977.
maxim, He who seeks equity must do equity, applied to suits between, 392.
fraudulent beneficiary not aided in equity, 401.
trustee appearing in instrument notice of third person's rights, 630.
party purchasing with notice of another's rights, held a trustee, 659, 770.
notice to trustee is constructive notice to beneficiary, 667.
notice to trustee of assignment by beneficiary to determine rights of priority, 694–697, 989. See PRIORITIES.
subsequent equity not protected by obtaining legal title from trustee, 728, 729, 769, 770, 773.
trustee liable for misleading *bona fide* purchaser, 781, note.
estoppel from acquiescence in settlement of accounts between, 820.
mistakes of law in transactions between, relieved against, 848.
person acquiring property through fraud treated as trustee, 910, 912, note, 914, note, 919, 920, 1055.
mortgagor with power of sale is a trustee for the sale, 958, note.
through probate of will obtained by fraud treated as trustee, 919.
rights of *cestui que use* at law, 979, 980.
covenantor to settle held a trustee, 981.
who may be in ordinary trusts, 987.
[infants, married women, lunatics, corporations, *cestuis,* executors, 987, note.]
in charitable trusts, 1026.
trust not allowed to fail for want of trustee, 988, 1007, 1026.
estates of, in passive trusts, 153, 374, 988, 989.
trustee in passive trust, to do all things to be done by holder of legal estate, 989.
interest of *cestui que trust* in passive trust, alienable, 989.
liability for debts and alienability of trust estate, where beneficiary is married woman, 989.
estates and rights of, in active trusts, 153, 369, 374, 989, 991, 1062.
rights of beneficiaries in trust fund, in trusts for sale and to dispose of proceeds, 992.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

TRUSTEE AND CESTUI QUE TRUST — *Continued.*

in trusts for accumulation, and to dispose of rents and profits, 992.

powers and rights of, in assignments for benefit of creditors, 993, 994.

duties, liabilities, and rights of, in deeds of trust to secure debts, 995.

estates, rights, and liabilities of, in express statutory trusts, 75, 1003, 1005.

power of trustee to sell and convey in express statutory trusts, 1004, 1005.

trustee, but not *cestui que trust,* may declare a trust, 1007, 1008.

trust, how declared by trustee in real and personal property, 1006–1008, 1060.

trust inferred from powers given to trustee, 1009, note, 1011.

uncertainty of beneficiaries in charitable, 154, 987, 1009, note, 1018, 1019, 1025, 1027.

of the trustee, 1026.

idea of antagonism between, in resulting and constructive trusts, 148, 1030.

interest and rights of *cestui que trust* in resulting and constructive, 369, 375, 1030, 1043, 1058, 1080.

distinction between true and *sub modo* trustees, 1044, 1046.

volunteers or purchasers with notice of trust property held trustees, 659, 688, 692, 770, 920, 1048.

bona fide purchasers from constructive trustees protected, 767, note, 770, 988, note, 1048, 1051, 1058, 1080.

proceeds of wrongful transfer, subject to constructive trust, in trustee's hands, 1048, 1051, 1058.

antecedent debts of trustee paid in violation of trust, 1048.

constructive or resulting trust in property purchased by trustees with trust funds, 422, 587, 912, note, 914, note, 920, 958, 1049, 1058.

where trustee obtains renewal of lease in own name, 1050.

where trustee appropriates, converts, or acquires trust property, 1051, 1052, 1058.

powers, duties, and liabilities of express trustees, 1059–1087.

acceptance by trustee unnecessary to validity of trust, 1007, 1060.

is necessary for power or liability of trustee, 1007, 1060.

acceptance may be express or implied, 1007, 1060.

joint owners, when property given to two or more trustees, 1060.

survivorship on death of trustee, 1060.

duty of trustees to conform to directions of trust, 1062.

liability to *cestui que trust* for non-performance, 1062.

implied authority, 1062.

[power to sell does not generally imply authority to pledge or mortgage, 1062, note.]

[direction to appoint agent does not require retention, 1062, note.]

[power of court to change scheme to effectuate intention, 1062, note.]

TRUSTEE AND CESTUI QUE TRUST — *Continued.*
the trust the charter of trustee's powers, 1062.
trustees not allowed to buy or set up adverse title, 1062.
duty of trustees to render accounts, and nature of, 1063.
[liability for interest for failure to, 1063, note.]
to obey directions of the court, 1064.
right of trustee to maintain suit for construction of trust, 1064, note, 1156.
duty of trustees to restore trust property at end of trust, 1065.
to use care and diligence, 1066–1074.
to protect and obtain possession of trust property, 1067.
collecting debts, etc.; liability for negligence, 1067.
depositing trust funds in banks, 1067, 1068, note, 1070, note, 1072, note.
payments, wrongful and otherwise, 1067, 1070.
trustee cannot divest himself of trust, unless in trust for sale, 1067.
duty of trustees not to delegate authority, 1068.
trustee may employ agent, 1068.
duty of trustees not to surrender entire control to co-trustee, 1069, 1082.
amount of care and diligence required of trustees, 1070.
liability for errors in judgment, 1070.
theory of trustees' liability only for gross negligence, 1070, note.
duty of trustees as to investments, 1070, 1071–1074.
to get largest income with smallest risk, 1071, 1072.
result of unreasonable delay, 1067, 1071, 1072.
when particular investments are required, 1067, note, 1073.
when trust gives no directions, 1074.
kinds only permitted, 1073, note, 1074.
consent of beneficiary to irregular investments, 1074.
duty of trustees to act with good faith, 951, 958, 1075–1078.
trustees cannot deal with trust property for own advantage, 1075.
must not mingle trust funds with their own, 1063, 1076.
must not act inconsistent with beneficiary's interests, 1077.
contracting with themselves, 958, 1049, 1077, 1078.
[contracts between corporation and one of its directors, 1077, note.]
duty of trustees to communicate information to beneficiary, 902–904, 1077.
trustees selling property to, and buying from, themselves, 958, 1049, 1077, 1078.
breach of trust by trustees, and liability therefor, 1079–1083
what is a breach of trust, 1079.
meddlers with trust property liable, 1079.

TRUSTEE AND CESTUI QUE TRUST — *Continued.*
trustees must be *sui juris* to be personally liable, 1079.
[as to limiting liability, 1079, note.]
beneficiary's claim on trust estate, 988, note, 1048, 1051, 1058, 1080.
personal liability of trustees, 1058, 1080.
[liability for interest, 1080, note.]
statute of limitations as a defense, 418, 419, 1080.
liability among co-trustees; contribution, 1081.
liability for acts of co-trustees, 1069, 1082.
cestui que trust acquiescing or concurring, 1083, 1104.
one of several *cestuis que trustent* taking part in, 1083, note.
compensation and allowance to trustees, 1084.
for expenses and outlays, 1084, 1085.
[extra compensation for services as attorney, 1084, note.]
[trustee's power to bind the estate, 1085, note.]
removal and appointment of trustees, 1086.
[grounds for removal, insolvency, 1086, note.]
[inability to agree with beneficiary, 1086, note.]
[disagreement between trustees, 1086, note.]
[trustee's views at variance with object of trust, 1086, note.]
[non-residence, 1086, note.]
appointment of new trustees, 1087.
persons standing in fiduciary relations are *quasi* trustees, 157, 1088.
rules governing duties and rights are the same as with express trustees, 1088.
corporation directors as *quasi* trustees, 157, 963, note, 1089-1096. See DIRECTORS.
guardians and agents as *quasi* trustees, 1097.
trustees unnecessary in creation of married women's separate estates, 1100.
married women liable for committing or acquiescing in trustee's breach of trust, 1104.
donee of gift *causa mortis* a trustee till donor's death, when article delivered, 1146, 1150.
suits to construe wills maintained by *cestuis que trustent,* 1156.
conversion by trustees when directed by court, 1167.
vendor in land contract a trustee of legal title for vendee, 105, 368, 1046, 1161, 1261.
vendee a trustee of purchase-money for vendor, 368, 1161, 1261.
receiver appointed in suits against trustee for breach of trust, 1334.
injunctions granted in suits by *cestui que trust* against trustee, 1058, 1340, note.
trustees liable to account in equity, 1058, 1063, 1097, 1421.
See TRUSTS.

Vol. I., §§ 1-519; Vol. II., §§ 520-974; Vol. III., §§ 975-1314; Vol. IV., §§ 1315-1421.

U

ULTRA VIRES,
stockholders may be estopped from setting up acts, 819.
where contract, suit may be brought upon implied contract, 942, note.
liability of directors where proceedings are, 1093.
acts may be restrained, 1345.

UNDUE INFLUENCE,
assignment procured by, subject to equities of original owner, 709.
mistake of law aided by, relieved against, 847.
inadequacy coupled with, a ground for relief, 928.
illegal contract relieved against when, 942.
transactions of persons of weak mind accompanied by, relieved against, 947.
when, in general, relieved against for, 951.

UNITED STATES COURTS,
from whence derive jurisdiction, 35, note, 282.
departments of law and equity distinct in, 41.
procedure in law and equity in, 41, 292, note.
jurisdiction of, in suits for administration, 234, note, 293, [and note], 1154.
equity jurisdiction of, 285, 291-298.
uniformity of, throughout United States, 292.
identity of, 292.
[code provisions permitting union of legal and equitable causes, not followed, 292, note.]
[code provisions permitting legal relief on equitable title, not followed, 292, note.]
[code provisions permitting equitable defenses at law, not followed, 292, note.]
[no equitable set-off or counterclaim at law, 292, note.]
[effect of code provisions requiring suits to be in name of "real party in interest," 292, note.]
[jurisdiction not abridged, by state laws, 293, note.]
[injunctions, 293, note.]
[cancellation, 293, note.]
[partition, 293, note.]
[specific performance, 293, note.]
[foreclosure of mortgages, 293, note.]
[enforcement of equitable liens, 293, note.]
[creditors' bills, 293, note.]
[administration of estates of decedents, 293, note.]
[enlargement of jurisdiction as result of state legislation, 293, note.]
[examples, 293, note.]
[nature of new right or remedy, 293, note.]

UNITED STATES COURTS—*Continued.*
[statutory suit to quiet title, 293, note.]
[not, ordinarily, when defendant in possession, 293, note.]
[statutory creditors' suits by single contract creditors, not allowed, 293, note.]
[notice of *lis pendens* in, 640, note.]
[effect of other kind of notice, in absence of record, 664, note.]
[charitable trusts in, 1029, note.]
extent of, 285, 294.
statutory provisions relating to inadequacy of legal remedies as affecting, 295–297, 914.
effect of state laws on, [292, note, 293, note], 297.
territorial limitations on, 298.
rules adopted by, in case of charitable trusts, 294, 1029.
in married women's contracts, 1126, note.
grantor's lien, whether enforced by, 1249, note.
equitable decrees and remedies of, operate *in personam,* 1317, 1318, note.
have cognizance of suits for infringement of patent rights and copyrights, 1352.

UNSOUND MIND,
jurisdiction of equity over persons and property of, 1311–1314. See NON COMPOTES MENTIS.

USES,
jurisdiction of equity enlarged by introduction of, 38, 52, 58.
doctrine of, as illustrating evasion and contradiction of legal rules, 52.
maxim, Equity follows the law as applied to, 426, 982.
theory of, borrowed from the Roman law, 151, 976, 977.
when invented, and growth of, 151, 978.
designed to evade the law, 978.
resorted to at first for purposes of fraud, 978.
for whose benefit made, 978.
how regarded at law, 979, 980.
jurisdiction of chancery over, when established, 980.
Bacon's description of passive, 980.
resulting and constructive, invented; doctrines of, based on theory of consideration, 981.
introduction of double nature of property in land; the use and the seisin, 982.
free from feudal burdens and common-law restrictions, 426, 978, 982.
legal incidents of, 426, 978, 982.
statute of, when passed, and intent of, 151, 983.
description and effect of statute of, 983.

USES — *Continued.*
kinds of, not embraced in statute of, 984.
what, embraced in statute of, 984, 985.
use upon a use not executed by statute of, 985.
operation of the statute of, defeated, 985.
forms of conveyance after statute of; covenants to "stand seised"; deeds of "bargain and sale," 985, note, 986, 1035.
trusts are based on statute of, 151, 984, 986.
existence of statute of, in United States, and effect on creation of trusts, 986, note.
See TRUSTS.

USURY,
equitable relief from, although relief obtainable at law, 278.
maxim, He who seeks equity must do equity, applied to relief from, 391, 937.
maxim, He who comes into equity must come with clean hands, applied where contract tainted with, sought to be enforced, 391, note.
contracts void and voidable by statute for, 930.
a defense, without an offer of repayment of money borrowed, 391, 393, note, 937.
affirmative relief of cancellation, reformation, or recovery of usurious excess, 391, 403, note, 937, 941, note.
right to complain of, is personal one, 937.
payment of usurious debts and mortgages assumed, 937.
whether prior encumbrance can be defeated for, 937.

UTAH,
mortgages of land in, 163, note, 1188.
[spendthrift trusts in, 989, note.]
statutory suit to quiet title in, 1396, notes.

V

VALUE,
statements concerning, whether may be misrepresentations, 878.
time essential in specific performance when, is fluctuating, 1408, note.

VENDOR AND VENDEE,
sum to be paid in breaches of contracts between, is liquidated damages, 442, note.
vendee when relieved from forfeitures, 455, 456, note.
rule of *lis pendens* extends to suits to enforce vendor's liens, 635.
purchaser or mortgagee with notice of rights of, bound, 688, 692.
whether *bona fide* purchase a defense where subsequent vendee obtains legal title, 773.
when vendor may have contract canceled or corrected for mistake, 869, 871.
duty to disclose facts, when exists between, 903, 904.
dealings between, of land fiduciary to certain extent, 963.

VENDOR AND VENDEE — *Continued.*
vendee must surrender possession of land before entitled to cancellation of contract, 965, note.
liens of, on contract of sale of land, 167, 1260–1263. See LIENS.
rights of, on executory contract for sale of land, 105, 368, 372, 1161, 1260, 1261, 1263, 1406.
doctrine of conversion as operating upon, 105, 367, 368, 372, 1160, 1161, 1261. See CONVERSION.
vendor holds legal title as security and as trustee, 105, 368, 1046, 1161, 1260, 1261.
vendor's legal title may be conveyed or devised, and descends to heirs, 1261.
vendor's interest, in equity, personal, and passes to personal representatives, 105, 368, 372, 1261.
vendee a trustee of purchase-money, 368, 1161, 1261.
vendee's interest, in equity, real, and descends to heirs, 105, 368, 372, 1261, 1406.
time from which rights of, accrue, 368, note, 1162, 1163.
when vendee may interplead vendor, 1327, note.
equitable defenses in actions between, 1374, note.
specific performance of contracts of. See SPECIFIC PERFORMANCE.

VENDOR'S LIEN. See LIENS.

VERMONT,
law and equity systems distinct, but administered by same tribunal in, 41, note.
equity jurisdiction co-extensive with English chancery in, 284, 342, 345.
statutory provisions concerning, 284, note.
time within which widow must elect in, 513, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
statute of uses in, 986, note.
[spendthrift trusts in, 989, note.]
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, notes.
equity jurisdiction over administration of decedent's estates in, 1154.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance does not exist in, 1249.
equitable remedies and decrees operating *in rem* in, 1317, note.

VIRGINIA,
law and equity systems distinct, but administered by same tribunal in, 41, note.
equity jurisdiction co-extensive with English chancery in, 285, 342.
statutory provisions concerning, 285, note.
notice of lis pendens in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
[spendthrift trusts in, 989, note.]
deeds of trust in, 995, note.
charitable trusts in, 1029, note.
married women's power of disposition of separate estate in, 1105, notes.
married women's contracts in, 1126, notes.
statute 7 George II. concerning mortgages re-enacted in, 1179, note.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance does not exist in, 1249.
equitable remedies and decrees operating *in rem* in, 1317, note.
interpleader in legal actions in, 1329, note.

W

WAGERS. See GAMING.

WAGES. See COMPENSATION.

WARRANTY,
doctrine of collateral, not interfered with by equity, 53.

WASHINGTON,
distinction between legal actions and suits in equity abolished in, 40, note, 287.
statutory provisions concerning equity jurisdiction in, 287, note.
recording in, 646, note.
assignments of things in action in, 705, note.
[charitable trusts in, 1029, note.]
[married women's contracts in, 1126, note.]
[mortgages of land in, 1188, note.]
[grantor's lien on conveyance does not exist in, unless reserved, 1249, note.]
real party in interest to sue in, 1273, note.

WASTE,
final relief granted on injunction restraining, 237.
relief against, in equity, to prevent multiplicity of suits, 252, 271.
equity jurisdiction of courts of New Hampshire over, 307, 308.
of courts of Maine, 331.
mortgagee in possession liable for, 1216, note.
receivers appointed in case of, 1334.

WASTE — *Continued.*
injunctions granted between mortgagors and mortgagees to restrain, 1345, 1348, note.
when granted in general, 1348.
what is, and distinction between and trespass, 1348.

WEST VIRGINIA,
law and equity systems distinct, but administered by same tribunal in, 41, note.
equity jurisdiction co-extensive with English chancery in, 285, 342.
statutory provisions concerning, 285, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note.
effect of other kind of notice in absence of record in, 664, note.
deeds of trust in, 995, note.
[parol trusts in, 1006, note.]
charitable trusts in, 1029, note.
statutory provisions concerning married women's separate property and contracts, 1099, note.
married women's power of disposition of separate estate in, 1105, note.
married women's contracts in, 1126, notes.
equity jurisdiction over administration of decedents' estates in, 1154, note.
mortgages of land in, 163, note, 1187.
grantor's lien on conveyance does not exist in, 1249.
equitable remedies and decrees operating *in rem* in, 1317, note.
interpleader in legal actions in, 1329, note.

WIDOW,
election between dower and gifts by husband's will, 492-502. See ELECTION.
conditions and limitations in restraint of marriage of, whether valid, 933.
of mortgagor subrogated on payment of mortgage debt, 1212, note.
See DOWER; DOWER, ASSIGNMENT OF.

WIFE. See HUSBAND AND WIFE; MARRIED WOMEN.

WILLS,
probate of, not included in jurisdiction of equity, 77, 1158, note.
construing and establishing and setting aside as equitable remedies, 138, 171, 351, 1378, note.
estates or interests directly protected or established by, 171, 1378, note, 1393.
power of courts of Maine to construe, 329.
election under, 461-519. See ELECTION.

WILLS — *Continued.*
satisfaction of debts, legacies, and portions by, 520-577. See SATISFACTION.
making of, prevented by accident, whether relieved against, 828.
not reformed in equity, 871.
when equity will correct, on ground of mistake, 871.
jurisdiction a part of that of construction and interpretation of, 871, note.
supplying, rejecting, and transposing words, 871, note.
descriptions and names of beneficiaries, 871, note.
extrinsic evidence to show intention or mistake in, 871, 1036.
jurisdiction of equity to set aside, when obtained by fraud, 913.
in case of lost or destroyed, 913, note.
probate of, obtained by fraud, persons deriving title thereunder, trustees, 913, note, 919, 1154.
rewards for procuring, are illegal, 931.
agreements to share property which may be left by, not illegal, 931, note.
conditions and limitations in, in restraint of marriage, when valid, 933. See MARRIAGE.
Roman law testament, 976.
trusts inferred to carry out purposes of, 1013.
married women may dispose of separate estate by, 1104, 1105.
operation of, on specific legacies, 1130.
property undisposed of by, liable first for claims, 1135.
imperfect gifts by, not supported as gifts *causa mortis*, 1147.
donations *causa mortis* not revoked by, 1150.
jurisdiction of equity in construction and enforcement of, 1155-1158.
none where purely legal estates are created, 352, note, 1155, 1156.
effect on, of legislation in American states, 77, 156, 1155.
generally considered incident to that over trusts, 351, 352, note, 1064, note, 1154-1157.
limited to, of personal property, 1155, 1156, 1393, note.
to, of real property involving trusts, 352, note, 1155, 1156, 1393, note.
suits to construe, by whom maintained, 1156.
exercised in some states where terms of, are difficult or doubtful, 1157.
in what cases exercised, 1157.
suit to establish, by devisee in possession, 351, 352, note, 1154, 1158.
none, until will admitted to probate, 1154, note, 1158, note.
conversion by, takes place from death, 1162.
resulting trust on total failure of purposes of conversion in, 1170.
on partial failure, 1171, 1172.
equitable liens arising from charges by, 1244-1248. See LIENS.

WISCONSIN,
equity jurisdiction co-extensive with English chancery in, 285, 342, 345.
statutory provisions concerning, 285, note.
reformed procedure adopted in, 40, note, 287.
election of widow concerning dower in, 494, note.
statutory provision requiring actual notice in; interpretation of, 596, note.
notice of *lis pendens* in, 640, note.
recording in, 646, note, 733, note.
effect of other kind of notice in absence of record in, 664, note.
assignments of things in action in, 705, note.
deeds of trust in, 995, note.
express trusts in, 1003, note.
charitable trusts in, 1029, note.
resulting trusts in, where conveyance to one, price paid by another, 1042, note.
passive trusts for married women abolished in, 1098, note.
statutory provisions concerning married women's separate property and contracts in, 1099, note.
married women's contracts in, 1126, note.
equity jurisdiction over administration of decedents' estates in, 1154.
mortgages of land in, 163, note, 1188.
grantor's lien on conveyance exists in, 1249.
real party in interest to sue in, 1273, note.
appointment of receivers in, 1335, note.
granting injunctions in, 1337, note.
legal and equitable defenses united in same answer in, 1368, note.
defendant in, required to demand affirmative relief in pleading equitable defense, 1369, note.
restraining actions at law in, 1371, note.
statutory suit to quiet title in, 1396, notes.

WITNESSES,
discovery a result of common-law rules as to who might be, 82, 190.
effect on discovery of statutory rules as to who may be, 83, 193.
examination of, 82, 142, 190, 210-215. See PERPETUATION OF TESTIMONY; TESTIMONY DE BENE ESSE.
when cannot be asked whether he believed his misrepresentation to be true, 886.

WORDS,
what, may be supplied, rejected, or changed in wills, 871, note.

WRITINGS,
invasion, piracy, or disclosure of private and unpublished, restrained, 1340, note, 1353.

WRITS,
at common law, nature and issuing of, 21.
statute of Edward I. concerning new, 24–29.
abstract of statute, 24.
limited results of the legislation, 25–29.
new actions invented by, case, trover, assumpsit, 25, 29.
proceedings before chancellor originally commenced by, 32.
from what time not issued in proceedings before chancellor, 35.
narrowness of, of execution, the origin of creditors' suits, 1415.

WYOMING,
distinction between legal actions and suits in equity abolished in, 40, note, 287.
statutory provisions concerning equity jurisdiction in, 287, note.
recording in, 646, note.
assignments of things in action in, 705, note.
real party in interest to sue in, 1273, note.

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